

D.C. and California were well-attended, and the participants engaged in thoughtful and productive discussion of the many complex issues involved in this matter....<sup>24</sup>

The difficulty of obtaining rights to orphan works as part of a mass digitization project was the subject of comments filed by interested parties, including the settling parties.<sup>25</sup> Congress and the Copyright Office took great pains to consider how an orphan works solution would affect the owners of those works and the copyright system itself, both in the United States and internationally.<sup>26</sup>

As many note, the proposed settlement would give Google an exclusive license to the orphan works of absent class members because the Registry could not grant to others the same rights without the right holder's permission – which no orphan owner will be available to grant.<sup>27</sup> Moreover, under the terms Google and plaintiffs drafted, Google would be able to use those orphan works on terms that Congress and the Copyright Office *rejected*. In 2008, the Senate passed legislation recommended by the Copyright Office that would require a “diligent search” for an orphan work's owner before using the work, in part to ensure that the legislation meets

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<sup>24</sup> Letter from Marybeth Peters, Register of Copyrights, to Senators Orrin G. Hatch and Patrick Leahy of Jan. 23, 2006, included in U.S. Copyright Office, *Report on Orphan Works* (Jan. 2006) (“Report on Orphan Works”), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

<sup>25</sup> See, e.g., Letter from Allan Adler, Association of American Publishers, et al., to U.S. Copyright Office of Mar. 24, 2005 (“AAP Initial Comment”), available at <http://www.copyright.gov/orphan/comments/OW0605-AAP-AAUP-SIIA.pdf>; Letter from David Drummond, Google, to U.S. Copyright Office of Mar. 25, 2005 (“Google Initial Comment”), available at <http://www.copyright.gov/orphan/comments/OW0681-Google.pdf>; Letter from Allan Adler, Association of American Publishers, et al., to U.S. Copyright Office of May 6, 2005 (“AAP Reply Comment”), available at <http://www.copyright.gov/orphan/comments/reply/OWR0085-AAP-AAUP-SIIA.pdf>; Letter from Paul Aiken, The Authors Guild, to U.S. Copyright Office of May 9, 2005 (“Authors Guild Reply Comment”), available at <http://www.copyright.gov/orphan/comments/reply/OWR0135-AuthorsGuild.pdf>.

<sup>26</sup> See *Report on Orphan Works* at 59-68.

<sup>27</sup> See SA § 6.2(b)(iii), and Attach. I (Settlement Notice) § 8.B; Samuelson, *supra*, n.14; Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, Univ. of Chicago, Olin Law and Economics Program, Research Paper Series (Apr. 16, 2009), available at [http://www.mediainstitute.org/IntellectualProperty/IPI\\_ViewPoints\\_061709.html](http://www.mediainstitute.org/IntellectualProperty/IPI_ViewPoints_061709.html) (Ex. N); James Grimmelmann, *Google and the Zombie Army of Orphans*, Feb. 27, 2009, available at <http://james.grimmelmann.net/essays/ZombieArmy>. (Ex. O).

international treaty requirements.<sup>28</sup> The proposed settlement would place no diligent search burden on Google, replacing it with a requirement that copyright owners proactively register their works with a registry – a concept that plaintiffs opposed in the legislative proceedings, the Copyright Office rejected, and the Senate omitted from the bill it passed last year.<sup>29</sup>

In addition, the proposed settlement would establish an “escrow” system under which funds are collected from customers to be disbursed to orphan work owners if and when they surface. The Copyright Office also considered and *rejected* the use of an escrow, and nearly all interested parties, including Google, the Association of American Publishers (“AAP”) and the Authors Guild, opposed it.<sup>30</sup> The proposed settlement’s escrow system would be even worse than the proposal the Copyright Office and the Senate rejected. It would create conflicts of interest among the class by imposing an escrow and then re-allocating unclaimed funds to *other* copyright owners and the Book Rights Registry, thereby creating an economic *disincentive* to find orphan work owners.<sup>31</sup>

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<sup>28</sup> See *Report on Orphan Works* at 121.

<sup>29</sup> See *Report on Orphan Works* at 104-05. See also AAP Reply Comment, *supra* n.25, at 3 (“a legislative solution to encourage the use of ‘orphan works’ should place the affirmative responsibility for due diligence ‘squarely on the user’ by requiring the user to conduct a reasonable efforts search to obtain permission from the copyright owner before using the ‘orphan work.’”) (emphasis added); Authors Guild Reply Comment, *supra* n.25, at 5-7 (“Above all, the law must not take away the rights of owners who could be found by a truly diligent search. *An owner who cannot be readily located should not be deemed guilty of ‘neglecting’ or abandoning his or her work.* ... These [registration-based] proposals are unjustifiably overbroad, and they would unfairly affect individual owners much more than corporations and institutions...” (emphasis added); cf. S. 2913, 110th Cong. § 2 (2008) (reasonably diligent search approach).

<sup>30</sup> See *Report on Orphan Works* at 113-14; see also Transcript of Orphan Works Roundtable at 165 (July 26, 2005), available at <http://www.copyright.gov/orphan/transcript/0726LOC.PDF>; AAP Initial Comment, *supra* n.25, at 6; Authors Guild Reply Comment, *supra* n.25, at 7.

<sup>31</sup> These are just two of the ways in which the proposed settlement would bypass the democratic process and Congress’s exclusive Constitutional role. The settling plaintiffs changed positions on these central issues – in which they abandoned fundamental positions that other class members still hold – also calling into question their qualifications to serve as class representatives.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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The Authors Guild, Inc., *et al.*, :

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Plaintiffs, :

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vs. :

Case No. 05 CV 8136-DC

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Google Inc., :

:

Defendant. :

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MEMORANDUM OF AMICUS CURIAE OPEN BOOK ALLIANCE  
IN OPPOSITION TO THE PROPOSED SETTLEMENT  
BETWEEN THE AUTHORS GUILD, INC., ASSOCIATION OF  
AMERICAN PUBLISHERS, INC., ET AL., AND GOOGLE INC.

Gary L. Reback  
(CA State Bar No. 100118)  
(*Pro Hac Vice* Application Pending)

Carr & Ferrell LLP  
2200 Geng Road  
Palo Alto, CA 94303

Counsel for Amicus Curiae Open Book Alliance

Of course, these algorithms are also designed to maximize Google's revenue. For a variety of reasons, including the desire to prevent undesirable manipulation of the results, neither Google nor its competitors reveal the criteria for prioritization in the search result or ad listings. Under the terms of the Google "auction," an advertiser might be willing to pay more, for example, but paying more does not necessarily secure top placement. The opaque, confusing, and complex nature of selection criteria leaves web sites and advertisers vulnerable to discipline, and wary of the threat of discipline. A web-based business could be severely damaged by Google's manipulation of search results and ad listings, using means not even visible to the outside world.

In the search advertising and search syndication markets, then, only the presence of strong competition prevents supplier abuse. Even a dominant search company would have to pause before manipulating search or advertising results if the victim of the manipulation had realistic alternatives. Google's market dominance has created great concern in Silicon Valley, and not just among antitrust enforcers and Google competitors. Some commentators have even called for government regulation of search criteria to prevent market abuse by Google.<sup>20</sup>

Search advertising and search syndication are scale markets. A supplier improves its search product by crawling and indexing collections of materials/postings to determine word associations and other relationships. The greater the amount and the higher the quality of material crawled and the greater the number of queries run on a platform, the better the algorithms powering search engine become. Similarly, search advertising becomes more lucrative as individual preferences are tracked more frequently. A comprehensive book database holds great opportunity for Google. By placing advertising next to digital book pages (especially

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<sup>20</sup> *The Time Has Come To Regulate Search Engine Marketing And SEO*, TECHCRUNCH (July 13, 2009), at <http://www.techcrunch.com/2009/07/13/the-time-has-come-to-regulate-search-engine-marketing-and-seo/>.



of orphan work-related litigation alone chills the potential for competition. While the risk arising out of the use of orphan works can be minimized by simply excluding orphan works from an offering, a competitor who cannot harness the vast base of knowledge contained in orphan works is doomed to fail, particularly when forced with a competitor in Google which can use the orphan works.

**C. Google Gains an Unfair Advantage in the Search Marketplace**

This exclusive market has yet one more anti-competitive effect: it secures for Google access to a database capable of vastly improving Google's central product, Google Search. With sole access to this data, Google can better refine its search algorithm and gain a tremendous advantage against other search providers. This result is unreasonable and unfair to class members, competitors, and consumers alike. As a consequence of Google's singular position in the emerging book search marketplace and its control of orphan works, as discussed above, Google will gain a tremendous advantage in its core business area: Google Search. Google, and other search providers, have developed proprietary algorithms and search models that are constantly evolving in an effort to provide higher quality search results in the minimum amount of time. Search engineers generally agree, however, that the more data available, the better the resulting algorithm and the better the search engine. Indeed, search providers have long used the wealth of information available on the Internet to help refine their proprietary search algorithms. Google's own Director of Research, Peter Norvig, has stated that "if you go from a 1 million word training set to a 10 million word training set . . . the very worst algorithm at 10 million words is better than the very best algorithm at 1 million words. So rather than arguing about which [algorithm] is better or trying to discover a better one, why not just go out and gather more data." Peter Norvig, *Theorizing from Data: Avoiding the Capital Mistake*, May 31, 2007,

available at <http://www.youtube.com/watch?v=nU8DcBF-qq4>.<sup>21</sup> This is exactly what Google has done, but it has done so in a way that unfairly excludes all other market participants from this pool of data. In obtaining what amounts to a compulsory license to orphan works that no would be competitor could ever likely achieve, Google simultaneously enhances its primary market for Internet search.

**CONCLUSION**

For the foregoing reasons, Yahoo! respectfully requests that the District Court reject the Proposed Settlement.

Dated: New York, New York  
September 8, 2009

WINSTON & STRAWN LLP

By: /s/ Thomas P. Lane

Michael S. Elkin (ME 2300)  
Thomas P. Lane (TL 8983)  
Robert C. Turner (RT 7980)  
200 Park Avenue  
New York, New York 10166  
(212) 294-6700

*Attorneys for Class Member  
Yahoo! Inc.*

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<sup>21</sup> Other commentators have also made the argument for more data over better algorithms. See Anand Rajaraman, *More Data Usually Beats Better Algorithms*, Mar. 24, 2008, available at <http://anand.typepad.com/datawocky/2008/03/more-data-usual.html>.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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The Authors Guild, Inc., Association of American	:
Publishers, Inc., et al.,	:
	:
Plaintiffs,	:
	:
v.	:
	:
Google Inc.,	:
	:
Defendant.	:

-----X

Case No. 05 CV 8136-DC

**AMENDED SETTLEMENT  
AGREEMENT**

1.155 “Supplemental Notice” has the meaning set forth in Article XII (Class Notice Program).

1.156 “Supplemental Opt-Out Deadline” means the deadline fixed by the Court to opt out of the Amended Settlement Agreement pursuant to Rule 23 of the Federal Rules of Civil Procedure.

1.157 “Third-Party Required Library Services Provider” has the meaning set forth in Section 7.2(e)(ii) (Third-Party Required Library Services Provider).

1.158 “Third-Party Unauthorized Access” means any access (other than Prohibited Access) by any third party to any Digital Copy of a Book that is not authorized by this Amended Settlement Agreement, the applicable Library-Registry Agreement, or the applicable Host Site-Registry Agreement, and is not otherwise authorized by the Rightsholder.

1.159 “Unauthorized Access” means any display or reproduction in the United States by Google of any Digital Copy of a Book or Insert that is not authorized by this Amended Settlement Agreement or the Rightsholder.

1.160 “Unclaimed Works Fiduciary” has the meaning set forth in Section 6.2(b) (Organizational Structure).

1.161 “Unclaimed Funds” has the meaning set forth in Section 6.3(a)(Unclaimed Funds).

1.162 “United States” or “U.S.” means the states and territories, the District of Columbia, and the possessions of the United States of America.

## **ARTICLE II — SETTLEMENT BENEFITS – OVERVIEW AND AUTHORIZATIONS**

### **2.1 Benefits to the Amended Settlement Class – Overview.**

(a) Google Book Search. Google is authorized to, in the United States, sell subscriptions to the Institutional Subscription

Database, sell individual Books, place advertisements on Online Book Pages, and make other commercial uses of Books, all as further described in this Amended Settlement Agreement. Google shall pay to the Registry, for the benefit of the Rightsholders, seventy percent (70%) of all revenues earned by Google through uses of Books in Google Products and Services in the United States authorized under this Amended Settlement Agreement, less ten percent (10%), for Google's operating costs, deducted from such revenues prior to such calculation (*i.e.*, sixty-three percent (63%) of all revenues earned by Google through uses of Books in Google Products and Services in the United States authorized under this Amended Settlement Agreement). The Registry will distribute the revenues to Rightsholders pursuant to the provisions of the Plan of Allocation.

(b) Cash Payment. Google shall pay a minimum of forty-five million United States dollars (U.S. \$45 million) into the Settlement Fund to pay Amended Settlement Class members whose Books and Inserts have been Digitized on or before May 5, 2009. Such forty-five million United States dollars (U.S. \$45 million) will be distributed from the Settlement Fund in the form of Cash Payments of at least sixty United States dollars (U.S. \$60) per Principal Work; fifteen United States dollars (U.S. \$15) per Entire Insert; and five United States dollars (U.S. \$5) per Partial Insert in accordance with the Plan of Allocation. To the extent that funds greater than forty-five million United States dollars (U.S. \$45 million) are required in order to pay every such Amended Settlement Class member his, her or its Cash Payment, Google shall make an additional payment to enable such Cash Payments to be made to the Rightsholders from the Settlement Fund. To the extent funds remain from the forty-five million United States dollars (U.S. \$45 million) after all Cash Payments are made, such excess will be distributed pursuant to the Plan of Allocation.

(c) Registry/Notice/Claims Administration Funding. Google is obligated to pay thirty-four and one-half million United States dollars (U.S. \$34.5 million) (of which twelve million United States dollars (U.S. \$12 million) has been paid) to fund the launch and the initial operations of the Registry and to fund other Administrative Costs. The Registry will be responsible for locating and collecting information from Rightsholders, identifying and coordinating payments to Rightsholders, and otherwise representing

the interests of Rightsholders under this Amended Settlement Agreement.

(d) Attorneys' Fees and Costs. Google shall pay Plaintiffs' attorneys' fees and costs in accordance with Section 5.5 (Attorneys' Fees).

(e) Summary Only. This Section 2.1 (Benefits to the Amended Settlement Class – Overview) is a summary of some of the provisions of this Amended Settlement Agreement and is subject to all of the other provisions of this Amended Settlement Agreement.

2.2 Authorization of Google, Fully Participating Libraries and Cooperating Libraries. In exchange for the benefits conferred in this Amended Settlement Agreement on Plaintiffs and Rightsholders, Rightsholders, as of the Effective Date, authorize (a) Google to make Display Uses and Non-Display Uses of their Books and Inserts in GBS and other Google Products and Services, (b) each Fully Participating Library to use its Library Digital Copy and (c) each Host Site to make the Research Corpus available, all in accordance with the terms and conditions of this Amended Settlement Agreement, a Library-Registry Agreement or a Host Site-Registry Agreement, as applicable. As of the Effective Date, Rightsholders authorize Google, the Fully Participating Libraries, the Cooperating Libraries and the Host Sites to engage in the activities, and only the activities, set forth in this Amended Settlement Agreement, a Library-Registry Agreement or a Host Site-Registry Agreement, as applicable, and only in accordance with such terms and conditions as are applicable to those activities; provided that the remedy for any breach of a term or condition of this Amended Settlement Agreement or a Library-Registry Agreement shall not be termination of such authorizations except as provided in Section 3.7(b) (Failure to Provide Contemplated Rightsholder Services). This Amended Settlement Agreement does not authorize Google, any Participating Library or any Host Site to make any uses of Books and Inserts other than those uses that are authorized under this Amended Settlement Agreement. This Amended Settlement Agreement neither authorizes nor prohibits, nor releases any Claims with respect to, (i) the use of any work or material that is in the public domain under the Copyright Act in the United States, (ii) the use of books in hard copy (such term does not include microform) format other than the creation and use of Digital Copies of Books and Inserts, or (iii) any Participating Library's Digitization of Books if the resulting Digitized Books are neither provided to Google pursuant to this Amended Settlement Agreement nor included in any LDC, or the use of any such Digitized Books that are neither provided to Google pursuant to this Amended Settlement Agreement nor included in any LDC.

2.3 Author-Publisher Procedures. All rights of Books Rightsholders under this Amended Settlement Agreement are subject to the Author-Publisher Procedures.

2.4 Non-Exclusivity of Authorizations. The authorizations granted to Google in this Amended Settlement Agreement are non-exclusive only, and nothing in this Amended Settlement Agreement shall be construed as limiting any Rightsholder's right to authorize, through the Registry or otherwise, any Person, including direct competitors of Google, to use his, her or its Books or Inserts in any way, including ways identical to those provided for under this Amended Settlement Agreement.

**ARTICLE III — GOOGLE BOOK SEARCH – RIGHTS, BENEFITS AND OBLIGATIONS**

3.1 Digitization, Identification and Use of Books.

(a) Non-Exclusive Digitization Rights. As of the Effective Date, in the United States (i) Google may, on a non-exclusive basis, Digitize all Books and Inserts obtained by Google from any source (whether obtained before or after the Effective Date), (ii) Fully Participating Libraries and Cooperating Libraries may provide Books and Inserts to Google in hard copy (not including microform) format to be Digitized (or in a form Digitized by or for such Fully Participating Library or Cooperating Library), and (iii) Google and Fully Participating Libraries may use such Books and Inserts as provided in this Amended Settlement Agreement and the Library-Registry (Fully Participating) Agreements. The authorizations to use Books and Inserts provided for by this Amended Settlement Agreement or a Library-Registry Agreement are not transfers of copyright ownership to such Books or Inserts, and nothing in this Amended Settlement Agreement or a Library-Registry Agreement shall operate to transfer any copyright ownership in Books or Inserts. The foregoing authorization for Google to Digitize Books and Inserts includes authorization of Google's contractors to Digitize Books and Inserts for Google, including libraries that may Digitize Books and Inserts, or portions thereof, at Google's request.

(b) Identification of Digitized Books and Government Works.

(i) List of Digitized Books and Government Works. Google has previously provided Plaintiffs, in a form mutually agreed, with a list of the Books, Public Domain Books with a copyright date after 1922 and Government Works that Google has Digitized as of January 5, 2009 and the date each Book, Public Domain Book with a copyright date after 1922 or Government Work was Digitized by Google, and a separate list of all Books, Public Domain Books with a copyright date after 1922 and Government Works that Google reasonably anticipated it would Digitize on or before May 5, 2009. On November 2, 2009, Google provided Plaintiffs with a final list of all Books, Public Domain Books with a copyright date after 1922 and Government Works that Google Digitized on or before May 5, 2009.

(ii) Books Database. Google has made a searchable online database available to members of the Amended Settlement Class through the Internet (1) for the purpose of identifying all Books, Public Domain Books with a copyright date after 1922 and Government Works that Google has Digitized or reasonably anticipates that it might Digitize under this Amended Settlement Agreement, and (2) for purposes of Article V (Other Settlement Benefits), identifying whether such Books, Public Domain Books with a copyright date after 1922 or Government Works have been Digitized as of the Notice Commencement Date or Google reasonably anticipates that it might Digitize such Books, Public Domain Books or Government Works on or before May 5, 2009. Such database shall be referred to in this Amended Settlement Agreement as the “Books Database.” The Books Database supports queries by author, title, publisher, ISBN, and date of publication. The inclusion of a work within the Books Database does not, in and of itself, mean that the work is a Book within the meaning of Section 1.19 (Book).

(iii) Books. Google will also allow members of the Amended Settlement Class to submit bibliographic information (*e.g.*, title, author, and publication date) for Books not in the Books Database.

(iv) Inserts.

(1) Submission. The Books Database will allow each member of the Amended Settlement Class to submit identifying information regarding his, her or its Inserts, such as the Books, Public Domain Books with a copyright date after 1922 or Government Works in which such Inserts were published, the location of such Inserts within Books, Public Domain Books with a copyright date after 1922 or

Government Works and any other identifying information about such Inserts (*e.g.*, whether the Insert is an introduction, a foreword, etc.).

(2) Insert Identification. For content that may be an Insert, the Books Database will allow any Person who might be a member of the Amended Settlement Class to submit a digital copy of his, her or its content that may be an Insert or to otherwise identify such content that may be an Insert, and Google will perform searches to identify Books, Public Domain Books with a copyright date after 1922 or Government Works, if any, that contain such submitted content. If Google identifies any Books, Public Domain Books with a copyright date after 1922 or Government Works that may contain such submitted content, Google will notify such Person of such Books, Public Domain Books with a copyright date after 1922 or Government Works in order to enable him, her or it to determine whether the submitted content is an Insert in such Books, Public Domain Books with a copyright date after 1922 or Government Works and the pages on which such content appears. Google shall have no liability for failure to identify an Insert under this Section 3.1(b)(iv)(2) (Insert Identification).

### 3.2 Initial Display and No Display Book Classification.

(a) General Guidelines. Pursuant to Section 3.2(b) (Display/No Display Classification), Google and the Registry will classify all Books in one of two categories, either Display Books, as described in Section 3.3 (Display Books), or No Display Books, as described in Section 3.4 (No Display Books).

(b) Display/No Display Classification. Google will initially classify a Book as No Display if it is determined to be Commercially Available as of the Notice Commencement Date, and Display if it is determined not to be Commercially Available as of the Notice Commencement Date. A Rightsholder, Google, or the Registry (pursuant to Section 3.2(e)(i) (Change Requests by Rightsholders)), may change a Book's classification as Display or No Display as set forth in this Article III (Google Book Search – Rights, Benefits and Obligations).

(c) Notification of Display/No Display Classification.

The Books Database will identify whether a Book has been classified as a Display Book or a No Display Book.

(d) Commercial Availability, In Print/Out of Print and Public Domain Determination.

(i) Basis for Determination. Google shall determine whether a Book is Commercially Available or not Commercially Available based on its analysis of multiple third-party databases as well as its analysis of the Book's retail availability based on information that is publicly available to it on the Internet. Google will use third-party databases from a range of United States, Canadian, United Kingdom, and Australian sources that can be obtained on fair and commercially reasonable terms. When analyzing the third-party databases, Google will use the publishing status, product availability and/or availability codes to determine whether or not the particular database being used considers that Book to be Commercially Available. When analyzing information that is publicly available to it on the Internet, Google will determine retail availability by consulting various sources to determine whether the Book is Commercially Available. Each of these sources may contain errors; Google, however, shall use commercially reasonable efforts to determine whether a Book is Commercially Available or is not Commercially Available using a methodology reasonably agreed to by Google and the Registry that is designed to minimize the overall error rate. All Books for which Google does not have information from the sources identified above will be determined to be not Commercially Available. Rightsholders may provide information directly to Google that a Book is Commercially Available when they submit their Claim Forms, through the Books Database or, at any time after such submission, to Google or the Registry. When Google receives such information from Rightsholders or the Registry or Rightsholders otherwise assert that their Books are Commercially Available, such Books promptly shall be classified as Commercially Available. If Google reasonably believes that such information or assertion is inaccurate, then Google may challenge the classification pursuant to Article IX (Dispute Resolution).

(1) In-Copyright Principal Work. If a Book's Principal Work is not in the public domain under the Copyright Act in the United States and that Book is Commercially Available, then any other Book that has the same Principal Work (such as a previous edition) is also deemed to

be Commercially Available, whether or not such other Book is at the time in question also Commercially Available.

(2) Public Domain Principal Work. If a Book's Principal Work is in the public domain under the Copyright Act in the United States, and that Book is Commercially Available and also contains an Insert (*i.e.*, content that qualifies as an Insert and is not in the public domain under the Copyright Act in the United States), then any earlier edition of such Book that contains such Insert is also deemed to be Commercially Available.

(ii) In-Print/Out-of-Print. Google's initial determination of whether or not a Book is Commercially Available will be used to initially classify Books as "In-Print" or "Out-Of-Print," as such classifications are defined in the Author-Publisher Procedures, and only for purposes of the Settlement. Google shall provide the Registry with the determination as to whether a Book is Commercially Available as of the Notice Commencement Date and thereafter from time to time. Classification of Books as In-Print or Out-Of-Print pursuant to the terms of the Author-Publisher Procedures shall be the responsibility of the Registry. If the Registry re-classifies a Book as Out-Of-Print, the Registry will direct Google to change the classification of the Book to a Display Book, which Google shall do within thirty (30) days unless the Rightsholder of the Book, subject to Section 3.2(e)(i) (Change Requests by Rightsholders), expressly requests that the Book be treated as a No Display Book. If the Registry re-classifies a Book as In-Print, the Registry will direct Google to change the classification of the Book to a No Display Book only upon the express request of the Rightsholder of the Book, subject to Section 3.2(e)(i) (Change Requests by Rightsholders).

(iii) Mistakes. If a Book was mistakenly determined by Google not to be Commercially Available, then the Rightsholder of the Book may notify Google, or may authorize the Registry to notify Google, of such mistaken determination. To verify the claim, the Registry will provide, upon Google's reasonable request, information supporting any assertion by the Rightsholder of the Book that the Book is Commercially Available. If the Rightsholder asserts that the Book is Commercially Available, then, as Google's sole obligation and the Rightsholder's sole remedy (subject to Section 3.2(d)(iv) (Disputes)), Google promptly shall correct the determination as to whether the Book is Commercially Available.

(iv) Disputes. The Registry and Google shall work together to resolve any disputes regarding the determination of whether a Book is Commercially Available. If they are unable to do so, then the dispute shall be resolved pursuant to Article IX (Dispute Resolution). If the Arbitrator, in such dispute, finds in favor of the Rightsholder, then Google shall pay the Rightsholder's reasonable attorneys' fees and costs, including arbitration costs.

(v) Safe Harbor Public Domain Determination.

(1) Safe Harbor Process. Attachment E (Public Domain) sets forth the process by which Google may determine whether a book is a Public Domain Book for the sole purpose of determining whether Section 3.2(d)(v)(3) (Safe Harbor) is applicable. Attachment E (Public Domain) may be amended by Google and the Registry from time to time if Google develops and provides to the Registry additional or different processes for determining whether a book is a Public Domain Book. If the Registry reasonably believes that such processes do not identify Public Domain Books accurately, then the Registry shall notify Google thereof. Google shall respond to such notice within thirty (30) days, either by modifying such process or by explaining how such process can reasonably identify Public Domain Books accurately. Any disputes as to whether the process can reasonably identify Public Domain Books for purposes of determining the applicability of Section 3.2(d)(v)(3) (Safe Harbor) shall be resolved pursuant to Article IX (Dispute Resolution).

(2) List. Google shall identify to the Registry books that it has determined to be Public Domain Books pursuant to the process set forth in Attachment E (Public Domain) and for which Google wants the safe harbor described in Section 3.2(d)(v)(3) (Safe Harbor). For each such book, Google shall provide the supporting reasons and information that Attachment E (Public Domain) requires. At any time, the Registry or a Rightsholder may notify Google that it or a Rightsholder believes that any such book is not a Public Domain Book (with supporting reasons and information) and, upon receipt of such notice, Google shall promptly review the supporting reasons and information and shall either (a) re-classify the Book as in copyright or (b) notify the Registry and any notifying Rightsholder that Google continues to believe the book is a Public Domain Book. Any disputes with respect to whether a book is a Public Domain Book shall be resolved pursuant to Article IX (Dispute Resolution); in any such dispute, the burdens of proof as to whether the

book is in copyright or in the public domain under the Copyright Act in the United States (and the allocation and shifting of such burdens) shall be as if the action were one for copyright infringement brought under the Copyright Act.

(3) Safe Harbor. If, with respect to a book, Google has followed the process set forth in Attachment E (Public Domain) and neither the Registry nor a Rightsholder has notified Google pursuant to Section 3.2(d)(v)(2) (List), then Google may treat such book as if it is in the public domain under the Copyright Act in the United States for the purposes of this Amended Settlement Agreement, and Google will have no liability or obligation (a) for any use of such book to the extent that such use would be authorized under this Amended Settlement Agreement if such book were a Display Book or (b) for providing downloadable versions of such book. If the Registry or a Rightsholder has notified Google pursuant to Section 3.2(d)(v)(2) (List), Google otherwise obtains actual knowledge that a Book is not in the public domain under the Copyright Act in the United States, or a Book is determined to be in copyright pursuant to Article IX (Dispute Resolution), then, commencing five (5) Business Days from the date of such notice, knowledge or determination, the foregoing limitation on Google's liability or obligation will not apply.

(e) Change of Display/No Display Classification.

(i) Change Requests by Rightsholders. For all Books, the Registered Rightsholder of the Book or, for unclaimed Books, the Unclaimed Works Fiduciary (subject to the last sentence of this Section 3.2(e)(i) (Change Requests by Rightsholders)) may direct Google or the Registry to change the classification of a Book or group of Books to a Display Book or Display Books or to a No Display Book or No Display Books or to include in, or, pursuant to Section 3.5 (Right to Remove or Exclude), exclude any or all of his, her or its Books or group of Books from, one or more of the Display Uses. In the event the Rightsholder directs that any of his, her or its Books be included in one or more of the Display Uses, (1) the provisions of Section 3.5(b)(iii) (Coupling Requirement) will apply to such Books, (2) such Books will be considered Display Books, and (3) such Display Uses will be deemed authorized. Google will implement a direction to change the classification of a Book within thirty (30) days after Google receives notice of such direction. The Registry shall be able to direct Google to change the classification of a Book to a Display Book or a group of Books to Display

Books. A direction to change the classification of a Book to a No Display Book or a group of Books to No Display Books, however, must be initiated by the Rightsholder of the Book or Books.

(ii) Change Requests by Google. At any time after one (1) year from the Final Approval Date, Google shall have the right to request that the classification of a Book be changed to a Display Book if Google believes that the Book is not Commercially Available at that time, or if Google believes that a mistake was made in initially determining the Book to be Commercially Available. Upon receipt of such a request from Google, the Registry shall have one hundred and twenty (120) days to attempt to contact the Rightsholder of the Book to inform such Rightsholder of such request and/or collect evidence with respect to whether the Book is Commercially Available. The Registry shall notify Google if it is able to contact such Rightsholder and will inform Google whether such Rightsholder wants the Book to remain classified as a No Display Book. If the Rightsholder of the Book provides evidence that the Book is Commercially Available or otherwise directs Google that he, she or it wants the Book to remain a No Display Book, or if the Registry otherwise determines that the Book is Commercially Available, then the Registry will notify Google, and Google will not change the classification of the Book to a Display Book at that time on that basis. If, by the end of the one hundred twenty (120)-day period, the Registry is unable to contact the Rightsholder or to find accurate evidence regarding whether the Book is Commercially Available, then the Registry shall inform Google and Google may change the classification of the Book to a Display Book, subject to Section 3.5 (Right to Remove or Exclude).

### 3.3 Display Books.

(a) Display and Non-Display Uses. Subject to Section 3.5 (Right to Remove or Exclude) and Section 4.3 (Preview Uses), Google may make Display Uses and Non-Display Uses of all Display Books; provided, however, that Google will not make Display Uses of any Book that Google has classified as not Commercially Available until the later of the Effective Date or sixty (60) days after notifying the Registry that Google has classified such Book as not Commercially Available. If, within such sixty (60)-day period, a dispute under Section 3.2(d)(iv) (Disputes) arises between the Rightsholder or the Registry and Google regarding whether such Book is Commercially Available, Google will not make Display Uses

of the Book unless and until Google prevails under Article IX (Dispute Resolution).

(b) Inserts in Display Books. If a Book is classified as a Display Book, then, subject to Section 3.5 (Right to Remove or Exclude), Google may make Display Uses and Non-Display Uses of all Inserts in such Book. If a Book is classified as a No Display Book, then all Inserts in that Book are also subject to Section 3.4 (No Display Books).

(c) Inserts in Government Works and Public Domain Books. Google may use all Inserts in Government Works and Public Domain Books in connection with any uses of such Government Works and Public Domain Works in Google Products and Services, subject to Section 3.5(b) (Right to Exclude from Display Uses and Revenue Models).

(d) Accommodation of Print Disabilities. Google may provide the Display Uses in a manner that accommodates users with Print Disabilities so that such users have a substantially similar user experience as users without Print Disabilities.

(e) Change to No Display. Rightsholders of Books may, pursuant to Section 3.2(e)(i) (Change Requests by Rightsholders), direct Google or the Registry to change the classification of a Display Book to a No Display Book.

(f) Author Landing Page Links. If, in any Display Use of a Book in GBS for which Display Use is authorized pursuant to this Amended Settlement Agreement, Google presents any web page (i) dedicated to an individual author that includes hyperlinks to that author's Books and other features, or (ii) with content from a Book that includes a hyperlink to the website of the publisher of such Book, then Google will also include on such page a hyperlink (or similar or appropriate technology) to that author's website, in either case only if (1) the Registry provides Google with such hyperlink, and (2) such website promotes the author's works, or provides relevant information about the author, and is otherwise appropriate for such purposes; provided that Google may remove any such

hyperlink if Google becomes aware that such hyperlink no longer functions to link to such website.

(g) Display Use Attributes. With respect to their Display Books, Google and the Rightsholders may negotiate and Rightsholders may authorize Google to modify or remove the restrictions that are placed on Google in Section 4.1(d) (Basic Features of Institutional Subscriptions) and 4.2(a) (Basic Features of Consumer Purchase), and comparable restrictions that may apply to additional Revenue Models that may be agreed pursuant to Section 4.7 (Additional Revenue Models).

#### 3.4 No Display Books.

(a) Non-Display Uses. Subject to Section 3.5 (Right to Remove or Exclude), Google may make Non-Display Uses of all No Display Books.

(b) Change to Display. Rightsholders of Books may, pursuant to Section 3.2(e)(i) (Change Requests by Rightsholders), direct Google or the Registry to change the classification of a No Display Book to a Display Book, or to include any or all of their No Display Books in one or more of the Display Uses, in which case such Books will then be considered to be Display Books, and Article IV (Economic Terms for Google's Use of Books) shall apply.

#### 3.5 Right to Remove or Exclude.

##### (a) Right to Remove.

(i) Right to Remove. A Rightsholder of a Book may direct that his, her or its Book not be Digitized, or if already Digitized, that the Book be Removed. If a Book has not yet been Digitized when Google receives a Removal request for that Book, Google will use reasonable efforts not to Digitize that Book, but, in any event, will comply with the request to Remove. Google will implement a Rightsholder's Removal direction as soon as reasonably practicable, but in any event no later than thirty (30) days after notice from the Registry, and in accordance with Section 3.5(b) (Right

to Exclude from Display Uses and Revenue Models), will simultaneously act promptly to exclude a Book for which it has received a Removal request. A Fully Participating Library will implement a Rightsholder's Removal direction for a Book as soon as reasonably practicable, but in any event no later than ninety (90) days after notice from the Registry.

(ii) Back-up Storage. Google and Fully Participating Libraries may maintain Books on back-up tapes or on any other back-up storage media subject to compliance with the Security Standard. If any back-up tape or other back-up storage media containing such Book is restored, then any Book that has been Removed pursuant to Section 3.5(a)(i) (Right to Remove) shall also be Removed from any copy made from the back-up tape or other back-up storage media.

(iii) Limitations on Right to Remove. The right to Remove under Section 3.5(a)(i) (Right to Remove) is limited to requests made on or before April 5, 2011 for Removal as described in Section 1.126(a) (Removed) or after April 5, 2011 but on or before March 9, 2012, for Removal as described in Section 1.126(b) (Removed). Thereafter, requests will be honored only to the extent that the Books have not yet been Digitized as of the date the request is made; if the Books at issue have already been Digitized, the Rightsholder may request exclusion from particular Display Uses (under Section 3.5(b)(i) (Right to Exclude)) but not Removal (under Section 3.5(a)(i) (Right to Remove)).

(b) Right to Exclude from Display Uses and Revenue Models.

(i) Right to Exclude. Any Rightsholder of a Book at any time may direct Google or the Registry to exclude his, her or its Book, or any portion thereof, from any one or more, or all, Display Uses, Revenue Models or the Book Annotation sharing feature under Section 3.10(c)(ii) (Hyperlinks and Book Annotations), and any Rightsholder of an Insert at any time may direct that his, her or its Insert, or any portion thereof, be excluded from all (but not less than all) Display Uses; provided that any Rightsholder of an Insert may only direct that his, her or its Insert, or any portion thereof, be excluded but not the entire Book, Public Domain Book or Government Work in which its Insert is contained. Google shall implement any such direction as follows. Google will implement a Rightsholder's exclusion direction promptly, but in any event no later than thirty (30) days after notice from the

Registry or from resolution of the dispute in favor of such Rightsholder (in the case of a challenge under Section 3.5(b)(ii) (Challenging Insert Exclusion Requests) or Section 3.5(b)(vii) (Government Works and Public Domain Works)). Google shall use commercially reasonable efforts to develop a mechanism for excluding no more of Books or Inserts than Rightsholders direct. If, after using such commercially reasonable efforts, Google is unable to limit its exclusion to the Insert or portion of the Book or Insert directed by a Rightsholder, Google may exclude up to the entire page or pages on which such Insert or portion appears. If, however, Google or the Registry develops a tool that enables Rightsholders to specify with precision the location and amount of material in an Insert or portion of a Book or Insert that is less than an entire page and for which the Rightsholder has directed exclusion, Google shall, upon receipt of such direction, exclude such Inserts or portions of Books or Inserts, but no more than that, from Display Uses as directed.

(1) Exclusion from Library Digital Copy. Notwithstanding Section 3.5(b)(i) (Right to Exclude), no Rightsholder may direct that his, her or its Book or Insert be excluded from any Library Digital Copy provided, however, that, in the case of a Book, a Rightsholder of the Book may request Removal of such Book pursuant to Section 3.5(a) (Right to Remove).

(ii) Challenging Insert Exclusion Requests. The Rightsholder of a Book that contains an Insert that the Rightsholder of the Insert has directed be excluded may challenge such direction under law or contract rights, and any dispute regarding such challenge shall be resolved pursuant to Article IX (Dispute Resolution). In addition, if (a) the Rightsholder of a Book that contains an Insert for which the Insert Rightsholder has directed exclusion is not a Registered Rightsholder or (b) the Registered Rightsholder of the Book that contains such Insert (1) determined not to challenge such exclusion pursuant to the previous sentence and (2) does not object to Google making such challenge, then Google may challenge whether the Rightsholder of the Insert would have a right under the Copyright Act to exclude such Insert. Google and the Registry will develop a process to implement the foregoing. Any dispute regarding such challenge shall be resolved pursuant to Article IX (Dispute Resolution).

(iii) Coupling Requirement. Notwithstanding Section 3.5(b)(i) (Right to Exclude), if the Rightsholder of any Library Work authorizes Consumer Purchase or any additional Revenue Model that may be developed pursuant to Section 4.7 (Additional Revenue Models) (except for any

additional Revenue Model in which access to the Library Scan of that Library Work is provided to users free of charge) of or for such Library Work and Google uses a Library Scan of such Library Work for Consumer Purchase or for such additional Revenue Model, then the Rightsholder authorizes Google to include such Library Work in all Institutional Subscriptions (the “Coupling Requirement”); provided, however, that if a Library Work is Commercially Available as of the Notice Commencement Date or becomes Commercially Available at any time during the two (2)-year period after the Notice Commencement Date, the Coupling Requirement will not apply to that Library Work; provided, further, that if, at any time after the end of such two (2)-year period, the Library Work ceases to be Commercially Available, then the Coupling Requirement shall thereafter apply to such Library Work if Google is using the Library Scan for Display Uses.

(iv) Mistakes and the Coupling Requirement. If, as of the Notice Commencement Date, a Library Work for which Google uses a Library Scan for Consumer Purchase or any additional Revenue Model that may be developed pursuant to Section 4.7 (Additional Revenue Models) (except for any additional Revenue Model in which access to the Library Scan of that Library Work is provided to users free of charge) is not Commercially Available but Google mistakenly determined such Library Work to be Commercially Available, and such Library Work does not become Commercially Available at any time during the two (2)-year period following the Notice Commencement Date, then, upon a determination that the Library Work is not Commercially Available after such two (2)-year period, the Coupling Requirement will apply to such Library Work if Google is using a Library Scan for Display Uses. If, as of the Notice Commencement Date or at any time during the two (2)-year period following the Notice Commencement Date, such Library Work is mistakenly determined to be not Commercially Available, then, upon determination that the Library Work is Commercially Available, the Coupling Requirement will not apply to such Library Work; provided, however, that if, at any time after the end of such two (2)-year period, the Library Work ceases to be Commercially Available, then the Coupling Requirement shall thereafter apply to such Library Work if Google uses a Library Scan for Display Uses.

(v) Waiver of Coupling Requirement. Google and the Registry may, with the consent of a Fully Participating Library or a Cooperating Library, agree to waive the Coupling Requirement as to Library Works of which such Fully Participating Library or Cooperating Library is the source and for which Google uses a Library Scan for Display Uses;

provided, however, that for any Library Work for which a Library Scan is constructed from more than one physical copy of a Library Work, such waiver requires the consent of all Fully Participating Libraries and Cooperating Libraries that are the source of copies of such Library Work. Any Fully Participating Library and Cooperating Library may also agree to such a waiver in its Digitization Agreement with Google or upon notice to Google, in which event Google shall notify the Registry of such waiver. Google and the Registry may, with the consent of all of the Fully Participating Libraries and the Cooperating Libraries, acting through the Designated Representative, agree to waive the Coupling Requirement as to all Library Works subject to the Coupling Requirement.

(vi) Continuing Obligations. If Google is authorized to make a Display Use of a Book and, subsequent to such authorization, a Rightsholder Removes such Book or excludes such Book or an Insert contained therein, Google shall cease such Display Use except that Google may make such Display Use of such Book or Insert to the extent necessary to fulfill its obligations as of the date of such Removal or exclusion request to any user who previously purchased access to or use of the Book through any Institutional Subscription (for a period not to exceed ten (10) months or the term of the Institutional Subscription, whichever is less, after the date of such Removal or exclusion request) or Consumer Purchase or any substantially similar Google Product or Service based on authorizations granted to Google under a separate agreement entered into directly with the Rightsholder.

(vii) Government Works and Public Domain Works. If a Rightsholder of an Insert in a Government Work or a Public Domain Book (not an Insert in a Book) directs Google to exclude its Insert from Display Uses, Google may elect to reject such direction. In the event of such a rejection, such Rightsholder may, notwithstanding any release in this Amended Settlement Agreement, bring either a judicial action in United States federal court against Google with respect to Google's use of the Insert, in which judicial action the Rightsholder may seek to recover any and all relief available pursuant to the Copyright Act or, alternatively, the Rightsholder may initiate dispute resolution under Article IX (Dispute Resolution) with respect to Google's rejection of the Rightsholder's direction. If the Rightsholder prevails in such arbitration, (i) the Arbitrator shall issue an order prohibiting Google from making any and all Display Uses of such Insert that the Arbitrator determines would be an infringement of such Rightsholder's Copyright Interest, (ii) Google shall pay the Rightsholder's reasonable attorneys' fees and costs, including the cost of the arbitration, and (iii) the foregoing and any other injunctive relief deemed

appropriate by the Arbitrator shall be Google's sole obligation and the Rightsholder's sole remedy for rejecting the Rightsholder's direction for exclusion of its Insert in a Government Work or Public Domain Book from Display Uses (in addition to any award of injunctive relief, to prevent a continuing infringement of such Rightsholder's Copyright Interest in his, her or its Insert, that may be awarded by the Arbitrator). Pending the Decision of the Arbitrator, Google shall stop any and all Display Uses of the Insert.

(c) Take-Down or Transfer Requests.

(i) Definitions. As used in this Section 3.5(c) (Take-Down or Transfer Requests), the following terms have the following meanings:

(1) "Counter-Notice" means a request, in the form of notice attached as Exhibit B to the Author-Publisher Procedures, that states, under penalty of perjury, that the Initial Authorizing Rightsholder has the good faith belief that he, she or it has rights in a Book that is the subject of a Take Down Request or a Transfer Request necessary to authorize Google to exploit such Book as it is being exploited in such Other Google Program.

(2) "Educational Books" means Books that, when published, were intended primarily for sale to educational markets (*i.e.*, K-12, higher education, continuing education, vocational, professional, self-study, and similar educational markets) for use in educational programs.

(3) "Initial Authorizing Rightsholder" means the Person who had given Google permission to use a Book that is the subject of a Take Down Request or a Transfer Request.

(4) "Notifying Rightsholder" means a Rightsholder who has a good faith belief that Google is exploiting a Book in an Other Google Program without the necessary authorization from such Rightsholder.

(5) "Other Google Program" means a Google program other than, but similar to, the Revenue Models, including the Google Partner Program.

(6) “Take Down Request” means a request, in the form of notice attached as Exhibit A to the Author-Publisher Procedures, that Google remove a Book from an Other Google Program.

(7) “Transfer Request” means a request, in the form of notice attached as Exhibit A to the Author-Publisher Procedures, to transfer a Book from an Other Google Program to one or more Display Uses in one or more of the Revenue Models.

(ii) Procedures. The following procedures will apply to each Book classified as In-Print under the Author-Publisher Procedures (except for Educational Books) that is the subject of a contract between an author and a publisher regarding publication of such Book executed prior to 1992 and that has not been amended thereafter to expressly grant or retain all electronic rights pertinent to an Other Google Program if such Book is displayed in an Other Google Program.

(1) If Google receives a Take Down Request or a Transfer Request from the Registry, Google shall send a copy to the Initial Authorizing Rightsholder.

(2) If the Initial Authorizing Rightsholder fails to respond within thirty (30) days, then, if the request satisfies the requirements set forth in the Author-Publisher Procedures, Google shall take down such Book or transfer such Book into the Revenue Models, as specified in the request. If Google transfers such Book into the Revenue Models, such Book shall become subject to this Amended Settlement Agreement.

(3) If the Initial Authorizing Rightsholder responds to a Take Down Request by filing a Counter-Notice, the Registry will forward the Counter-Notice to Google and the Notifying Rightsholder. If the Counter Notice requirements set forth in the Author-Publisher Procedures are met, Google may, in its discretion, take down, maintain or restore access to such Book in the Other Google Program.

(4) If the Initial Authorizing Rightsholder responds to a Transfer Request by filing a notice of objection with the Registry, then Google shall not include such Book in the Revenue Models and shall stop displaying such Book in the Other Google Program while the Notifying

Rightsholder and the Initial Authorizing Rightsholder resolve the dispute. Google shall only restore access to such Book in any of the Revenue Models or the Other Google Program once (a) the Initial Authorizing Rightsholder and the Notifying Rightsholder jointly authorize Google to do so or (b) either the Initial Authorizing Rightsholder or the Notifying Rightsholder obtains a court (or, if the contract between the author and publisher regarding publication of such Books permits, arbitration) ruling giving it authority to direct Google to do so.

(5) In any disputes between an Initial Authorizing Rightsholder and a Notifying Rightsholder over which of them has the right to authorize Google to exploit a Book in the Other Google Program or in the Revenue Models, Google will not be named as a party or brought into the dispute in any manner and will have no liability or responsibility with respect to any such dispute.

3.6 Technical Adaptations. Except with respect to Books Removed under Section 3.5(a) (Right to Remove), Google may make technical adaptations to (but not adapt or alter the content of) all Books (whether Display or No Display) and Inserts as reasonably necessary to preserve, maintain, manage, and keep technologically current its copies of the Books and Inserts.

3.7 Contemplated Rightsholder Services.

(a) Obligation. Google shall implement both of the Contemplated Rightsholder Services (*i.e.*, Institutional Subscriptions and Consumer Purchases) within five (5) years after the Effective Date. If Google discontinues both of the Contemplated Rightsholder Services prior to the fifth (5th) anniversary of the Effective Date, Google shall implement comparable replacement monetization opportunities for the Rightsholders within a period of one year from the date that Google discontinues the Contemplated Rightsholder Services. Google's sole obligation and the sole remedy for any failure under this Section 3.7(a) (Obligation) is set forth in Sections 3.7(b) (Failure to Provide Contemplated Rightsholder Services) through (d) (Third-Party Required Library Services Provider).

(b) Failure to Provide Contemplated Rightsholder Services. If (i) Google fails to implement either of the Contemplated Rightsholder Services within five (5) years after the Effective Date or

(ii) Google discontinues both of the Contemplated Rightsholder Services prior to the fifth (5th) anniversary of the Effective Date, and does not implement comparable replacement monetization opportunities for the Rightsholders within a period of one year from the date that Google discontinues the Contemplated Rightsholder Services, then, in either case, Google's right to make any and all Non-Display Uses and Display Uses shall terminate ninety (90) days after notice to Google by the Registry, except as may be authorized by the Registry; provided, however, that if Google subsequently offers one of the Contemplated Rightsholder Services, Google's rights to make any and all Non-Display Uses and Display Uses shall be immediately re-instated. Notwithstanding the foregoing, if Google believes that any actions or inactions of the Registry have proximately caused Google to fail to provide the Contemplated Rightsholder Services, then Google will provide the Registry with notice describing the Registry's actions or inactions within such ninety (90)-day notice period, and the Registry's notice of termination will have no effect and Google may continue to make any and all Non-Display Uses and Display Uses. Any dispute over whether any action or inaction of the Registry has proximately caused Google to fail to provide the Contemplated Rightsholder Services shall be subject to the dispute resolution provisions of Article IX (Dispute Resolution) and Google may make any and all Non-Display and Display Uses pending the Decision of the Arbitrator.

(c) Additional Contemplated Rightsholder Services Provider. In addition, if (i) Google fails to implement both of the Contemplated Rightsholder Services within five (5) years after the Effective Date or (ii) Google discontinues both of the Contemplated Rightsholder Services and does not implement comparable replacement monetization opportunities for the Rightsholders within a period of one year from the date that Google discontinues the Contemplated Rightsholder Services, then, in either case, the Registry on the one hand and/or the Fully Participating Libraries and the Cooperating Libraries on the other hand, acting reasonably, may work to find one or more provider(s) that can provide Consumer Purchases, Institutional Subscriptions and/or the additional Revenue Models listed in Section 4.7 (Additional Revenue Models), and/or Required Library Services, on substantially the same terms described in this Amended Settlement Agreement. Any such arrangement shall be subject to the consent of the Registry, on the one hand, and the Fully Participating Libraries and the Cooperating Libraries acting

through the Designated Representative, on the other hand (but in the case of the Fully Participating Libraries and the Cooperating Libraries only as to Library Scans), which consent of the Registry and the Fully Participating Libraries and the Cooperating Libraries shall not be unreasonably withheld or delayed (any such provider is referred to in this Amended Settlement Agreement as an “Additional Contemplated Rightsholder Services Provider”). If an Additional Contemplated Rightsholder Services Provider is identified and the foregoing required consent is obtained, then Google will provide such Additional Contemplated Rightsholder Services Provider with Digital Copies of the Library Scans (so long as the Digital Copies are not restricted from further distribution under the Digitization Agreement between Google and a Fully Participating Library or a Cooperating Library) and Digital Copies of other Books that may be provided by Google without restriction. Such Digital Copies may be used by the Additional Contemplated Rightsholder Services Provider solely to provide the Contemplated Rightsholder Services and/or the additional Revenue Models listed in Section 4.7 (Additional Revenue Models) and/or Required Library Services in accordance with the terms of this Amended Settlement Agreement and, in addition, with respect to Digital Copies of Library Scans only, the terms of Google’s agreements with each of the Fully Participating Libraries and the Cooperating Libraries. Such Additional Contemplated Rightsholder Services Provider is, in connection with any Claim arising out of its making available Digital Copies of Books, deemed to be a successor of Google for purposes of Section 10.1(g) (Google Releasees).

(d) Third-Party Required Library Services Provider. If Google provides a Digital Copy of the Library Scans to a Third-Party Required Library Services Provider under Section 7.2(e) (Required Library Services Requirement), then the Contemplated Rightsholder Services may also be provided by the Third-Party Required Library Services Provider in addition to the Required Library Services, and Google will have no obligation to provide Contemplated Rightsholder Services and will have no liability or obligation with respect to Contemplated Rightsholder Services provided by the Third-Party Required Library Services Provider.

(e) Google’s Exclusion of Books. Google may, at its discretion, exclude particular Books from one or more Display Uses for editorial or non-editorial reasons. However, Google’s right to exclude Books for editorial reasons (*i.e.*, not for quality, user

experience, legal or other non-editorial reasons) is an issue of great sensitivity to Plaintiffs and Google. Accordingly, because Plaintiffs, Google and the libraries all value the principle of freedom of expression, and agree that this principle is an important part of GBS and other Google Products and Services, Google agrees to notify the Registry of any such exclusion of a Book for editorial reasons and of any information Google has that is pertinent to the Registry's use of such Book other than Confidential Information of Google and other than information that Google received from a third party under an obligation of confidentiality.

(i) Digital Copy of Excluded Books. Google will provide to the Registry a Digital Copy of any Book that Google excludes for editorial reasons. The Registry may, subject to Section 3.5 (Right to Remove or Exclude), engage, with the consent (not to be unreasonably withheld) of the Fully Participating Library or the Cooperating Library from which the Library Scan of such Book was made (including, if Google constructed a Digital Copy of a Book pursuant to Section 7.2(a)(i) (Fully Participating Library Collections) from one or more physical Books, all such libraries that were the source of such physical Books), a Third-Party Required Library Services Provider that, once engaged, may make available to users a Digital Copy of that Book for uses comparable to Display Uses and Non-Display Uses; provided that, if a Book is not then Commercially Available and the Third-Party Required Library Services Provider makes available the Book for a fee, then the Third-Party Required Library Services Provider must also offer the Required Library Services (Section 7.2(e) (Required Library Services Requirement)) for the Book to the extent required by such Fully Participating Library or Cooperating Library. Such Third-Party Required Library Services Provider is, in connection with any Claim arising out of its making available such Digital Copy of the Book, deemed to be a successor of Google for purposes of Section 10.1(g) (Google Releasees).

3.8 Effect of Changes in Law. Google will be able to take advantage of any future legislative change(s), such as legislation allowing the use of orphan works (if enacted), that put Google at a competitive disadvantage in its use of Books in any Google Products and Services that are subject to this Amended Settlement Agreement; provided, however, that Google may choose to receive the benefit of such change(s) only if a third party is actually taking advantage of such law(s) in connection with services that competitively disadvantage Google in its provision of any such Google Products and Services; provided, further, that no changes in the "fair use" doctrine as codified in Section 107 of the Copyright Act shall trigger this Section 3.8 (Effect of Changes in Law).

3.9 Distribution Arrangements. When Google may make any Snippet Display of a Book under this Amended Settlement Agreement, Google may also allow third parties that have entered into agreements with Google (a) to display snippets served by Google on their websites in response to user interactions on their websites and (b) to cache temporarily snippets transmitted by Google as described in the foregoing clause (a) for future display on their websites in response to user interactions on their websites.

3.10 Specific Prohibitions.

(a) Prohibitions on Display. Except as expressly permitted by this Amended Settlement Agreement or otherwise by Registered Rightsholders or, for unclaimed works, by the Unclaimed Works Fiduciary, Google shall not (i) display any Expression from Books or Inserts; (ii) display any Expression from Books or Inserts in a manner that would constitute a derivative work of such Books or Inserts under the Copyright Act; or (iii) display summaries or abstracts of, or compilations from, Books or Inserts created using Digital Copies.

(b) Prohibitions on Linking. Except as expressly permitted by this Amended Settlement Agreement or otherwise by Registered Rightsholders or, for unclaimed Books, by the Unclaimed Works Fiduciary, Rightsholders or the Registry, Google shall not create hyperlinks to Preview Use Book pages permitted by the terms of this Amended Settlement Agreement from revenue generating products or services if the effect of those links in the aggregate is to detract from revenue under this Amended Settlement Agreement that the Rightsholder(s) of such Book(s) would realize if the links did not exist, unless such services or products (i) are search services (including, for example, Google Web Search, Google Earth and other Google services that show search results by browsing instead of by entering a search query), or (ii) have the effect of making discovery of Books easier, more efficient, more widespread, or more useful. If Plaintiffs or any Rightsholders believe that this Section 3.10(b) (Prohibitions on Linking) has been violated, as Plaintiffs' and Rightsholders' sole remedy and Google's sole obligation, the Registry will notify Google of the existence of such links and if it is agreed or an Arbitrator, pursuant to Article IX (Dispute Resolution), determines that this Section 3.10(b) (Prohibitions on Linking) has been violated, Google will expeditiously remove said links or come to a separate agreement with the Registry to permit them.

(c) Integrity of the Text.

(i) No Alteration of Text. Except as expressly authorized by the Registered Rightsholder or, for unclaimed works, by the Unclaimed Works Fiduciary, or in this Amended Settlement Agreement, Google may not intentionally alter the text of a Book or Insert when displayed to users. Changes in the formatting or presentation of text are not considered to be alteration of the text, *e.g.*, for the Accommodated Service.

(ii) Hyperlinks and Book Annotations. Except as expressly authorized by the Registered Rightsholder or, for unclaimed Books, by the Unclaimed Works Fiduciary, Google may not add hyperlinks to any content within a page of a Book or facilitate the sharing of Book Annotations, except that Google may:

(1) add hyperlinks within the Book for specific internal references from text contained within the Book to other sections of the Book, such as from a table of contents entry to the referenced page, from a page number in the index to the page, or from internal references in the Book to footnotes, endnotes, bibliographical material, appendices, figures, and illustrations,

(2) add a hyperlink from an explicit reference in the Book to an online version of an external source cited in a footnote, endnote, or bibliographical material,

(3) add a hyperlink to a URL that the Rightsholder included in a Book,

(4) temporarily highlight or otherwise emphasize words in response to a user's action, so long as such highlight or emphasis appears only on the user's monitor and/or on a page printed by such user, and

(5) Subject to the Rightsholder's right to exclude its Books from the Book Annotation sharing feature, allow a user to make Book Annotations for the user's own personal use and to share those Book Annotations with a limited number of other users, provided that the feature

that enables Book Annotations within Google Products and Services is subject to the following limitations:

- a) Book Annotations may not be shared with the general public, and
  - b) Book Annotations may not be accessible to any user who has not expressly chosen to access it either by active selection or by participation in a group such as a class for which this feature is used, and
  - c) Book Annotations may not be displayed with the Book for other users who do not already have the right to view the Book, and
  - d) for sharing of a Book Annotation in connection with Consumer Purchase, the user may only share such Book Annotation with no more than twenty-five (25) individuals and the user must identify (*e.g.*, by name, login or user id) each individual with whom such Book Annotation will be shared, and
  - e) for sharing of a Book Annotation as part of an Institutional Subscription, the user may only share such Book Annotation with the following other users of such Institutional Subscription: instructors and students in a single academic course sharing such Book Annotation in connection with such course during an academic year or with students of the same course during a subsequent academic year, and employees of the subscriber of the Institutional Subscription sharing such Book Annotation in connection with a discrete work project during the course of that project.
- (iii) Advertising Content. Google may not place on, behind or over the contents of a Book or portion thereof (including on Preview Use pages or Snippet Display pages), as displayed to a user, any pop-up, pop-under, or any other types of advertisements or content of any kind. In addition to a Rightsholder's right to exclude one or more of his, her or its Books from Advertising Uses pursuant to Section 3.5(b)(i) (Right to Exclude), the Unclaimed Works Fiduciary may exclude from Advertising

Uses one or more unclaimed Books if Google displays animated, audio or video advertisements in conjunction with those Books and the Registry determines that exclusion from such Advertising Uses is in the best interests of Rightsholders of such unclaimed Books.

3.11 Hosted Version for Rightsholders. Upon request by a Rightsholder of a Book, Google will provide a hosted version of such Book for use in conjunction with such Rightsholder's website, similar to Google's hosted version of Books in the Google Partner Program. Such hosted version will contain the "look and feel" of the Rightsholder's website with minimal Google branding, which branding may be tailored by the Rightsholder upon the Rightsholder's further reasonable request.

3.12 Use of Digital Copies. Except as permitted by Sections 3.7(c) (Additional Contemplated Rightsholder Services Provider), 3.7(e) (Google's Exclusion of Books), 7.2(b)(ix) (Other Uses), 7.2(e)(ii) (Third-Party Required Library Services Provider) or 7.2(g)(ii)(2) (Alternative Accommodated Service Provider), neither Rightsholders nor the Registry may authorize any Person to use Digital Copies of their Books or Inserts made by or for Google without Google's consent; provided that Rightsholders may authorize any Fully Participating Library to use Digital Copies of their Books or Inserts in such Fully Participating Library's LDC consistent with such Fully Participating Library's Digitization Agreement with Google.

3.13 Communication of Rightsholder Directions to Google. Rightsholders shall communicate to the Registry or, at their election and provided that Google implements an Online interface for such purpose, directly to Google, all directions for Removal, exclusion, inclusion, and pricing, and any other directions for Books and Inserts provided for in this Amended Settlement Agreement. If, however, a Rightsholder communicates directly with Google, then Google shall, before implementing any such direction, (a) notify the Registry and provide the Registry with the Rightsholder's contact information and direction and (b) subject to Section 13.2 (Validating and Challenging Claims), receive confirmation from the Registry that (i) for Books, the Person communicating with Google is an appropriate Rightsholder under the Author-Publisher Procedures, and (ii) Google is authorized to implement such direction under this Amended Settlement Agreement, including (for Books) the Author-Publisher Procedures. The Registry will promptly respond to any such notification and request for confirmation from Google and, in any event, within the same period of time as the Registry typically responds to requests directly from Rightsholders to the Registry.

3.14 Advertising Uses. Google may display advertisements on Preview Use pages and other Online Book Pages ("Advertising Uses"). Advertising on general search results pages in which the search is performed over multiple Books and/or over other content such as web pages in response to a user query is not considered to be an "Advertising Use," even if a single Book is the sole search result of a given search on a

search results page. Except as set forth in Section 3.10(c)(iii) (Advertising Content) and Section 3.5(b)(i) (Right to Exclude), this Amended Settlement Agreement does not otherwise limit Google's right to display advertising anywhere on Google Products and Services.

3.15 Extent of Rights and Authorizations.

(a) Books. A Book Rightsholder's rights and Google's authorizations under this Amended Settlement Agreement apply to all of the Protected Expression of such Rightsholder contained in a Book in which such Rightsholder holds a Copyright Interest.

(b) Inserts. A Rightsholder of an Insert has no rights under this Amended Settlement Agreement with respect to any Book or any portion of any Book in which such Insert appears, other than the Insert itself, *e.g.*, a Rightsholder of an Insert has no right to Remove the Book in which his, her or its Insert appears, or to authorize or to prohibit Display Uses of the Book in which his, her or its Insert appears.

(c) Other Content. If content (*e.g.*, text or images) in a Book is (i) in the public domain under the Copyright Act in the United States or (ii) subject to a Copyright Interest not owned by any Rightsholder of such Book or by any Rightsholder of any Insert in such Book, this Amended Settlement Agreement neither authorizes nor prohibits, nor releases any Claims with respect to, the use of such content.

**ARTICLE IV — ECONOMIC TERMS FOR GOOGLE'S USE OF BOOKS**

4.1 Institutional Subscriptions.

(a) General Guidelines for Pricing of Institutional Subscriptions.

(i) Objectives. The economic terms for Institutional Subscriptions of Books will be governed by two objectives: (1) the

4.5 Standard Revenue Splits and Discounting.

(a) Obligation to Pay Revenue Share.

(i) Net Purchase Revenues. Google shall pay to the Registry, on behalf of the Rightsholders, the Standard Revenue Split for Purchases. The “Standard Revenue Split for Purchases,” paid by Google to Rightsholders, through the Registry, is seventy percent (70%) of Net Purchase Revenues.

(ii) Net Advertising Revenues. Google shall pay to the Registry, on behalf of the Rightsholders, the Standard Revenue Split for Advertising. The “Standard Revenue Split for Advertising,” paid by Google to Rightsholders, through the Registry, is seventy percent (70%) of Net Advertising Revenues.

(iii) Agreed Revenue Splits. Notwithstanding clauses (i) and (ii) above, for any Revenue Model(s) for any Book(s) classified as Commercially Available, Google and the Rightsholder(s) of such Book(s) each has the right to request that the other negotiate a revenue split different from the Standard Revenue Split for Advertising and the Standard Revenue Split for Purchases (together, the “Standard Revenue Splits”). If Google or a Rightsholder requests that the revenue split be negotiated for any Revenue Model(s) and Google and the Rightsholder are unable to agree on a revenue split different from the Standard Revenue Splits for such Revenue Model(s), then such Standard Revenue Splits (or the then applicable previously negotiated and agreed revenue split, if any) shall apply to such Books for that Revenue Model(s); provided that Google may choose not to make such Books available through such Revenue Model(s) as permitted under Section 3.7(e) (Google’s Exclusion of Books)) and the Rightsholder may choose to exclude its Book(s) from such Revenue Model(s) pursuant to Section 3.5(b) (Right to Exclude from Display Uses and Revenue Models). If Google and such Rightsholder(s) agree to a revenue split, then beginning within sixty (60) days after the date of such agreement, any calculations in Section 4.5(b) (Discounting, Special Offers and Subsidies) and any payments in Section 4.6 (Payment Terms) shall be based on such agreed revenue split rather than the Standard Revenue Splits. Google or the Rightsholder(s) shall notify the Registry of any agreed revenue split, the date of agreement to such revenue split, and the Books to which it applies. The Registry may not disclose information about any agreed revenue split with any Rightsholder (other than

any other Rightsholder(s) of the Book(s) to which such agreed revenue split applies) unless such information is otherwise publicly available. Once a Book is classified as not Commercially Available, the Standard Revenue Splits shall apply beginning no later than sixty (60) days after such reclassification, notwithstanding any prior agreed revenue split between Google and a Rightsholder.

(b) Discounting, Special Offers and Subsidies.

(i) Discounts. Google may provide discounts off the List Prices at its sole discretion. If Google elects to provide such discounts, the Standard Revenue Split for Purchases paid to the Registry for the benefit of the Rightsholders will be based on the List Prices, unless otherwise set forth in this Section 4.5(b) (Discounting, Special Offers and Subsidies) or unless otherwise agreed by Google and the Registry.

(ii) Consumer Purchases. The Registry may authorize Google to make special offers of Books available through Consumer Purchases at reduced prices from the List Prices, subject to notification of such reduced price to the Registered Rightsholders of the Book, with an opportunity for any such Rightsholder (for his, her or its claimed Books) or the Unclaimed Works Fiduciary (for unclaimed Books) not to approve such reduced price. If Google sells Books at such a reduced price, the Standard Revenue Split for Purchases or a revenue split agreed pursuant to Section 4.5(a)(iii) (Agreed Revenue Splits) will be based on such reduced price.

(iii) Use of Intermediaries for Institutional Subscription Sales Generally. Google may offer a discount of up to ten percent (10%) off the List Prices for Institutional Subscriptions for any Institutional Subscriptions sold through intermediaries.

(iv) Sales of Institutional Subscriptions through Institutional Consortia. Approved discounts, if any, that Google is authorized to offer to an Institutional Consortium or its members will be included as part of the Pricing Strategy. Additional discounts will require Registry approval. Unless otherwise agreed upon by the Registry, Google is only authorized to offer discounts to Institutional Consortia if members of the Institutional Consortium purchase Institutional Subscriptions for at least seventy percent (70%) of the FTEs (*i.e.*, full-time equivalent students) of the members of the

Institutional Consortium. For purposes of this Section 4.5(b)(iv) (Sales of Institutional Subscriptions through Institutional Consortia), absent agreement of the Registry, Google may not offer such discount to any Institutional Consortium (or its members) that was not a member of the International Coalition of Library Consortia as of the date on which the then-current Pricing Strategy became effective and that was formed for the primary purpose of entering into an Institutional Subscription agreement with Google. Google will notify the Registry no less than thirty (30) days prior to entering into an Institutional Subscription agreement, with an approved Institutional Consortium discount, with an Institutional Consortium (or its members) that was not a member of the International Coalition of Library Consortia as of the date on which the then-current Pricing Strategy became effective.

(v) Sale of Consumer Purchases through Affiliate Programs and Resellers.

(1) Affiliate Programs. With respect to sales of Books through Consumer Purchase through an Affiliate Program, Google may deduct from the money otherwise owed to the Registry for the benefit of the Rightsholders from such sale pursuant to Section 4.5(a)(i) (Net Purchase Revenues), up to three and three-quarters percent (3.75%) of the List Price as compensation actually paid through the Affiliate Program; provided, however, that such deduction will be made only to the extent and in an amount equal to one-half (1/2) the compensation actually paid by Google through the Affiliate Program. “Affiliate Program” means a program by which Google authorizes third parties to link their websites to Google Products and Services using specially formatted links and pays such third parties referral fees for sales of Books through Consumer Purchase to users referred to Google through such links.

(2) Resellers. To the extent that Google makes Books available through Consumer Purchases pursuant to this Amended Settlement Agreement, Google will allow resellers to sell access to such Books to their end users. Google will be responsible for hosting and serving the Digital Copies of such Books, and will be responsible for the security of such Digital Copies in accordance with Article VIII (Security and Breach). Google will permit the reseller of a Book to retain a majority of Google’s share of Net Purchase Revenues from Consumer Purchases through such reseller.

(vi) Subsidies for Fully Participating Libraries and Cooperating Libraries. Google may subsidize the purchase of Institutional Subscriptions by Fully Participating Libraries and Cooperating Libraries and the amount paid to the Registry, on behalf of Rightsholders, will be as if no such subsidy had been provided.

(vii) Rightsholders' Consumer Subscription Discount. If and at such time as a Consumer Subscription is available from Google pursuant to Section 4.7(c) (Consumer Subscription Models), individual Rightsholders may, at the Registry's discretion, be offered a discount off of the price for such Consumer Subscription, which discount is subject to the approval of Google and the Registry.

(c) Sales and Other Taxes. In all cases, Net Purchase Revenues and Net Advertising Revenues shall not include sales or other government charges or taxes. Google shall charge any applicable sales or other government charges or taxes in addition to the List Price or any other price authorized pursuant to this Amended Settlement Agreement.

#### 4.6 Payment Terms.

(a) Payment Terms. Google shall remit payment to the Registry under this Article IV (Economic Terms for Google's Use of Books) within (i) sixty (60) days after the end of each calendar quarter for payments made with respect to Net Advertising Revenues and Net Purchase Revenues received by Google during the first full twelve (12) months after the Effective Date, and (ii) sixty (60) days after the end of each calendar month for payments made with respect to Net Advertising Revenues and Net Purchase Revenues received by Google thereafter. Payments to the Registry shall be made either by check or (if by wire transfer) pursuant to the wire transfer instructions provided by the Registry.

(b) Exceptions. Notwithstanding the foregoing provisions of Section 4.5 (Standard Revenue Splits and Discounting) and this Section 4.6 (Payment Terms), Google shall not be required to pay the Registry for (i) any purchase of or access to Books through any fraudulent or invalid means, including the fraudulent use of

Payment to Class Members Whose Books and Inserts Have Been Digitized). The Registry shall make payments to Registered Rightsholders from amounts received by it pursuant to Article IV (Economic Terms for Google's Use of Books), or shall cause payments to be made from the Settlement Fund as provided in the Plan of Allocation and the Registry shall be responsible for correcting or causing to be corrected any errors in making such payments.

5.5 Attorneys' Fees. Counsel for the Author Sub-Class shall apply to the Court for an award of attorneys' fees and reimbursement of expenses in a total amount not to exceed thirty million United States dollars (U.S. \$30 million). Google has agreed to pay those amounts over and above the other consideration to the Amended Settlement Class, and agrees not to undermine in any way, or encourage anyone else to undermine in any way, the petition for attorneys' fees filed by Counsel for the Author Sub-Class so long as such petition seeks fees and reimbursement of expenses in the amount of thirty million United States dollars (U.S. \$30 million). In no event will Google be obligated to pay any attorneys' fees and expenses for Counsel for the Author Sub-Class in excess of thirty million United States dollars (U.S. \$30 million). Attorneys' fees and expenses consistent with this Section 5.5 (Attorneys' Fees) that are granted by the Court shall be paid by the Depository Bank within ten (10) Business Days after the Effective Date by wire transfer to counsel for the Author Sub-Class.

#### **ARTICLE VI — ESTABLISHMENT AND CHARTER OF REGISTRY**

6.1 Functions. Before the Effective Date, Plaintiffs will establish a registry that:

- (a) is authorized to act on behalf of Rightsholders as set forth in this Amended Settlement Agreement,
- (b) will own and maintain a rights information database for Books and Inserts and their authors and publishers,
- (c) will, from its inception, use commercially reasonable efforts to locate Rightsholders of Books and Inserts,
- (d) will, on behalf of Rightsholders, receive payments from Google under this Amended Settlement Agreement and distribute those payments to Registered Rightsholders in accordance with this Amended Settlement Agreement, the Plan of Allocation and the Author-Publisher Procedures,

(e) will assist in the resolution of disputes between Rightsholders,

(f) will, upon request, monitor Google's display and pricing of Books for Rightsholders located outside of the United States to ensure that they conform to the requirements of this Amended Settlement Agreement and to such Rightsholders' instructions, and use commercially reasonable efforts to provide a means for such Rightsholders themselves to monitor and verify their claimed Books, and

(g) will have such other responsibilities (i) as are set forth in this Amended Settlement Agreement and (ii) as the Charter may permit or as the Board of Directors of the Registry may determine are consistent with the Registry's functions and are not inconsistent with this Amended Settlement Agreement.

## 6.2 Charter.

(a) Not-For-Profit Entity. The Registry will be organized and operated as a not-for-profit entity, and all funds received by the Registry under this Amended Settlement Agreement will be for the exclusive direct or indirect benefit of the Rightsholders, subject to the restrictions herein.

### (b) Organizational Structure.

(i) General. The Registry will be organized on a basis that allows the Registry, among other things, to (i) represent the interests of Rightsholders in connection with this Amended Settlement Agreement, (ii) respond in a timely manner to requests by Google, Fully Participating Libraries and Cooperating Libraries, and (iii) to the extent permitted by law, license Rightsholders' U.S. copyrights to third parties (in the case of unclaimed Books and Inserts, the Unclaimed Works Fiduciary may license to third parties the Copyright Interests of Rightsholders of unclaimed Books and Inserts to the extent permitted by law).

(ii) Board of Directors. The Registry will have equal representation of the Author Sub-Class and the Publisher Sub-Class on its Board of Directors, with each act of the Board requiring a majority of the directors, with such majority including at least one director who is a representative of the Author Sub-Class and one director who is a representative of the Publisher Sub-Class. The Board of Directors will have at least one representative of the Author Sub-Class from each of the following countries: the United States, Canada, the United Kingdom and Australia; and at least one representative of the Publisher Sub-Class from each of the following countries: the United States, Canada, the United Kingdom and Australia.

(iii) Unclaimed Works Fiduciary. The Charter will provide that the Registry's power to act with respect to the exploitation of unclaimed Books and Inserts under the Amended Settlement will be delegated to an independent fiduciary (the "Unclaimed Works Fiduciary") as set forth in Sections 3.2(e)(i) (Change Requests by Rightsholders), 3.10 (Specific Prohibitions), 4.2(c)(i) (Pricing Bins), 4.3 (Preview Uses), 4.5(b)(ii) (Consumer Purchases), 4.7 (Additional Revenue Models), 6.2 (Charter), and 6.3 (Unclaimed Funds and Public Domain Funds) of the Amended Settlement Agreement and Sections 3.2 and 3.3 (Procedures for Changing Classification of a Book) of the Author-Publisher Procedures, and otherwise as the Board of Directors of the Registry deems appropriate. The Unclaimed Works Fiduciary will be a person or entity that is not a published book author or book publisher (or an officer, director or employee of a book publisher). The Unclaimed Works Fiduciary (and any successor) will be chosen by a supermajority vote of the Board of Directors of the Registry and will be subject to Court approval.

(iv) Unclaimed Funds and Public Domain Funds. The Charter will also direct the Registry to follow the guidelines in this Amended Settlement Agreement regarding Unclaimed Funds and Public Domain Funds described in Section 6.3 (Unclaimed Funds and Public Domain Funds). The Registry will use funds from the Settlement, as well as Unclaimed Funds as described in Section 6.3 (Unclaimed Funds and Public Domain Funds), to attempt to locate Rightsholders of unclaimed Books and Inserts.

(v) Limitations. In addition, the Charter will prohibit the Registry from coordinating Rightsholders for purposes of representing them as a sub-group regarding any matter under this Amended Settlement

Agreement, or working with any sub-group of Rightsholders to exclude their Books from Display Uses or Non-Display Uses, or to advocate that any sub-group of Rightsholders decrease its participation in the Settlement in any manner. Notwithstanding the foregoing, nothing herein shall limit or restrict the Registry from being able to represent the interests of all Author Sub-Class members as a sub-group or all Publisher Sub-Class members as a sub-group.

(c) Registry Commitments. The Plaintiffs shall cause the Registry (i) to ratify this Amended Settlement Agreement at the first meeting of its Board of Directors; (ii) to adopt a resolution by which the Registry shall become a signatory to this Amended Settlement Agreement; (iii) to adopt a Certificate of Incorporation and bylaws that implement the requirements of Sections 6.1 (Functions), 6.2 (Charter) and 6.3 (Unclaimed Funds and Public Domain Funds); and (iv) to not take any act inconsistent with its obligations under this Amended Settlement Agreement. Google will have the right to approve such Certificate of Incorporation and bylaws for conformance with the foregoing commitments prior to their filing or adoption (as the case may be), such approval not to be unreasonably withheld or delayed.

### 6.3 Unclaimed Funds and Public Domain Funds.

#### (a) Unclaimed Funds.

##### (i) Unclaimed Funds for Unclaimed Books.

(1) Subject to clauses (2) and (3) below, any revenues paid to the Registry and due to Rightsholders of Books that are unclaimed by such Rightsholders under this Amended Settlement Agreement (“Unclaimed Funds”) will be held by the Registry for the benefit of the Rightsholder(s) of such Books until such Rightsholders register and claim such Books.

(2) Beginning with the sixth year after the Effective Date, and every year thereafter, subject to the approval of the Unclaimed Works Fiduciary, the Registry may use up to twenty-five percent (25%) of Unclaimed Funds earned in any one year that have remained unclaimed

for least five (5) years (such percentage to be allocated across all unclaimed Books in proportion to the Unclaimed Funds that they earned) for the purpose of attempting to locate the Rightsholders of unclaimed Books. The Board of Directors of the Registry, in consultation with the Unclaimed Works Fiduciary, will determine how to use such Unclaimed Funds to attempt to locate the Rightsholders of unclaimed Books, including the use, as appropriate, of national and international licensing and collecting societies, reproduction rights organizations, and associations of authors and publishers.

(3) Beginning ten (10) years after the Effective Date, any Unclaimed Funds shall be allocated proportionally to the United States, Canada, the United Kingdom and Australia, based, respectively, on the number of Books registered with the United States Copyright Office (for the United States) and the number of Books published in Canada, the United Kingdom and Australia. Subject to the approval of the Unclaimed Works Fiduciary as to the timing of such motions, the Registry may file a motion or motions with the Court recommending how Unclaimed Funds held at least ten (10) years should be distributed to literacy-based charities in each such country that directly or indirectly benefit the Rightsholders and the reading public, after consultation with Google and, acting through the Designated Representative, the Fully Participating Libraries and the Cooperating Libraries. The charities will be entities that advance literacy, freedom of expression, and/or education and are (a) described in Section 501(c)(3) of the Internal Revenue Code (for Unclaimed Funds from Books registered with the United States Copyright Office), (b) organizations qualifying as “Charitable Organizations,” as defined in Section 149.1 of the Income Tax Act of Canada (for Books published in Canada), (c) any body recognized as a charity under the Charities Act 2006, Charities and Trustee Investment (Scotland) Act 2005 or Charities Act (Northern Ireland) 2008 or any legislation replacing or amending such acts (for Books published in the United Kingdom), or (d) charities that are exempt from income tax in Australia (for Books published in Australia) and, for avoidance of doubt, will not include the Authors Guild, Association of American Publishers or other trade organizations. Such motion or motions will be made with notice to and an opportunity to be heard by the attorneys general of all states in the United States, all Rightsholders whom the Registry will have been able to locate as of that time, and all Fully Participating Libraries and Cooperating Libraries. This Section 6.3(a)(i) (Unclaimed Funds for Unclaimed Books) is subject to Section 17.23 (Court’s Continuing Jurisdiction).

(ii) Abandoned Funds for Claimed Books. Any revenues due to Registered Rightsholders of claimed Books will be held by the Registry for the benefit of such Rightsholders until paid to such Rightsholders in accordance with this Amended Settlement Agreement; provided that, any such revenues that are abandoned in accordance with applicable law will be distributed to the appropriate governmental authority in accordance with applicable law.

(b) Public Domain Funds. Funds that may be mistakenly paid by Google to the Registry for books that are in the public domain under the Copyright Act in the United States (“Public Domain Funds”) will be distributed according to the guidelines set forth in this Section 6.3(b) (Public Domain Funds). If Google pays the Registry Public Domain Funds derived from Institutional Subscriptions or Consumer Subscriptions, then those funds will be distributed on a proportional revenue basis among Registered Rightsholders whose Books are included within each subscription. If Google pays the Registry Public Domain Funds from Consumer Purchases, Advertising Uses, per-page printing fees pursuant to Section 4.8(a)(ii) (Printing), or additional Revenue Models set forth in Sections 4.7 (Additional Revenue Models) (if Google and the Registry agree to implement such Revenue Models) and such funds have not yet been paid to a Registered Rightsholder, then the Registry will return those Public Domain Funds to Google for distribution, at Google’s option, to a not-for-profit entity or to any consumer that may have purchased access to a book that is in the public domain under the Copyright Act in the United States. Google will have no right to reclaim Public Domain Funds for a book that is in the public domain under the Copyright Act in the United States from a Person who claimed he, she or it is a Rightsholder of such book once the Registry pays such funds to such Person.

(c) Records and Reporting. The Registry shall keep accurate records of its disbursement of Unclaimed Funds and Public Domain Funds. The Registry shall prepare annual written reports of the same and shall submit such reports to Google within forty-five (45) days after the end of each calendar year.

(d) Audit Rights. Google may, upon thirty (30) days’ prior notice and at its own expense, retain a nationally recognized independent and mutually-acceptable independent auditor (whose

fees are not contingency based), under a duty of confidentiality to the Registry, to review and audit the Registry's relevant records to confirm the payments made under Section 6.3(a) (Unclaimed Funds) and Section 6.3(b) (Public Domain Funds). The audit shall: (i) be subject to the Registry's security and confidentiality requirements; (ii) occur no more than once every calendar year and not during the first or last three (3) weeks of a calendar quarter; (iii) transpire during the Registry's normal business hours; and (iv) cover a period not to exceed the previous four (4) calendar years. The Registry will promptly correct any payment errors. In addition, if the audit reveals an underpayment of five percent (5%) or more in the payments for any calendar quarter, then the Registry shall pay for the reasonable costs associated with the audit. The accounting firm may only disclose to Google whether or not the Registry is in compliance with its payment obligations under Section 6.3(a) (Unclaimed Funds) and Section 6.3(b) (Public Domain Funds) and, if the Registry is not in compliance, the amount of any underpayment and supporting calculations.

6.4 Funding and Technical Assistance. Google shall:

(a) fund the set-up and operations of the Registry according to the terms set forth in Section 5.2 (Payment For Registry, Notice and Claims Administration); and

(b) provide reasonable technical assistance with respect to the design, development and maintenance of the Registry.

6.5 Google's Rights to Registry Data.

(a) Data for Google. The Registry will provide Google with access to such Registry data, including all updates, as are reasonably necessary for Google to perform its obligations under this Amended Settlement Agreement.

(b) Data for Fully Participating Libraries. The Registry will provide Google with access to such Registry data, including all updates, as are reasonably necessary for Fully Participating Libraries to perform their obligations under their respective Library-Registry (Fully Participating) Agreements.

Google may provide to the Fully Participating Libraries such Registry data, including all updates, as are reasonably necessary for Fully Participating Libraries to perform their obligations under their respective Library-Registry (Fully Participating) Agreements.

(c) Survival. Google's rights to have access to data about a Book or Insert will survive the expiration of the term of the U.S. copyright in such Book or Insert and, to the extent that Google requires access to data after the expiration of the terms of all U.S. copyrights in all Books and Inserts, the Registry, if still operational at such time, shall provide such access.

#### 6.6 Exchange of Data between Google and the Registry.

(a) Data Provided by Google. Google shall provide the following to the Registry:

(i) Digital Copies to Libraries. The name of any library to which it has provided Digital Copies of Books Digitized in the United States and, upon request of the Registry, the library at which a particular Book has been Digitized.

(ii) Digitized Books. On at least a quarterly basis, an update to the list of Books, Public Domain Books with a copyright date after 1922 and Government Works that Google has Digitized under this Amended Settlement Agreement along with Metadata with respect to such Books to the extent that Google is permitted to do so under then-existing contracts with Metadata providers. Google, Plaintiffs, and the Registry will cooperate to obtain such Metadata providers' permission for Google to provide Plaintiffs and the Registry with such lists; provided that the Registry shall be responsible for payment of any additional license fees to such providers to the extent required. In communicating between them, Google and the Registry will use a unique identifier for each Book, Public Domain Book with a copyright date after 1922 or Government Work. The update for a Book, Public Domain Book with a copyright date after 1922 or Government Work will be available within a reasonable period after Digitization and completion of processing of such Book, Public Domain Book with a copyright date after 1922 or Government Work by Google. The data provided shall include information for each Book regarding the Display

Uses, if any, that are being made of the Book and identification of any Books that Google is not offering for sale, including any Books that Google excludes from Display Uses for non-editorial reasons (in addition to Google's obligation under Section 3.7(e) (Google's Exclusion of Books)). The Registry will use this information for internal purposes only, provided that an individual record of a Book, Public Domain Book with a copyright date after 1922 or Government Work may be disclosed by the Registry to any Rightsholder of that Book or an Insert in that Book, Public Domain Book with a copyright date after 1922 or Government Work. The Registry may need permission from Metadata providers to obtain such Metadata, and will be responsible for payment of any additional license fees to the extent required by such providers.

(iii) Books Sold. Along with the payments required under Section 4.6 (Payment Terms) for the applicable period, a list of the Books sold, the number of Books sold, and, for each such sale, the sale price.

(iv) Library Scans. Upon request by the Registry and if a Fully Participating Library or a Cooperating Library invokes its rights pursuant to Section 7.2(e)(ii) (Third-Party Required Library Services Provider), reasonable information regarding Google's provision of Required Library Services, to determine compliance with Section 7.2(e)(i) (Obligation).

(v) Usage Data. Data sufficient to enable the Registry to calculate Subscription Usage Fees and Book Usage Fees, as defined in the Plan of Allocation.

(vi) Registration/Claims Process Data. All data provided to Google by members of the Amended Settlement Class or their agents in connection with the registration, claims, and opt out processes. Such data shall be subject to a Registry privacy policy.

(vii) Additional Information. Additional data, including updates, as reasonably necessary for the Registry to perform its obligations under this Amended Settlement Agreement.

(b) No Google Licenses. Except with respect to (i) the limited right to use Digital Copies of Library Scans and of Books

other than Library Works provided by Google pursuant to Section 3.7(c) (Additional Contemplated Rightsholder Services Provider), Section 7.2(e)(ii) (Third-Party Required Library Services Provider) and Section 7.2(g)(ii)(2) (Alternative Accommodated Service Provider) and (ii) the limited right to use information provided by Google pursuant to Section 6.6(a) (Data Provided by Google), no licenses are granted by Google to the Rightsholders, the Registry, Plaintiffs or any other Person pursuant to this Amended Settlement Agreement, by implication, estoppel or otherwise.

(c) Data Provided by the Registry. The Registry shall provide the following to Google:

(i) Books Claimed. A list of all Books and Inserts for which a Registered Rightsholder has registered with the Registry, instructions with respect to the Removal of Books and the exclusion or inclusion of Books and Inserts pursuant to Article III (Google Book Search – Rights, Benefits and Obligations) and to the Specified Price pursuant to Section 4.2(b)(i)(1) (Specified Price), and any other directions for Books and Inserts provided for in this Amended Settlement Agreement.

(ii) Metadata Corrections. Any corrections to the Metadata, and any other corrections or modifications to information the Registry previously provided to Google regarding a Book or Insert.

(iii) Registered Rightsholders. The identity of any Registered Rightsholder for a given Book or Insert; provided, however, that if the Book or the Insert was published under a pseudonym, then the Registry will only disclose that pseudonym to Google and, provided further, that if a Rightsholder requests that his, her or its identity not be disclosed to Google, then the Registry will only disclose an alias. The Registry will neither encourage Rightsholders to request, nor discourage Rightsholders from requesting, such non-disclosure. The Registry will also provide a means for Google to match contact information and other identifying information for a Rightsholder against the Registry's information pertaining to that Rightsholder. Such mechanism need not reveal the Rightsholder's contact information to Google. Rightsholder information provided by the Registry is subject to the terms of Section 15.3 (Confidentiality of Rightsholder Information).

(d) Claimed Books to be Public. The Registry will make publicly available whether or not a Book has been registered with the Registry and, for Books that have been registered, the identity of the Registered Rightsholder, unless the Registered Rightsholder requests that such information not be made public for reasonable privacy concerns, as determined by the Registry.

(e) Copyright Status. The Registry and Google will provide each other with information that each obtains bearing on the copyright status of works that are or may be Books or Inserts.

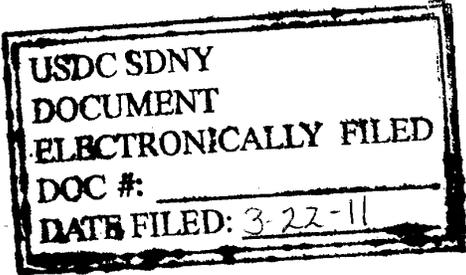
(f) No Personally Identifiable Information. In no event will Google provide personally identifiable information about end users to the Registry other than as required by law or valid legal process.

6.7 Authorization of Registry. Where this Amended Settlement Agreement confers on the Registry rights and obligations with respect to Books and Inserts, including with respect to the Registry's relationship with each of Google, the Fully Participating Libraries, the Cooperating Libraries and the Public Domain Libraries, Plaintiffs and all Rightsholders, as of the Effective Date, shall be deemed to have authorized the Registry to exercise such rights and perform such obligations on behalf of the Rightsholders with respect to their respective Books and Inserts, including to enter into Library-Registry Agreements. In no event, however, may the Registry direct Google to change the classification of a Book, include or exclude a Book or Insert in or from any Display Use, or take any other action, that is contrary to such Book or Insert Rightsholder's express direction with respect to such Book or Insert, as made pursuant to and in conformance with this Amended Settlement Agreement.

## **ARTICLE VII — FULLY PARTICIPATING LIBRARY AND COOPERATING LIBRARY RIGHTS AND OBLIGATIONS**

7.1 Becoming a Fully Participating Library or a Cooperating Library. Google shall notify the Registry when it has identified a library that wishes to become a Fully Participating Library or a Cooperating Library. The Registry shall have approval rights as to whether a library may become a Fully Participating Library or a Cooperating Library; provided, however, that in all cases the Registry may only withhold its approval for a library to become a Fully Participating Library or a Cooperating Library due to (a) reasonable concerns as to whether the library can comply with the obligations imposed on a Fully Participating Library or a Cooperating Library by this Amended Settlement

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----x  
THE AUTHORS GUILD et al., :  
Plaintiffs, :  
- against - :  
GOOGLE INC., :  
Defendant. :  
-----x

OPINION

05 Civ. 8136 (DC)

**APPEARANCES:** (See last page)

**CHIN, Circuit Judge**

Before the Court is plaintiffs' motion pursuant to Rule 23 of the Federal Rules of Civil Procedure for final approval of the proposed settlement of this class action on the terms set forth in the Amended Settlement Agreement (the "ASA"). The question presented is whether the ASA is fair, adequate, and reasonable. I conclude that it is not.

While the digitization of books and the creation of a universal digital library would benefit many, the ASA would simply go too far. It would permit this class action -- which was brought against defendant Google Inc. ("Google") to challenge its scanning of books and display of "snippets" for on-line searching -- to implement a forward-looking business arrangement that would grant Google significant rights to exploit entire

books, without permission of the copyright owners. Indeed, the ASA would give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission, while releasing claims well beyond those presented in the case.

Accordingly, and for the reasons more fully discussed below, the motion for final approval of the ASA is denied. The accompanying motion for attorneys' fees and costs is denied, without prejudice.

#### **BACKGROUND**

##### **A. The Facts and Prior Proceedings**

In 2004, Google announced that it had entered into agreements with several major research libraries to digitally copy books and other writings in their collections. Since then, Google has scanned more than 12 million books. It has delivered digital copies to the participating libraries, created an electronic database of books, and made text available for online searching. See generally Emily Anne Proskine, Google's Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project, 21 Berkeley Tech. L.J. 213, 220-21 (2006) (describing project). Google users can search its "digital

library" and view excerpts -- "snippets" -- from books in its digital collection.<sup>1</sup>

The benefits of Google's book project are many. Books will become more accessible. Libraries, schools, researchers, and disadvantaged populations will gain access to far more books. Digitization will facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities. Authors and publishers will benefit as well, as new audiences will be generated and new sources of income created. Older books -- particularly out-of-print books, many of which are falling apart buried in library stacks -- will be preserved and given new life.<sup>2</sup>

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<sup>1</sup> The term "digital library" apparently first appeared in the 1980s, see Mary Murrell, Digital + Library: Mass Book Digitization as Collective Inquiry, 55 N.Y.L. Sch. L. Rev. 221, 230 (2010), although the notion of a "universal library -- the utopian dream of gathering [] all human knowledge and, especially, all the books ever written in one place" -- has been with us for many centuries, id. at 226; see also id. at 226-36 (detailing that history). It is estimated that there are 174 million unique books. (Clancy Decl. ¶ 11, ECF No. 946). The Republic of Germany reports that certain "European nations have taken affirmative steps to create a European Digital Library ('Europeana') that balances the needs of authors and publishers with those of users in a way that meets the interests of both." (Mem. in Opp'n to ASA of Republic of Germany 2, ECF No. 852 ("Germany Mem.")).

<sup>2</sup> See, e.g., Matthew Sag, The Google Book Settlement & the Fair Use Counterfactual, 55 N.Y.L. Sch. L. Rev. 19, 73 (2010)

Millions of the books scanned by Google, however, were still under copyright, and Google did not obtain copyright permission to scan the books.<sup>3</sup> As a consequence, in 2005, certain authors and publishers brought this class action and the related case, respectively, charging Google with copyright infringement. The authors seek both damages and injunctive relief, and the publishers seek injunctive relief. Google's principal defense is fair use under § 107 of the Copyright Act, 17 U.S.C. § 107.

The parties engaged in document discovery and, in the fall of 2006, began settlement negotiations. On October 28,

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("There is no doubt that approval of the settlement will yield enormous cultural, intellectual, and educational benefits. It will expand access to millions of out-of-print books for all readers; it will also facilitate a revolution in access for print-disabled persons and users in remote locations without immediate geographic access to the nation's marquee research libraries. . . . From the perspective of authors and publishers, the GBS [Google Book Search] settlement promises new ways to profit from out-of-print works, as well as the possibility that increased access will draw in new readers and open up new niche markets.").

<sup>3</sup> "Google proceeded to scan, digitize, and copy books . . . without attempting to contract with rightsholders beforehand to obtain rights and licenses to copy in-copyright books and display portions of them on its website. In doing so, Google reversed the default copyright arrangement by shifting the burden to rightsholders to assert their rights." Alessandra Glorioso, Google Books: An Orphan Works Solution, 38 Hofstra L. Rev. 971, 992 (2010) (footnotes omitted).

2008, after extended discussions, the parties filed a proposed settlement agreement. The proposed settlement was preliminarily approved by Judge John E. Sprizzo by order entered November 17, 2008 (ECF No. 64). Notice of the proposed settlement triggered hundreds of objections. As a consequence, the parties began discussing possible modifications to the proposed settlement to address at least some of the concerns raised by objectors and others. On November 13, 2009, the parties executed the ASA and filed a motion for final approval of the ASA pursuant to Federal Rule of Civil Procedure 23(e) (ECF No. 768). I entered an order preliminarily approving the ASA on November 19, 2009 (ECF No. 772).

Notice of the ASA was disseminated. As was the case with the original proposed settlement, hundreds of class members objected to the ASA. A few wrote in its favor. The Department of Justice ("DOJ") filed a statement of interest raising certain concerns (ECF No. 922). Amici curiae weighed in, both for and against the proposed settlement. The Court conducted a fairness hearing on February 18, 2010.

**B. The ASA**

The ASA is a complex document. It is 166 pages long, not including attachments. Article I sets forth 162 definitions,

including the capitalized terms discussed below. I will not describe the ASA in detail, but will summarize its principal provisions.

The Class consists of all persons (and their heirs, successors, and assigns) who, as of January 5, 2009, own a U.S. copyright interest in one or more Books or Inserts<sup>4</sup> implicated by a use authorized by the ASA. Certain individuals and entities are excluded. (ASA § 1.13). The Author Sub-Class consists principally of members of the Class who are authors and their heirs, successors, and assigns. (ASA § 1.17). The Publisher Sub-Class consists of all members of the Class that are publishing companies that own a U.S. copyright interest in an Insert or have published a Book. (ASA § 1.122).

Under the ASA, Google is authorized to (1) continue to digitize Books and Inserts, (2) sell subscriptions to an electronic Books database, (3) sell online access to individual Books, (4) sell advertising on pages from Books, and (5) make certain other prescribed uses. (ASA §§ 3.1, 4.1-4.8; see also ASA § 1.149). The rights granted to Google are non-exclusive;

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<sup>4</sup> An Insert includes, for example, a foreword, prologue, or essay that is independently copyrighted, if certain other requirements are met. (ASA § 1.75).

Rightsholders retain the right to authorize others, including competitors of Google, to use their Books in any way. (ASA §§ 2.4, 3.1(a)). Google will pay to Rightsholders 63% of all revenues received from these uses, and revenues will be distributed in accordance with a Plan of Allocation and Author-Publisher Procedures. (ASA §§ 2.1-2.4, 4.5, 5.4 & Attachs. A, C).

The ASA will establish a Book Rights Registry (the "Registry") that will maintain a database of Rightsholders, and the Registry will administer distributions of revenues. (ASA § 6.1(b)). Google will fund the establishment and initial operations of the Registry with a payment of \$34.5 million (which will also cover the costs of notice to the Class). (ASA § 2.1(c)). The Registry will be managed by a Board consisting of an equal number of Author Sub-Class and Publisher Sub-Class representatives (at least four each). (ASA § 6.2(b)). The ASA will also create an "independent" Unclaimed Works Fiduciary to represent interests with respect to, and assume responsibility for certain decisions pertaining to, unclaimed works, including pricing and book classification. (ASA §§ 3.2(e)(i), 3.3, 3.10, 4.2(c)(i), 4.3, 4.5(b)(ii), 4.7, 6.2(b)(ii)).

Rightsholders can exclude their Books from some or all of the uses listed above, and they can remove their Books altogether from the database. At any time Rightsholders can ask Google not to digitize any Books not yet digitized, and Google will use "reasonable efforts" not to digitize any such Books. (ASA §§ 1.124, 3.5(a)(i)). A Rightsholder may also request removal from the Registry of a Book already digitized, and Google is obligated to remove the Book "as soon as reasonably practicable, but in any event no later than thirty (30) days." (ASA § 3.5(a)(i)).

As for Books and Inserts digitized before May 5, 2009, Google will pay \$45 million into a Settlement Fund to make Cash Payments to Rightsholders -- at least \$60 per Principal Work, \$15 per Entire Insert, and \$5 per Partial Insert, for which at least one Rightsholder has registered a valid claim on or before the agreed-upon deadline. (ASA §§ 2.1(b), 13.4; see also Stip. & Order to Extend Cash Payment Deadline 1-2, Feb. 18, 2011, ECF No. 970). These are minimum amounts, and if more than \$45 million becomes necessary to pay all eligible claims, Google will provide additional funds. If payment of all eligible claims requires less than \$45 million, the Registry will distribute greater amounts up to a maximum of \$300 per Principal Work, \$75 per Entire Insert, and \$25 per Partial Insert. (ASA § 5.1).

Going forward, the ASA provides for Google to split revenues with Rightsholders. For works covered by the ASA, Google will pay to the Registry, on behalf of Rightsholders, 70% of net revenues from sales and advertising; net revenues reflect a 10% deduction for Google's operating costs. (ASA §§ 1.89, 1.90, 4.5(a)(i)-(ii)). Revenue splits can be renegotiated by individual Rightsholders. (ASA § 4.5(a)(iii)).

The ASA obligates the Registry to use "commercially reasonable efforts" to locate Rightsholders. (ASA § 6.1(c)). The Registry will receive payments from Google on behalf of Rightsholders and will in turn distribute them to registered Rightsholders. (ASA § 6.1(d)). Funds unclaimed after five years may be used, in part, to cover the expense of locating owners of unclaimed works. (ASA § 6.3(a)(i)(2)). After ten years, unclaimed funds may be distributed to literary-based charities. (ASA § 6.3(a)(i)(3)).<sup>5</sup>

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<sup>5</sup> The States of Connecticut, Massachusetts, Pennsylvania, Texas, and Washington objected specifically to provisions of the ASA dealing with unclaimed funds. (See Objection to ASA of Massachusetts, Pennsylvania & Washington, ECF No. 860; Objection of Connecticut to ASA, ECF No. 851; Letter from Att'y Gen. of Tex. to Court (Jan. 27, 2010) (ECF No. 887)). I need not rule on these objections at this time, as no unclaimed funds yet exist (see Pls.' Suppl. Mem. Responding to Specific Objections 154-55,

The ASA distinguishes between in-print (Commercially Available) and out-of-print (not Commercially Available) Books. (ASA §§ 1.31, 3.2, 3.3). Google may not display in-print Books at all unless and until it receives prior express authorization from the Books' Rightsholders. The ASA does give Google the right to make Non-Display Uses of in-print Books. (ASA § 3.4). Google may display out-of-print Books without the prior express authorization of the Books' Rightsholders, but its right to do so ceases when and if the Rightsholder directs Google to stop.

**C. The Objections**

Approximately 500 submissions were filed commenting on the ASA and the original proposed settlement. The vast majority objected to the ASA.<sup>6</sup> Some 6800 class members opted out.

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ECF No. 955 ("Pls.' Suppl. Mem.")), and in light of my rulings below.

<sup>6</sup> Plaintiffs argue that the number of objections received is small when "viewed in light of the size of the Class, which numbers in the hundreds of thousands, or millions." (Pls.' Suppl. Mem. 1-2 & n.2, ECF No. 955). Some wrote in support of the ASA. (See, e.g., Letter from Gregory Crane to Court 1 (Aug. 7, 2009) (ECF No. 898) ("I am writing to support making the millions of books that Google has digitized reach the widest possible audience as quickly as possible. . . . This is a watershed event and can serve as a catalyst for the reinvention of education, research and intellectual life."); Letter from Nat'l Fed'n of the Blind to Court 2 (Jan. 19, 2010) (ECF No. 858) ("[I]f this Court approves the settlement, the NFB and its members, as well as the estimated thirty million Americans who

(Fairness Hr'g Tr. 166, Feb. 18, 2010 (Michael J. Boni)). The major objections are as follows:

**1. Adequacy of Class Notice**

Certain objectors contend that class members were given inadequate notice of the original proposed settlement as well as of the ASA. For example, the Science Fiction and Fantasy Writers of America, Inc., the American Society of Journalists and Authors, Inc., and certain foreign publisher and authors associations object to the adequacy of notice.

**2. Adequacy of Class Representation**

Certain objectors, including some foreign authors, academic authors, Insert authors, and others object to the adequacy of representation, contending that their interests are at odds with the interests of the representative plaintiffs.

**3. Scope of Relief Under Rule 23**

Certain objectors as well as the United States argue that the ASA will improperly use Rule 23 to shape a "forward-looking" business arrangement that would release claims not

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cannot read print due to other disabilities, will benefit from unprecedented access to information."); Letter from Publishers Ass'n to Court 1-2 (Jan. 27, 2010) (ECF No. 825); Letter from Canadian Publishers' Council to Court (Jan. 27, 2010) (ECF No. 826)).

before the Court. They contend that the case is about the scanning of books and the display of "snippets," while the ASA will release claims regarding the display and sale of entire books.

**4. Copyright Concerns**

Certain objectors, including two of Google's major competitors, Amazon.com, Inc. ("Amazon") and Microsoft Corp. ("Microsoft"), object to the ASA on the grounds it would violate existing copyright law. They contend, for example, that judicial approval of the ASA would infringe on Congress's constitutional authority over copyright law. They contend further that the provisions of the ASA pertaining to "orphan works" would result in the involuntary transfer of copyrights in violation of the Copyright Act, as copyrighted works would be licensed without the owners' consent. See 17 U.S.C. § 201(e).

**5. Antitrust Concerns**

Certain objectors oppose the ASA on antitrust grounds, arguing that (1) certain pricing mechanisms would constitute horizontal agreements that would violate the Sherman Act; (2) the ASA would effectively grant Google a monopoly over digital books, and, in particular, orphan books; and (3) such a monopoly would

further entrench Google's dominant position in the online search business.

**6. Privacy Concerns**

Certain objectors, including the Center for Democracy and Technology and the Electronic Privacy Information Center, contend that the ASA raises significant privacy issues, as the digitization of books would enable Google to amass a huge collection of information, including private information about identifiable users, without providing adequate protections regarding the use of such information.

**7. International Law Concerns**

Certain foreign authors and entities contend that the ASA, even with its narrowed coverage of non-U.S. works, would violate international law by, for example, requiring foreign rightsholders to determine whether they are covered and therefore must "opt out," and also by favoring rightsholders from certain nations.

The parties have submitted detailed responses to all of the objections.

**DISCUSSION****A. Applicable Law**

Under Rule 23(e) of the Federal Rules of Civil Procedure, a settlement of a class action requires approval of the court. Fed. R. Civ. P. 23(e). The court may approve a settlement that is binding on the class only if it determines that the settlement is "fair, adequate, and reasonable, and not a product of collusion." Joel A. v. Giuliani, 218 F.3d 132, 138 (2d Cir. 2000); see Fed. R. Civ. P. 23(e)(2). This analysis requires the court to consider both "the settlement's terms and the negotiating process leading to settlement." Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116 (2d Cir.), cert. denied, 125 S. Ct. 2277 (2005). "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" Id. (quoting Manual for Complex Litigation (Third) § 30.42 (1995)).

Rule 23(e) does not set forth the factors a court is to consider in determining whether an agreement is fair, reasonable, and adequate. In this Circuit, courts traditionally consider the following factors, commonly referred to as the Grinnell factors: (1) the complexity, expense, and likely duration of the

litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through trial; (7) the ability of defendants to withstand greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of the attendant risks of litigation. City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted), abrogated on other grounds by Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000); see also Wal-Mart Stores, 396 F.3d at 117-19 (applying Grinnell factors in considering approval of settlement). The weight given to any particular factor varies based on the facts and circumstances of the case. 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 1797.1, at 77 (3d ed. 2005).

Public policy, of course, favors settlement. Wal-Mart Stores, 396 F.3d at 116-17; accord Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 461 (2d Cir. 1982) (noting "the paramount policy of

encouraging settlements"). Consequently, when evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement "into a trial or a rehearsal of the trial." Grinnell, 495 F.2d at 462. "Rather, the Court's responsibility is to reach an intelligent and objective opinion of the probabilities of ultimate success should the claims be litigated and to form an educated estimate of the complexity, expense and likely duration of such litigation and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." In re Met. Life Derivative Litig., 935 F. Supp. 286, 292 (S.D.N.Y. 1996) (quoting Lewis v. Newman, 59 F.R.D. 525, 527-28 (S.D.N.Y. 1973) (internal quotation marks and ellipsis omitted)).

In this case, the fairness and reasonableness of the ASA has been challenged on the basis that it would release claims not properly before the Court. The Second Circuit has observed that "[b]road class action settlements are common," and that consequently "[p]laintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief." Wal-Mart Stores, 396 F.3d at 106. But the Second Circuit has recognized that there are limits. First, "class

action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." Id. at 107 (quoting TBK Partners, 675 F.2d at 460). Second, the released claims must be adequately represented prior to settlement, in the sense that "[c]laims arising from a shared set of facts will not be precluded where class plaintiffs have not adequately represented the interests of class members." Id. at 106-07, 110.<sup>7</sup>

**B. Application**

I consider the "settlement's terms" and the "negotiating process" in the context of discussing the Grinnell

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<sup>7</sup> In the context of a consent decree resolving a race discrimination class action, the Supreme Court has identified similar concerns while addressing the scope of a federal court's remedial authority. In Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland (Firefighters), it held that a consent decree must (1) "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction"; (2) "com[e] within the general scope of the case made by the pleadings"; and (3) "further the objectives of the law upon which the complaint was based." 478 U.S. 501, 525 (1986) (alteration in original) (internal quotation marks omitted). Although the consent decree in Firefighters permitted forward-looking conduct, the conduct was remedial in nature and was intended to address the harm that was the subject of the lawsuit, i.e., the past discrimination. The consent decree did not create new and independent forward-looking business arrangements.

factors. As the Second Circuit did in Wal-Mart Stores, I combine certain of the factors and discuss them together. See 396 F.3d at 118 (combining fourth, fifth, and sixth factors), 119 (combining eighth and ninth factors). Of course, I consider also the objections to the ASA.

As a preliminary matter, I conclude that most of the Grinnell factors favor approval of the settlement. The ASA was the product of arm's length negotiations between experienced, capable counsel, with assistance from DOJ. Further litigation would be complex, expensive, and time-consuming. Although the parties have conducted only limited discovery, the case has been pending for some years. The legal and factual issues are complex, and there is a risk that if plaintiffs were to proceed to trial, they would be unable to establish liability or prove damages. As discussed further below, substantial questions exist as to whether the case could be maintained as a class action, in its present form, through trial. In light of the attendant risks, the financial aspects of the ASA fall well within the range of reasonableness.

Only two of the Grinnell factors weigh against approval of the settlement: the reaction of the class and defendant's ability to withstand judgment. As for the latter, there is no

real risk that a judgment following trial would render Google insolvent, and thus the avoidance of insolvency is not an issue. The former, however, is important. Not only are the objections great in number, some of the concerns are significant. Further, an extremely high number of class members -- some 6800 -- opted out. See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785, 812 (3d Cir. 1995) (noting that "the number and vociferousness of the objectors" is a factor to consider in weighing reasonableness of proposed settlement). I turn to the objections now.

**1. Adequacy of Class Notice**

The objections to the adequacy of the class notice are rejected. I am satisfied that the class received adequate notice. More than 1.26 million individual notices in thirty-six languages were sent directly to copyright owners, potential class members, and publisher and author associations worldwide. (Pls.' Suppl. Mem. 36-37, 54-60, ECF No. 955). Plaintiffs also established a website to provide information about the case, the original proposed settlement, and the ASA. Of course, the case has received enormous publicity, and it is hard to imagine that many class members were unaware of the lawsuit. (But see

Objections of Wash. Legal Found. to ASA & Class Certification, ECF No. 901 (objecting to notice)).

**2. Adequacy of Class Representation**

The adequacy of representation inquiry considers whether "1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000). Here, representative plaintiffs are represented by counsel highly experienced in class action and copyright litigation. I am confident that they are qualified, experienced, and able to conduct the litigation.

As to the first prong of the analysis, however, as discussed below, I conclude that there is a substantial question as to the existence of antagonistic interests between named plaintiffs and certain members of the class. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 595 (1997) ("[T]he settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected."). While it is true, as plaintiffs argue, that "differences in views or characteristics between class members do not mean the Class has not been adequately

represented" (Pls.' Suppl. Mem. 24, ECF No. 955), the differences here are troubling.

**3. Scope of Relief Under Rule 23**

The ASA can be divided into two distinct parts. The first is a settlement of past conduct and would release Google from liability for past copyright infringement. The second would transfer to Google certain rights in exchange for future and ongoing arrangements, including the sharing of future proceeds, and it would release Google (and others) from liability for certain future acts. (See, e.g., ASA §§ 10.1(f), 10.1(g), 10.2(a)).<sup>8</sup> I conclude that this second part of the ASA contemplates an arrangement that exceeds what the Court may permit under Rule 23. As articulated by the United States, the ASA "is an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation." (DOJ Statement of

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<sup>8</sup> The United States is of the view that the first part of the settlement -- settling claims for past infringement based on digitization for use of snippets -- is a matter that is appropriately settled in this case, while the second part -- the series of forward-looking commercial arrangements -- is not. (Hr'g Tr. 117-18 (William Cavanaugh)).

Interest 2, Feb. 4, 2010, ECF No. 922 ("DOJ SOI")).<sup>9</sup> Moreover, the Rules Enabling Act provides that the rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). As the Supreme Court noted in Amchem: "Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view." 521 U.S. at 629.

Although I am persuaded that the parties are seeking in good faith to use this class action to create an effective and beneficial marketplace for digital books, I am troubled in several respects.

**a. A Matter for Congress**

First, the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court. The ASA would create, for example, the Registry and the Fiduciary. Together, they would represent -- purportedly on an independent basis -- the interests of Rightsholders, including those who have not registered but are covered merely because they did not opt out.

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<sup>9</sup> But see Uhl v. Thoroughbred Tech. & Telecomm., Inc., 309 F.3d 978 (7th Cir. 2002) (affirming approval of settlement of class action based on forward-looking business arrangement).

The questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties. Indeed, the Supreme Court has held that "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." Eldred v. Ashcroft, 537 U.S. 186, 212 (2003); accord Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product.").<sup>10</sup> In Sony, the Supreme Court noted that it was Congress's responsibility to adapt the copyright laws in response to changes in technology:

From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment -- the printing press -- that gave rise to the original need for copyright protection.

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<sup>10</sup> See also Amchem Prods., 521 U.S. at 628-29 ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.").

Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned new rules that new technology made necessary.

464 U.S. at 430-31 (footnotes omitted).

In fact, Congress has made "longstanding efforts" to enact legislation to address the issue of orphan works. (Objections of Microsoft to ASA & Certification of Class 4-5 & nn.10-11, ECF No. 874 (quoting Statement of Marybeth Peters)). "Orphan Books" legislation was proposed in Congress in 2006 and 2008, but the proposed laws were not enacted. See Glorioso, supra n.3, at 980 (reviewing proposed legislation).

As discussed below, the ASA would also raise international concerns, and foreign countries, authors, and publishers have asserted that the ASA would violate international law. For this reason as well, the matter is better left for Congress.

**b. The Scope of the Pleadings**

Second, the ASA would release claims well beyond those contemplated by the pleadings. This case was brought to challenge Google's use of "snippets," as plaintiffs alleged that Google's scanning of books and display of snippets for online searching constituted copyright infringement. Google defended by

arguing that it was permitted by the fair use doctrine to make available small portions of such works in response to search requests. There was no allegation that Google was making full books available online, and the case was not about full access to copyrighted works. The case was about the use of an indexing and searching tool, not the sale of complete copyrighted works.

The parties argue that the pleadings are not limited to plaintiffs' claims with respect to the display of snippets, citing the Third Amended Complaint. (Pls.' Suppl. Mem. 33-34, ECF No. 955 (quoting Third Am. Compl. ¶¶ 4-8, 60, ECF No. 782)). While it is true that the pleadings refer to broader conduct (including the creation of "digital copies" of books (Third Am. Compl. ¶ 4, ECF No. 782; see also Hr'g Tr. 158-59 ("When the publishers sued, they sued for the initial act of scanning our books without permission, cover to cover. We were not so concerned about what uses were made.")) (Bruce P. Keller))), the copying and display of copyrighted material occurred in the context of "Google Book Search," which "is designed to allow users to search the text of books online. The digital archiving of the Books that are the subject of this lawsuit was undertaken by Google as part of Google Book Search." (Third Am. Compl. ¶ 41, ECF No. 782; see also id. ¶ 55 (describing Google's

agreements with four university libraries and one public library "to 'digitally scan books from their collections so that users worldwide can search them in Google'").

Google did not scan the books to make them available for purchase, and, indeed, Google would have no colorable defense to a claim of infringement based on the unauthorized copying and selling or other exploitation of entire copyrighted books.<sup>11</sup> Yet, the ASA would grant Google the right to sell full access to copyrighted works that it otherwise would have no right to exploit.<sup>12</sup> The ASA would grant Google control over the digital commercialization of millions of books, including orphan books

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<sup>11</sup> Counsel for Google acknowledged at the fairness hearing that Google would not have tried to defend digitizing and selling entire books. (Hr'g Tr. 150 (Daralyn J. Durie)).

<sup>12</sup> Certain authors note, for example, that the ASA would release other intellectual property claims that were never asserted in the case. (Objections of Arlo Guthrie et al. to Proposed Class Action Settlement Agreement 14, ECF Nos. 209, 849-2 ("This expansive release [ASA § 10.1(f)] bars class members from protecting their most fundamental intellectual property rights, including for example the trademark interests of Catherine Ryan Hyde [to the mark Pay It Forward]. . . . Moreover, the release would preclude authors from pursuing any number of other claims commonly associated with full protection of their intellectual property rights -- including for example right of publicity, disparagement, and tortious interference claims -- that also were not alleged.")).

and other unclaimed works.<sup>13</sup> And it would do so even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions. While its competitors went through the "painstaking" and "costly" process of obtaining permissions before scanning copyrighted books, "Google by comparison took a shortcut by copying anything and everything regardless of copyright status." (Hr'g Tr. 43 (Thomas Rubin, counsel for Microsoft)). As one objector put it: "Google pursued its copyright project in calculated disregard of authors' rights. Its business plan was: 'So, sue me.'" (Objection of Robert M. Kunststadt to Proposed Settlement 3, ECF No. 74).<sup>14</sup>

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<sup>13</sup> As articulated by the academic authors objecting to the ASA: "The Google Book Search (GBS) initiative envisioned in the [ASA] is not a library. 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." (Letter from Pamela Samuelson to Court (Jan. 27, 2010) (ECF No. 893) ("Samuelson Letter")).

<sup>14</sup> Some objectors accused Google of engaging in piracy. (See, e.g., Letter from Erika Faith Larsen to Court 1 (Jan. 27, 2010) (ECF No. 818) ("I am opting out because I believe this to be a copyright infringement and a form of pirating."); Letter from William Ash to Court 1 (Jan. 12, 2010) (ECF No. 884) ("Google . . . is trying to benefit by weakening copyright. It seems to first want to do this with 'orphaned' works based on the shady practice of stealing by finding. . . . Google is trying to legalize piracy.")).

Applying Firefighters, I conclude that the released claims would not come within "the general scope of the case made by the pleadings." 478 U.S. at 525.<sup>15</sup> Applying Wal-Mart Stores, I conclude that the released conduct would not arise out of the "identical factual predicate" as the conduct that is the subject of the settled claims. 396 F.3d at 107 (citation omitted).

**c. The Interests of Class Members**

Third, the class plaintiffs have not adequately represented the interests of at least certain class members. See Wal-Mart Stores, 396 F.3d at 106-07, 110. The academic author objectors, for example, note that their interests and values differ from those of the named plaintiffs: "Academic authors, almost by definition, are committed to maximizing access to

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<sup>15</sup> As for the third prong of the Firefighters test, supporters of the proposed settlement argue that it would "serve[] copyright law's central purpose of advancing knowledge and culture by furthering copyright's social utility and social justice goals through inclusion of those who have been excluded. The Google Books Project furthers these goals by using an accepted copyright mechanism (i.e., a private, court-supervised settlement) to address the novel copyright problems presented by the new technologies, while still preserving the rights of copyright holders." Lateef Mtima & Steven D. Jamar, Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information, 55 N.Y.L. Sch. L. Rev. 77, 79-80 (2010); see Harper & Row Pubs., Inc. v. Nation Enters., 471 U.S. 539, 545 (1985) ("[C]opyright is intended to increase and not to impede the harvest of knowledge."). As discussed below, however, the ASA raises significant copyright concerns as well.

knowledge. The [Authors] Guild and the [Association of American Publishers], by contrast, are institutionally committed to maximizing profits." (Samuelson Letter 3 (ECF No. 893)).<sup>16</sup> In addition, the class representatives have interests that may be at odds, at least in part, with interests of foreign Rightsholders, as discussed below. Likewise, the named plaintiffs have interests different from Rightsholders who do not come forward to register. The parties have little incentive to identify and locate the owners of unclaimed works, as fewer opt-outs will mean more unclaimed works for Google to exploit.<sup>17</sup>

Plaintiffs argue that in "virtually every class action settlement, a percentage (often a high percentage) of class members does not file claims or otherwise participate but, nevertheless, their claims are released. From a Rule 23 perspective, there is no more an 'orphan' problem here than in any other class action settlement in which less than 100% of the

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<sup>16</sup> Many academic authors, for example, would prefer that orphan books be treated on an "open access" or "free use" basis rather than one where they would be controlled by one private entity. (See Hr'g Tr. 55-57 (Pamela Samuelson)).

<sup>17</sup> Plaintiffs contend that "one of the Registry's core missions is to locate Rightsholders of unclaimed out-of-print books . . . . The Registry will strive to locate the Rightsholders of unclaimed Books." (Pls.' Suppl. Mem. 21, ECF No. 955).

class participates." (Pls.' Suppl. Mem. 3-4, ECF No. 955). I disagree. While it is true that in virtually every class action many class members are never heard from, the difference is that in other class actions class members are merely releasing "claims" for damages for purported past aggrievements. In contrast, here class members would be giving up certain property rights in their creative works, and they would be deemed -- by their silence -- to have granted to Google a license to future use of their copyrighted works.

#### **4. Copyright Concerns**

As alluded to above, the Copyright Clause of the Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. The Supreme Court has recognized that courts should encroach only reluctantly on Congress's legislative prerogative to address copyright issues presented by technological developments: "Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials." Sony, 464 U.S. at 431.

The ASA raises statutory concerns as well. Certain objectors contend that the ASA's opt-out provisions would grant Google the ability to expropriate the rights of copyright owners who have not agreed to transfer those rights. (See, e.g., Objection of Amazon to ASA 9, ECF No. 823). The argument may have merit. The Copyright Act provides:

When an individual author's ownership of a copyright, or any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under the copyright, shall be given effect under this title, except as provided under title 11.

17 U.S.C. § 201(e). Yet, the ASA proposes to expropriate rights of individuals involuntarily.

Plaintiffs argue that § 201(e) was enacted to prevent governmental suppression of copyrights and that it does not apply to private parties. (Pls.' Suppl. Mem. 113, ECF No. 955 (citing, e.g., In re Peregrine Entm't, Ltd., 116 B.R. 194, 206 n.16 (C.D. Cal. 1990))). The statute, however, refers to "any governmental body or other official or organization," and at a minimum a fair question exists as to whether this Court or the Registry or the

Fiduciary would be expropriating copyright interests belonging to authors who have not voluntarily transferred them. As Professor Nimmer has written: "By its terms Section 201(e) is not limited to acts by governmental bodies and officials. It includes acts of seizure, etc., by any 'organization' as well." 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 10.04 (Rev. Ed. 2010) (footnote omitted). In any event, I need not decide the precise question of whether the ASA would in fact violate § 201(e); the notion that a court-approved settlement agreement can release the copyright interests of individual rights owners who have not voluntarily consented to transfer is a troubling one. See also 17 U.S.C. § 106(1), (3) ("[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . reproduce the copyrighted work . . . [and] distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership.") (emphasis added).

A copyright owner's right to exclude others from using his property is fundamental and beyond dispute. See Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude

others from using his property."). As counsel for Amazon argued: "[T]he law of the United States is a copyright owner may sit back, do nothing and enjoy his property rights untrammelled by others exploiting his works without permission." (Hr'g Tr. 46-47 (David Nimmer)). Under the ASA, however, if copyright owners sit back and do nothing, they lose their rights. (See id. at 47). Absent class members who fail to opt out will be deemed to have released their rights even as to future infringing conduct. "Copyright owners who are not aware that the [ASA] affects their interest unknowingly leave Google to decide how their books are used." Glorioso, supra n.3, at 992.

Many objectors highlighted this concern in their submissions to the Court. An author from the United Kingdom states, very simply: "I do not want my books to be digitized." (Letter from Tony Peake to Settlement Administrator 1 (Dec. 24, 2009) (ECF No. 821)). A 79-year old nature writer and author of 23 books illustrated with photographs of animals in the wild worries that the loss of control over her works could result in their being used to "vilif[y] the wildlife I spent my life trying to help the public come to understand and protect." (Letter from Hope Ryden to Court 1 (Apr. 17, 2009) (ECF No. 84)). An author from Canada writes: "I am opting out because I believe in the

integrity of copyright. I believe that only I, myself, should have the right to determine how my work can be used." (Letter from Dina E. Cox to Court 1 (Jan. 19, 2010) (ECF No. 783)).

Finally, an author from Texas gives the example of her grandfather. He self-published a memoir, Dust and Snow, in 1988. He passed away in the 1990s, and the copyright to the book passed to his three daughters. The author observes:

From Google's point of view, Dust and Snow is an "orphaned" book. If and when Google scans it, the company is likely to be unsuccessful in trying to locate the publisher, since the book was self-published and my grandfather is now deceased. In essence, the way the settlement is written, such "orphaned" titles are automatically handed to Google free of charge to do with as it will.

From my family's point of view, Dust and Snow is not orphaned at all. It is very clear who owns the copyright. So why is Google being granted the automatic right to take over the copyright of books like my grandfather's?

(Letter from Margaret Jane Ross to Court 2 (Jan. 20, 2010) (ECF No. 787)).

While the named plaintiffs and Google would argue that these authors can simply opt out (see Hr'g Tr. 144 (Daralyn J. Durie)), the comments underscore certain points. First, many authors of unclaimed works undoubtedly share similar concerns.

Second, it is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission.<sup>18</sup> Third, there are likely to be many authors -- including those whose works will not be scanned by Google

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<sup>18</sup> In one submission, two literary agents expressed this concern eloquently:

By accepting this settlement, the court will be setting a highly questionable precedent, usurping the role of the legislature by creating a legal loophole for one corporation and reversing the very foundation of copyright protection. We who have devoted our lives to assisting the work of creative individuals are left with a sense of moral indignation. We have pledged, in our contracts with clients, to sell or license their rights to ethically and financially sound purchasers and licensees. And for many years we have toiled over agreements and contracts to accomplish this, aided by the protections of the law. The situation we find ourselves in now is one of dismay and powerlessness, with only the weak ability to "object" or opt out. We beseech you to give authors back their rights. Force Google to negotiate like any other publisher. And let us get back to work.

(Letter from Stuart Bernstein & Susan Bergholz to Court 3-4 (Jan. 26, 2010) (ECF No. 888)).

until some years in the future -- who will simply not know to come forward.<sup>19</sup>

#### 5. Antitrust Concerns

The United States, Amazon, and Microsoft, among others, raise a number of antitrust concerns presented by the ASA.

The ASA would give Google a de facto monopoly over unclaimed works. Only Google has engaged in the copying of books en masse without copyright permission. (See DOJ SOI 21, ECF No. 922; Hr'g Tr. 43 (Thomas Rubin)). As the United States observed in its original statement of interest:

This de facto exclusivity (at least as to orphan works) appears to create a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital-book subscription. The seller of an incomplete database -- i.e., one that does not include the millions of orphan works -- cannot compete effectively with the seller of a comprehensive product.

(DOJ Statement of Interest 24, Sept. 18, 2009, ECF No. 720). And as counsel for the Internet Archive noted, the ASA would give Google "a right, which no one else in the world would have, . . .

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<sup>19</sup> Google notes that under the ASA -- and unlike in other class actions -- class members retain "the right to change their mind. They can pull their books from the program at any point in time in the future." (Hr'g Tr. 152 (Daralyn J. Durie)).

to digitize works with impunity, without any risk of statutory liability, for something like 150 years." (Hr'g Tr. 95 (Hadrian Katz)).

The ASA would arguably give Google control over the search market. (See, e.g., Suppl. Mem. of Open Book Alliance in Opp'n to ASA 14-19, ECF No. 840). The ASA would permit third parties to display snippets from books scanned by Google, but only if they "have entered into agreements with Google." (ASA § 3.9). Likewise, the ASA would permit third parties to "index and search" scanned books only if they are non-commercial entities or they otherwise have Google's prior written consent. (ASA §§ 1.123, 1.93(e), 7.2(b)). The ASA would broadly bar "direct, for profit, commercial use of information extracted from Books in the Research Corpus" except with the express permission of the Registry and Google. (ASA § 7.2(d)(viii)). Google's ability to deny competitors the ability to search orphan books would further entrench Google's market power in the online search market. Cf. United States v. Griffith, 334 U.S. 100, 109 (1948) (holding that owners of movie theaters with monopoly power in certain towns violated § 2 of Sherman Act by obtaining exclusive licensing agreements for first-run films, allowing them to

foreclose competition and establish monopolies in more towns).<sup>20</sup> (See Mem. of Internet Archive in Opp'n to ASA 3-4, ECF No. 811 ("Internet Archive Mem.") ("Google would have the right to make complete copies of orphan works and use them for both display and non-display purposes, with no risk of copyright liability. Competitors that attempted to do the same thing, however, would face exposure to statutory damages.")).

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<sup>20</sup> Nor is it merely Google's competitors that have raised antitrust concerns. For example, amicus curiae Public Knowledge, a non-profit public interest organization "devoted to preserving the free flow of information in the digital age," objects that the ASA would grant Google "a monopoly in the market for orphan books." (Br. of Pub. Knowledge in Opp'n to ASA 2, ECF No. 895). It argues that "public access to orphan books must be open to all comers on a level playing field." (Id.). In addition, the Institute for Information Law and Policy at New York Law School argues:

The heart of the [ASA] is that it would give Google a license to sell complete copies of out-of-print books unless their copyright owners object. It is all but certain that many orphan copyright owners will be unable to object. This sweeping default license will operate only in Google's favor, instantly giving it a dominant market position.

(Letter from Inst. for Info. Law & Policy to Court 5 (Jan. 28, 2010) (ECF No. 856)).

6. Privacy Concerns

The Consumer Watchdog, Privacy Authors and Publishers, and others raise privacy concerns. The Consumer Watchdog argues that the ASA would give Google "the ability to collect nearly unlimited data about the activities of users of its Book Search and other programs, including users' search queries, the identity of books a particular user reads, how long that reader spends on each book, and even what particular pages were read." (Second Br. of Consumer Watchdog in Opp'n to ASA 11, ECF No. 841). These objectors contend that the ASA fails to provide adequate protections for users of Google Book Search. (Id. at 11-12; Privacy Authors & Publishers' Objection to Proposed Settlement 16, ECF No. 281). They contend that the ASA fails to follow established law that protects reader privacy by limiting the disclosure of reader information. (Privacy Authors & Publishers' Objection to Proposed Settlement 16-20, ECF No. 281 (citing case law and state statutes)).

The privacy concerns are real. Yet, I do not believe that they are a basis in themselves to reject the proposed settlement. The ASA provides that contact information provided by Class members to the Registry will not be disclosed to Google or the public if the Class member so requests. (ASA

§ 6.6(c)(iii), (d)). It also provides that Google shall maintain in confidence any Rightsholder's personally identifiable information received in connection with the settlement. (ASA § 6.6(f)). Google has "committed" to certain safeguards (Def.'s Br. in Supp. of Approval of ASA 55-56, ECF No. 941), although these are voluntary undertakings only. I would think that certain additional privacy protections could be incorporated, while still accommodating Google's marketing efforts.

#### **7. International Law Concerns**

The original settlement included any book subject to a U.S. copyright interest as of the Notice Commencement Date. That definition would have included all books published after 1989 in any country that is a signatory to the Berne Convention because the Berne Convention guarantees that foreign authors be given the same rights and privileges for their works as domestic authors. As the United States signed onto the Berne Convention in 1988, and it became effective in 1989, foreign books are covered by U.S. copyright protection (regardless of formal registration) after the effective date.

The ASA narrowed the definition so that any non-"United States work," see 17 U.S.C. § 101, is covered only if the copyright was affirmatively registered in Washington, D.C. or if

the Book was published in Canada, the United Kingdom, or Australia, on or before January 5, 2009 (ASA § 1.19). Plaintiffs also added "six non-U.S. based Representative Plaintiffs who fairly and adequately represent the interests of Class members whose Books and Inserts were published in the U.K., Canada or Australia." (Pls.' Suppl. Mem. 25, ECF No. 955).

Foreign rightsholders remain concerned, however, because many foreign books were registered in the United States to ensure coverage under U.S. law, especially those registered before 1989. (See, e.g., Germany Mem. 2-3, ECF No. 852; Suppl. Decl. of French Republic 2, ECF No. 853; Objections of Carl Hanser Verlag et al. 1-2, ECF No. 868 (publishing and author associations in Germany, Switzerland, Austria, Italy, and New Zealand); Letter from Literar Mechana to Court 1 (Jan. 18, 2010) (ECF No. 797)). VG Wort, a German "collecting society" representing authors and publishers of literary works and the fiduciary owner of some 380,000 German authors and 9000 German publishers, notes that many foreign copyright owners remain members of the class because they registered their works with the U.S. Copyright Office. (Letter from VG Wort to Court 3-4 (Jan. 21, 2010) (ECF No. 857)). Indeed, France and Germany, as well as many authors and publishers from countries such as Austria,

Belgium, India, Israel, Italy, Japan, New Zealand, Spain, Sweden, Switzerland, and the United Kingdom continue to object to the ASA, even with the revisions.

Many foreign objectors express concern as to whether the ASA would violate international law, including the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Indian authors and publishers, for example, object that the ASA "continues to provide Google with sweeping rights to exploit works of Indian authors/publishers under copyright protection without their express permission/consent, a violation of international and Indian copyright laws." (Objections of Niyogi Books et al. 1, ECF No. 807). An association of Canadian university teachers asserts that the ASA would "put[] the United States in violation of international intellectual property law and specifically in violation of trade agreements among Canada, the United States, and other parties as those agreements relate to copyright." (Letter from Canadian Ass'n of Univ. Teachers to Court 2 (Jan. 28, 2010) (ECF No. 900)). The Japan P.E.N. Club, an organization consisting of poets, playwrights, essayists, editors, and novelists in Japan, also opposes approval of the ASA, arguing that the settlement would give Google "an almost insurmountable

market advantage worldwide in the world of digital book publishing, while granting it a monopoly at home in the United States and other English-speaking countries." (Japan P.E.N. Club Amicus Curiae Br. in Opp'n to ASA 6, ECF No. 848-2).

Google responds that "this case is about United States copyright interests. It's about uses of works in the United States." (Hr'g Tr. 157-58 (Daralyn J. Durie)). This argument, however, ignores the impact the ASA would have on foreign rightsholders. In any event, I need not decide whether the ASA would violate international law. In light of all the circumstances, it is significant that foreign authors, publishers, and, indeed, nations would raise the issue.

A number of foreign objectors also complain that it was difficult for foreign authors to determine whether they were covered by the ASA. (See, e.g., Germany Mem. 6-7, ECF No. 852; Letter from Centro Español de Derechos Reprográficos to Court 1 (Jan. 22, 2010) (ECF No. 827); Letter from Irish Copyright Licensing Agency Ltd. to Court 1 (Jan. 26, 2010) (ECF No. 881); Letter from Assucopie to Court 1 (Jan. 22, 2010) (ECF No. 882)).<sup>21</sup> Works registered in the Copyright Office before 1978,

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<sup>21</sup> There was some support for approval of the ASA from Australia, Canada, and the United Kingdom (see, e.g., Letter from Publishers Ass'n to Court 1 (Jan. 27, 2010) (ECF No. 825) (United

for example, are not included in the online directory, and until recently the only way such foreign rightsholders could search the Copyright Office records was to do so in person in Washington, D.C., or by commissioning a member of the Copyright Office staff to conduct a search for a fee of \$330. (Objections of Carl Hanser Verlag et al. 12, ECF No. 868).

In addition, certain foreign objectors emphasize that the problem of orphan books is a global one. As Germany notes: "Courts and class action settlements are not the proper province for creating a cutting edge copyright . . . framework to bind future generations and impact global competition for the future of digital libraries." (Germany Mem. 11, ECF No. 852).

Likewise, France argues:

Concerning «Unclaimed books», national laws on «orphan» or «unclaimed» books in the digital age are now being elaborated in many countries. Each nation, pursuant to its own governing laws and structure, is the only actor with sufficient legitimacy to make

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Kingdom); Letter from Canadian Publishers' Council to Court 1 (Jan. 27, 2010) (ECF No. 826); Letter from Australian Publishers Ass'n to Court 1 (Jan. 28, 2010) (ECF No. 830); Letter from Soc'y of Authors to Court 1-2 (Jan. 22, 2010) (ECF No. 876) (United Kingdom)), although not everyone from those countries agreed (see, e.g., Letter from Diana Kimpton to Court 1 (Jan. 10, 2010) (ECF No. 817) (United Kingdom); Letter from Jenny Darling & Assocs. to Court 1 (Jan. 22, 2010) (ECF No. 886) (Australia); Letter from Canadian Ass'n of Univ. Teachers to Court 1 (Jan. 28, 2010) (ECF No. 900)).

decisions that affect Copyright. France considers that, in the meantime, any digital exploitation of books must abide by the international principles of copyright and, in particular, the prior consent of the rights holders.

(Suppl. Decl. of French Republic 2, ECF No. 853). The fact that other nations object to the ASA, contending that it would violate international principles and treaties, is yet another reason why the matter is best left to Congress.<sup>22</sup>

#### **CONCLUSION**

In the end, I conclude that the ASA is not fair, adequate, and reasonable. As the United States and other

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<sup>22</sup> Germany further argues as follows:

The [ASA] still rewards Google -- a serial scanning infringer -- with a de facto exclusive license regarding copyrights held by authors for books published in the United States, Canada, Australia, and United Kingdom, as well as over German and other international authors whose books have been registered in the United States. Competing digital libraries in Germany ("Deutsche Digitale Bibliothek") and throughout the world do not enjoy rights to such authors or "Orphan Works" because Germany requires licensing of rights prior to the usage of Orphan Works. Such a sweeping de facto compulsory license system would require legislative action (equivalent to Congressional action) in Germany.

(Germany Mem. 8, ECF No. 852).

objectors have noted, many of the concerns raised in the objections would be ameliorated if the ASA were converted from an "opt-out" settlement to an "opt-in" settlement. (See, e.g., DOJ SOI 23, ECF No. 922; Internet Archive Mem. 10, ECF No. 811). I urge the parties to consider revising the ASA accordingly.

The motion for final approval of the ASA is denied, without prejudice to renewal in the event the parties negotiate a revised settlement agreement. The motion for an award of attorneys' fees and costs is denied, without prejudice.

The Court will hold a status conference on April 25, 2011, at 4:30 p.m., in Courtroom 11A of the Daniel Patrick Moynihan Courthouse.

SO ORDERED.

Dated: March 22, 2011  
New York, New York



DENNY CHIN  
United States Circuit Judge  
Sitting By Designation

**APPEARANCES**

For Author Plaintiffs:

BONI & ZACK LLC  
By: Michael J. Boni, Esq,  
Joanne Zack, Esq.  
15 St. Asaphs Road  
Bala Cynwyd, PA 19004

For Publisher Plaintiffs:

DEBEVOISE & PLIMPTON LLP  
By: Bruce P. Keller, Esq.  
Jeffrey P. Cunard  
Richard S. Lee, Esq.  
919 Third Avenue  
New York, NY 10022

For Defendant Google Inc.

DURIE TANGRI LLP  
By: Daralyn J. Durie, Esq.  
Joseph C. Gratz, Esq.  
217 Leidesdorff Street  
San Francisco, CA 94111

For United States of America:

PREET BHARARA, Esq.  
United States Attorney  
for the Southern District of New York  
By: John D. Clopper, Esq.  
Owen Knedler, Esq.  
Assistant United States Attorneys  
86 Chambers Street, 5th Floor  
New York, NY 10007

- and -

WILLIAM F. CAVANAUGH, Esq.  
Deputy Assistant Attorney General  
Antitrust Division, U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001



2. The Authors Guild is the nation's largest organization of book authors, which has as its primary purpose to advocate for and support the copyright and contractual interests of published writers.

3. Defendant Google Inc. ("Google") owns and operates a major Internet search engine that, among other things, provides access to commercial and other sites on the Internet. Google has contracted with several public and university libraries to create digital "archives" of the libraries' collections of books, including those of the University of Michigan, the University of Wisconsin, and the University of California. As part of the consideration for creating digital copies of these collections, the agreements entitle Google to reproduce and retain for its own commercial use a digital copy of the libraries' archives.

4. By reproducing for and distributing to these and other libraries a digital copy of in-copyright Books (defined in paragraph 22 below), by reproducing for itself a digital copy of these Books, and by publicly displaying these Books, Google is engaging in massive copyright infringement. It has infringed, and continues to infringe, the electronic and other rights of the copyright holders of the Books.

5. Google has reproduced and continues to reproduce the Books for use on its website in order to, among other things, attract visitors to its web site and generate advertising revenue thereby.

6. Google knew or should have known that the Copyright Act, 17 U.S.C. § 101 *et seq.* ("the Act"), required it to obtain authorization from the holders of the copyrights in these Books before creating, distributing and reproducing digital copies of the Books for the

libraries providing Books to Google, for its own commercial use and for the use of others. Despite this knowledge, Google has unlawfully reproduced, distributed and publicly displayed the Books, and intends to continue to do so, without the copyright holders' authorization. Google has derived, and intends to continue to derive, revenue from this program by, among other things, attracting more viewers and advertisers to its website.

7. By this action, plaintiff authors, on behalf of themselves and all others similarly situated, seek damages, injunctive and declaratory relief with respect to Google's present infringement, and declaratory and injunctive relief with respect to Google's past, present and future planned unauthorized commercial and other use of the Books.

#### **JURISDICTION AND VENUE**

8. This copyright infringement action arises under 17 U.S.C. § 101 *et seq.* This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1338 (acts of Congress related to copyright).

9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because several of the named plaintiffs reside in this district and because defendant maintains offices and conducts business in this district.

#### **PARTIES**

##### **REPRESENTATIVE PLAINTIFFS**

10. The representative plaintiffs are published, professional authors who created Books.

11. Plaintiff Herbert Mitgang (“Mitgang”) resides in New York, New York. He is a published author of numerous nonfiction Books, and a holder of the United States copyright in the Book *The Man Who Rode the Tiger: The Life of Judge Samuel Seabury and the Story of the Greatest Investigation of City Corruption in this Century* (registration number A216794), published by Lippincott, which has been copied, distributed and displayed by Google.

12. Plaintiff Betty Miles (“Miles”) resides in Shelburne, Vermont. She is the author of several Books of children’s and young adult fiction and is a holder of the United States copyright in the Book *Just Think* (registration number A330604), published by Alfred A. Knopf, which is contained in the library of the University of Michigan.

13. Plaintiff Daniel Hoffman (“Hoffman”) resides in Swarthmore, Pennsylvania. He is the author and editor of many volumes of poetry, translation, and literary criticism, and of a memoir. He is a holder of the United States copyright in the Book *Barbarous Knowledge: Myth in the Poetry of Yeats, Graves, and Muir* (registration number A896931 and registration renewal number RE-696-986), published by Oxford University Press, which has been copied, distributed and displayed by Google.

14. Plaintiff Paul Dickson (“Dickson”) resides in Garrett Park, MD. He is a full-time writer and the author of numerous Books, and is a holder of the United States copyright in *Out of This World: American Space Photography* (registration number A923312), published by Delacorte Press, and *The NEW Official Rules: Maxims for Muddling through to the Twenty-First Century* (registration number TX0002621899), published by Addison-Wesley Publishing Company, which have been copied, distributed and displayed by Google.

15. Plaintiff Joseph Goulden (“Goulden”) resides in Washington, D.C. He is the author of several Books, and is a holder of the United States copyright in *The Superlawyers: The Small and Powerful World of the Great Washington Law Firms* (registration number A346254), published by Weybright and Talley, which has been copied, distributed and displayed by Google.

16. Plaintiff Jim Bouton (“Bouton”) resides in Alford, Massachusetts. He is the author and copyright holder of several Books, and is a holder of the United States copyright in *Ball Four* (registration number A173097), published by World Publishing Company, which has been copied, distributed and displayed by Google.

17. Plaintiffs are the exclusive owners of the copyrights for their Books listed above. None of the plaintiffs has authorized Google to reproduce his or her Books or to display, sell and/or distribute such Books on its website or anywhere else.

**ASSOCIATIONAL PLAINTIFF**

18. Plaintiff The Authors Guild, Inc. (“the Guild”) is a not-for-profit corporation organized under New York law and having its place of business at 31 East 32nd Street, New York, New York. The Guild and its predecessor organization, the Authors League of America (“the League”), have been leading advocates for authors’ copyright and contractual interests since the League’s founding in 1912. The Guild, whose membership includes more than 8,500 published authors, is the nation’s largest organization of authors. The activities of the Guild include reviewing members’ publishing and agency contracts; intervening in disputes involving authors’ rights; providing advice to members regarding developments in the law and in

the publishing industry that affect their rights; and supporting legislation in matters affecting copyright, freedom of expression, taxation and other issues affecting professional writers.

19. The Guild has associational standing to pursue claims for injunctive and declaratory relief on behalf of its members. The member authors would have standing to sue in their own right. The protection of authors' copyrights is germane, indeed central, to the purpose of the Guild. Individual participation of the authors is not required to determine whether Google's copying and planned display of the authors' copyrighted works for commercial use is in violation of the Act and to provide injunctive and declaratory relief to the Guild and the authors.

#### **DEFENDANT**

20. Google is a Delaware corporation with its principal place of business located in Mountain View, California. Google owns and operates the largest Internet search engine in the United States, which contains links to more than one trillion commercial and noncommercial Internet pages. Its search engine is available free of charge to Internet users, and is supported by commercial and other entities' purchases of advertising space on Google's and others' websites.

21. Late in 2004, Google announced the launch of a project it calls the Google Library Project, which was part of a service it called Google Print and now calls Google Book Search. Google Book Search is designed to allow users to search the text of books online. The digital archiving of the Books that are the subject of this lawsuit was undertaken by Google as part of Google Book Search.

**CLASS ALLEGATIONS**

22. The Class is defined as all persons residing in the United States who hold a United States copyright interest in one or more Books and are either (a) natural persons who are authors of such Books or (b) natural persons, family trusts or sole proprietorships who are heirs, successors in interest or assigns of such authors. "Books" means each full-length book published in the United States in the English language and registered with the United States Copyright Office within three months after its first publication. Excluded from the Class are the directors, officers and employees of Google; personnel of the departments, agencies and instrumentalities of the United States Government; and Court personnel.

23. This action has been brought and may properly be maintained as a Class Action pursuant to Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure.

24. Numerosity of the Class – Fed. R. Civ. Proc. 23(a)(1): The persons in the Class are so numerous that their joinder is impractical, and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the Court. The exact number of members of the Class is not known to plaintiffs, but plaintiffs reasonably estimate that there are at least thousands of Class members.

25. Existence and Predominance of Common Question of Law or Fact – Fed. R. Civ. Proc. 23(a)(2) & 23(b)(3): There is a well-defined community of interest in the questions of law or fact involved affecting the Class. Questions of law or fact common to the Class include, but are not limited to, the following:

- a. Whether Google has digitized (i.e, reproduced) Books and distributed copies of such Books to libraries and other sources;
- b. Whether Google plans to continue to digitize Books and distribute copies of such Books to libraries and other sources;
- c. Whether such reproduction and distribution constitutes copyright infringement;
- d. Whether Google has reproduced, and plans to continue to reproduce, Books for its own commercial use;
- e. Whether the reproduction by Google of Books constitutes copyright infringement;
- f. Whether Google's public display of content from Books on its commercial website infringes the copyrights of the Class;
- g. Whether Google's reproduction, distribution and display of millions of Books as alleged herein constitute a "fair use" of the Books;
- h. Whether Google acted willfully with respect to the acts complained of herein;
- i. Whether members of the Class have sustained damages and, if so, the proper measure of such damages;
- j. Whether injunctive relief is appropriate.

These questions of law or fact predominate over questions that affect only individual class members.

26. Typicality – Fed. R. Civ. Proc. 23(a)(3): The claims of the representative plaintiffs are typical of those of the Class. All plaintiffs own copyrights in works that have been or face the imminent threat of being copied, distributed and displayed by Google without authorization. The claims of the representative plaintiffs and all members of the Class depend on a showing of the acts of Google complained of herein.

27. Adequacy of Representation – Fed. R. Civ. Proc. 23(a)(4): Plaintiffs are adequate representatives of the Class and will fairly and adequately protect the interests of the Class. Plaintiffs' interests do not in any way conflict with the interests of the members of the Class that they seek to represent. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in complex class action litigation and in copyright actions.

28. Injunctive Relief – Fed. R. Civ. Proc. 23(b)(2): Google has acted or refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

29. Superiority – Fed. R. Civ. Proc. 23(b)(3): A class action is the best available method for the fair and efficient adjudication of this controversy. Since the damages suffered by individual class members, while not inconsequential, may be relatively small, the expense and burden of individual litigation make it impractical for members of the Class to seek redress individually for the wrongful conduct alleged herein. Should separate actions be required to be brought by each individual member of the Class, the resulting multiplicity of lawsuits would cause undue hardship and expense on the Court and the litigants. A class action is

therefore the best method to assure that the wrongful conduct alleged herein is remedied, and that there is a fair, efficient, and full adjudication of this controversy. Plaintiffs anticipate no undue difficulty in the management of this litigation as a class action.

#### **GENERAL ALLEGATIONS**

30. Google is in the business of providing Internet search services to the public. It derives the vast majority of its revenues directly from the sale of advertising, and would likely be unable to offer its search engine and other services to the public free of charge without a continued stream of advertising revenues.

31. On December 14, 2004, Google announced in a press release that it had entered into agreements with four university libraries and one public library to “digitally scan books from their collections so that users worldwide can search them in Google.” According to Google’s release, this was to be an “expansion of the Google Print program, which assists publishers in making books and other offline information searchable online. Google is now working with libraries to digitally scan books from their collections, and over time will integrate this content into the Google index, to make it searchable for users worldwide.” Google’s press release also claimed that it would make “brief excerpts” of copyrighted material available.

32. Google is providing the scanning technology that allows the library books to be copied.

33. Google uses the Books obtained from various libraries and other sources in order to attract visitors and, thereby, advertisers, to its website.

34. Google has already copied Books from the collections of various libraries, including Books in which plaintiffs Mitgang, Hoffman, Dickson, Goulden and Bouton own United States copyright interests. In so doing, Google has reproduced in their entirety at least two digital copies of such Books – one for the library that permitted Google to digitize such Books and the other for Google’s own commercial use – without the copyright holders’ permission and in violation of their rights under copyright. Google has also announced plans to, and has for several years, publicly displayed the Books on its commercial website.

35. Google continues to reproduce and distribute digitized copies of the Class’s Books without their authorization. Google continues to display the Books on its website for the commercial purposes detailed above.

36. Google’s acts have caused, and unless restrained, will continue to cause damages and irreparable injury to representative plaintiffs and the Class through:

- a. continued copyright infringement of the Books and/or the effectuation of new and further infringements;
- b. depreciation in the value and ability to license and sell their Books;
- c. lost profits and/or opportunities; and
- d. damage to their goodwill and reputation.

37. Google acted willfully or knew or should have known that its actions constitute infringement.

38. Plaintiffs and the other members of the Class have suffered damages and/or are in imminent danger of suffering further damages from Google’s unlawful practices.

**COUNT ONE - Copyright Infringement**  
**(By Plaintiffs Mitgang, Hoffman, Dickson, Goulden and Bouton)**

39. Plaintiffs Hoffman, Dickson, Goulden and Bouton reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

40. Plaintiffs Mitgang, Hoffman, Dickson, Goulden and Bouton and other members of the Class own a valid copyright in and to at least one Book that has been copied, distributed and displayed by Google without permission. They, not Google, have the exclusive rights to, among other things, reproduce their Books, distribute copies of their Books to the public, publicly display their Books, and authorize such reproduction, distribution and display of their Books.

41. Google has copied, distributed and/or displayed for its own commercial use one or more copies of some of the Books from university libraries or other sources, and Google has stated that it intends to copy most, if not all, of the Books in the collection of the University of Michigan library and other libraries.

42. Google's conduct is in violation of the copyrights held by named plaintiffs Mitgang, Hoffman, Dickson, Goulden and Bouton and other members of the Class.

43. Google's infringement of the copyrights of the Books was willful.

44. As a result of Google's acts of copyright infringement and the foregoing allegations, plaintiffs Mitgang, Hoffman, Dickson, Goulden and Bouton and other members of the Class have suffered damages.

**COUNT TWO - Injunctive Relief**  
**(By All Plaintiffs)**

45. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

46. Google has reproduced, distributed and displayed, and continues to reproduce, distribute and display, Books contained in the University of Michigan, the University of Wisconsin, the University of California and other libraries.

47. Google has also placed such unlawfully copied Books on its website in order to, among other things, generate consumer traffic and revenues.

48. Google's commercial use of the Books constitutes additional wholesale copyright infringement.

49. Unless enjoined from doing so, Google's commercial use of the Books, and distribution of the Books to the libraries, will cause plaintiffs and the Class irreparable harm by depriving them of both the right to control the reproduction, display and/or distribution of their copyrighted Books and to receive revenue therefrom.

50. Plaintiffs and the Class are likely to succeed on the merits of their copyright infringement claim because Google's existing and planned uses of the Books do not fall within any of the statutory exceptions to copyright infringement and are in violation of copyright.

51. The balance of hardships tips in favor of plaintiffs and the Class, because Google's massive earnings will not be severely damaged by its inability to create a new stream of revenues and because other comprehensive electronic databases exist for public use.

52. Plaintiffs are therefore entitled to an injunction barring Google from continued infringement of the copyrights of plaintiffs and the Class, and other equitable relief as more fully set forth in the Prayer for Relief.

**COUNT THREE – Declaratory Relief**  
**(By All Plaintiffs)**

53. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

54. An actual controversy exists between the Authors Guild, the representative plaintiffs and the Class, on the one hand, and Google, on the other hand, by reason of Google's present and continuing infringement of the representative plaintiffs' and the Class's copyrights as alleged herein.

55. Plaintiffs are entitled to a judgment declaring that Google's actions are unlawful and, specifically, that Google infringed and continues to infringe the representative plaintiffs' and the Class's United States copyrights in violation of the Copyright Act.

**PRAYER FOR RELIEF**

**WHEREFORE**, plaintiffs pray for relief and that judgment be entered against defendant as follows:

- A. For certification of the Class;
- B. For an award of damages under the Copyright Act;
- C. For an injunction (a) barring Google from continued infringement of the copyrights of the representative plaintiffs and the Class, and/or (b) other equitable relief to redress any continuing violations of the Act;

D. For (a) permanent injunctive and declaratory relief barring Google from continued infringement of the copyrights of the representative plaintiffs and the Class, and/or (b) other equitable relief to redress any continuing violations of the Act;

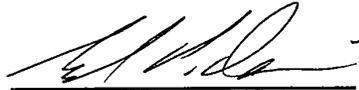
E. For costs and attorneys' fees; and

F. For such other and further relief as the Court finds just and proper.

**DEMAND FOR JURY TRIAL**

The representative plaintiffs, as provided by Rule 38 of the Federal Rules of Civil Procedure, request trial by jury in the above-captioned matter.

Dated: October 14, 2011



Sanford P. Dumain  
MILBERG LLP  
One Pennsylvania Plaza  
New York, NY 10119  
Tel: (212) 594-5300  
Fax: (212) 868-1229  
sdumain@milberg.com

Michael J. Boni (pro hac vice)  
Joanne Zack  
BONI & ZACK LLC  
15 St. Asaphs Rd.  
Bala Cynwyd, PA 19004  
(610) 822-0200 (phone)  
(610) 822-0206 (fax)  
MBoni@bonizack.com  
JZack@bonizack.com

Robert J. LaRocca  
KOHNSWIFT & GRAF, P.C.  
One South Broad Street, Suite 2100  
Philadelphia, PA 19107  
Telephone: (215) 238-1700  
Facsimile: (215) 238-1968  
rlarocca@kohnsswift.com

*Counsel for Plaintiffs*



2. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the Fourth Amended Complaint and therefore denies such allegations.

3. Google admits that it owns and operates an Internet search engine, that it has entered into agreements with several libraries (including those of the Universities of Michigan, Wisconsin, and California) to digitally scan and create a searchable index of the words in many books in their collections, and that it will retain a digital scan of such books. Google denies the remaining allegations in paragraph 2 of the Fourth Amended Complaint.

4. Google denies the allegations in paragraph 4 of the Fourth Amended Complaint.

5. Google denies the allegations in paragraph 5 of the Fourth Amended Complaint.

6. Google denies the allegations in paragraph 6 of the Fourth Amended Complaint.

7. Google admits that Plaintiffs have brought a purported class action seeking damages and injunctive and declaratory relief for alleged copyright infringement. Google denies the remaining allegations in paragraph 7 of the Fourth Amended Complaint.

#### **JURISDICTION AND VENUE**

8. Google admits that Plaintiffs purport to bring a copyright infringement action under 17 U.S.C. § 101, *et seq.*, and that such an action presents a federal question under 28 U.S.C. §§ 1331 and 1338.

9. Google admits that venue is proper in this district.

#### **PARTIES**

##### **REPRESENTATIVE PLAINTIFFS**

10. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the Fourth Amended Complaint and therefore denies such allegations.

11. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Fourth Amended Complaint and therefore denies such allegations.

12. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Fourth Amended Complaint and therefore denies such allegations.

13. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the Fourth Amended Complaint and therefore denies such allegations.

14. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14 of the Fourth Amended Complaint and therefore denies such allegations.

15. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 of the Fourth Amended Complaint and therefore denies such allegations.

16. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 of the Fourth Amended Complaint and therefore denies such allegations.

17. Google admits that it has not entered into any agreements with the Named Plaintiffs concerning the books listed in paragraphs 10 through 16 of the Fourth Amended Complaint. Google is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 17 of the Fourth Amended Complaint and therefore denies such allegations.

**ASSOCIATIONAL PLAINTIFF**

18. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18 of the Fourth Amended Complaint and therefore denies such allegations.

19. Google is without knowledge or information sufficient to form a belief as to the truth of the allegations that the member authors of the Authors Guild would have standing to sue Google for copyright infringement in their own right and that protection of authors' copyrights is germane to the purposes of the Author's Guild, and therefore denies such allegations. Google denies the remaining allegations in paragraph 19 of the Fourth Amended Complaint.

**DEFENDANT**

20. Google admits that it is a Delaware corporation with its principal place of business located in Mountain View, California, that it operates a large Internet search engine, and that it receives revenue from advertising.

21. Google admits that in 2004 it announced the launch of the Library Project, which is part of its Google Book Search (formerly known as Google Print) service. Google further admits that Google Book Search allows users to search an index of the words in books. Google denies the remaining allegations in paragraph 21 of the Fourth Amended Complaint.

**CLASS ALLEGATIONS**

22. Google admits that the Complaint purports to define a class as set forth in paragraph 22 of the Fourth Amended Complaint.

23. Google denies the allegations in paragraph 23 of the Fourth Amended Complaint.

24. Google denies the allegations in paragraph 24 of the Fourth Amended Complaint.

25. Google denies the allegations in paragraph 25 of the Fourth Amended Complaint.

26. Google denies the allegations in paragraph 26 of the Fourth Amended Complaint.

27. Google denies the allegations in paragraph 27 of the Fourth Amended Complaint.

28. Google denies the allegations in paragraph 28 of the Fourth Amended Complaint.

29. Google denies the allegations in paragraph 29 of the Fourth Amended Complaint.

**GENERAL ALLEGATIONS**

30. Google admits that it provides Internet search services to the public and derives the majority of its revenue from advertising. Google denies the remaining allegations in paragraph 30 of the Fourth Amended Complaint.

31. Google admits that on December 14, 2004, it issued a press release, which speaks for itself.

32. Google admits that it provides technology which is used in scanning library books. Google denies any remaining allegations in paragraph 32 of the Fourth Amended Complaint.

33. Google denies the allegations in paragraph 33 of the Fourth Amended Complaint.

34. Google admits that it has digitally scanned some Books from libraries. Google further admits that it has scanned some of the Books without obtaining the copyright holder's permission, but avers that such permission is not required. Google denies the remaining allegations in paragraph 34 of the Fourth Amended Complaint.

35. Google denies the allegations in paragraph 35 of the Fourth Amended Complaint.

36. Google denies the allegations in paragraph 36 of the Fourth Amended Complaint.

37. Google denies the allegations in paragraph 37 of the Fourth Amended Complaint.

38. Google denies the allegations in paragraph 38 of the Fourth Amended Complaint.

**COUNT ONE - Copyright Infringement**  
**(by Plaintiffs Mitgang, Hoffman, Dickson, Goulden and Bouton)**

39. Google incorporates by reference its answers to paragraphs 1 through 38 above as if fully restated herein.

40. Google is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 40 of the Fourth Amended Complaint that the Named Plaintiffs and the Class own a valid copyright in and to at least one Work that has been scanned by Google, and therefore denies such allegation. Google denies the remaining allegations in paragraph 40 of the Fourth Amended Complaint.

41. Google admits that it has scanned some of the literary works contained in university libraries and from other sources, and that it intends to scan additional literary works in university libraries. Google denies the remaining allegations in paragraph 41 of the Fourth Amended Complaint.

42. Google denies the allegations in paragraph 42 of the Fourth Amended Complaint.

43. Google denies the allegations in paragraph 43 of the Fourth Amended Complaint.

44. Google denies the allegations in paragraph 44 of the Fourth Amended Complaint.

**COUNT TWO - Injunctive Relief**  
**(by All Plaintiffs)**

45. Google incorporates by reference its answers to paragraphs 1 through 44 above as if fully restated herein.

46. Google admits that it has made digital scans of some of the works contained in the named libraries. Google denies the remaining allegations in paragraph 46 of the Fourth Amended Complaint.

47. Google denies the allegations in paragraph 47 of the Fourth Amended Complaint.

48. Google denies the allegations in paragraph 48 of the Fourth Amended Complaint.

49. Google denies the allegations in paragraph 49 of the Fourth Amended Complaint.

50. Google denies the allegations in paragraph 50 of the Fourth Amended Complaint.

51. Google denies the allegations in paragraph 51 of the Fourth Amended Complaint.

52. Google denies the allegations in paragraph 52 of the Fourth Amended Complaint.

**COUNT III - Declaratory Relief  
(by All Plaintiffs)**

53. Google incorporates by reference its answers to paragraphs 1 through 52 above as if fully restated herein.

54. Google denies the allegations in paragraph 54 of the Fourth Amended Complaint.

55. Google denies the allegations in paragraph 55 of the Fourth Amended Complaint.

**JURY DEMAND**

Defendant Google Inc. demands a jury trial of all issues triable by jury under applicable law.

**DEFENSES**

**FIRST DEFENSE**

The Complaint fails to state a claim upon which relief can be granted.

**SECOND DEFENSE**

The Court lacks jurisdiction over the subject matter of this action because Plaintiffs lack statutory and Article III standing to bring this action and/or because the case or controversy, if any ever existed, is now moot.

**THIRD DEFENSE**

Plaintiffs' claims and/or the remedies sought are barred by the First Amendment to the United States Constitution.

**FOURTH DEFENSE**

Plaintiffs' claims are unsuitable for class treatment pursuant to Federal Rule of Civil Procedure 23.

**FIFTH DEFENSE**

Google's use of and activities with respect to books that are subject to copyright are subject to one or more of the limitations on 17 U.S.C. § 106 set forth in 17 U.S.C. §§ 107-122.

**SIXTH DEFENSE**

Some or all of the Plaintiffs' claims are barred or subject to dismissal for failure to comply with renewal, notice, and registration requirements, and with other necessary formalities.

**SEVENTH DEFENSE**

Some or all of the copyrights on which Plaintiffs rely have been forfeited or abandoned.

**EIGHTH DEFENSE**

Some or all of Plaintiffs' works or portions thereof are not original.

**NINTH DEFENSE**

Some or all of Plaintiffs' works or portions thereof are in the public domain.

**TENTH DEFENSE**

Some or all of Plaintiffs' claims are barred by the merger doctrine.

**ELEVENTH DEFENSE**

Some or all of Plaintiffs' works or portions thereof constitute unprotectable ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries.

**TWELFTH DEFENSE**

Some or all of Plaintiffs' works or portions thereof constitute scenes a faire.



WHEREFORE, Defendant Google Inc. respectfully prays the Court as follows:

1. That the Court dismiss the Complaint;
2. That the Court deny certification of the proposed class;
3. That Plaintiffs recover nothing of Google;
4. That the Court deny Plaintiffs' request for injunctive and declaratory relief;
5. That the costs of this action, including reasonable attorneys' fees, be taxed against Plaintiffs pursuant to 17 U.S.C. § 505 or other applicable law; and
6. That the Court grant Google such other and further relief as the Court deems just and proper.

Dated: June 14, 2012

Respectfully submitted,

By: */s/ Joseph C. Gratz*

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Daralyn J. Durie (*pro hac vice*)  
ddurie@durietangri.com  
Joseph C. Gratz (*pro hac vice*)  
jgratz@durietangri.com  
DAVID MCGOWAN (*Pro Hac Vice*)  
dmcgowan@durietangri.com  
GENEVIEVE P. ROSLOFF (*Pro Hac Vice*)  
grosloff@durietangri.com  
DURIE TANGRI LLP  
217 Leidesdorff Street  
San Francisco, CA 94111  
Telephone: 415-362-6666  
Facsimile: 415-236-6300

Attorneys for Defendant Google Inc.

DURIE TANGRI LLP  
DARALYN J. DURIE (*Pro Hac Vice*)  
ddurie@durietangri.com  
JOSEPH C. GRATZ (*Pro Hac Vice*)  
jgratz@durietangri.com  
DAVID McGOWAN (*Pro Hac Vice*)  
dmcgowan@durietangri.com  
GENEVIEVE P. ROSLOFF (*Pro Hac Vice*)  
grosloff@durietangri.com  
217 Leidesdorff Street  
San Francisco, CA 94111  
Telephone: 415-362-6666  
Facsimile: 415-236-6300

Attorneys for Defendant  
Google Inc.

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., Associational  
Plaintiff, BETTY MILES, JOSEPH  
GOULDEN, and JIM BOUTON, on behalf of  
themselves and all other similarly situated,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 05 CV 8136 (DC)

**ECF Case**

**DECLARATION OF JUDITH A. CHEVALIER  
IN SUPPORT OF DEFENDANT GOOGLE INC.'S  
MOTION FOR SUMMARY JUDGMENT**

I, Judith A. Chevalier, declare as follows:

1. I am the William S. Beinecke Professor of Economics and Finance at the Yale University School of Management.
2. I have been retained by Defendant Google Inc. as an expert in this matter to assess certain economic factors relevant to the Google Books Project and the effect of such scanning and related uses on authors and consumers.
3. My expert report, which was submitted in this matter on May 4, 2012, is attached hereto as Exhibit A. The facts in that report stated on my personal knowledge are true and correct. The report also states truly and correctly my opinions in this matter, based on the facts of which I have personal knowledge and the additional information reflected in the report.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 18, 2012 in New Haven CT.

  
Judith A. Chevalier

**EXHIBIT A**



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*Expert Report of Judith A. Chevalier*

## **I. Introduction**

### **A. Background and Experience**

1. I am the William S. Beinecke Professor of Economics and Finance at the Yale University School of Management. I also hold a joint courtesy appointment at the Yale Department of Economics. I received my undergraduate degree in Economics from Yale University in 1989 and my Ph.D. in Economics from the Massachusetts Institute of Technology in 1993. I was an assistant professor in the Department of Economics at Harvard University from 1993 to 1994. I was a faculty member at the University of Chicago Graduate School of Business from 1994 to 2001, reaching the rank of full professor in 1999. I have been a faculty member at Yale University School of Management since 2001. I am a Research Associate at the National Bureau of Economic Research. From 2007 to 2009, I was the Deputy Provost for Faculty Development at Yale University.
2. At Yale University, I teach courses in competitive strategy at the MBA level including a course entitled "Technology Strategy." This course helps students understand strategic issues that arise in high technology industries. I also teach a course entitled "Business, Public Policy and the Information Economy" at the undergraduate level, although I have previously taught a version of this course at the MBA level. This course examines copyright, antitrust, and regulatory issues in telecommunications and broadcasting. At Yale University, I am also a former member and Chair of the University's Committee on Cooperative Research, a committee that oversees the University's patenting and licensing policies.
3. My research interests include corporate finance and applied industrial organization, and I have published numerous articles in these areas in the *American Economic Review*; *Journal of Political Economy*; *The Journal of Industrial Economics*; *The Journal of Law and Economics*; *The Journal of Law, Economics, & Organization*; *Quarterly Journal of Economics*; *Journal of Marketing Research*; and *The Journal of Finance*, among others. In 1999, I received the Elaine Bennett Research Prize, a prize for excellence in research by a woman economist given every two years by the Committee on the Status of Women in the Economics Profession of the American Economic Association.
4. I am a co-editor of the *RAND Journal of Economics*, a former co-editor of the *American Economic Review* and a former co-editor of *The B.E. Journal of Economic Analysis and Policy*. I have previously served as an associate editor of *The Journal of Finance*, *The Quarterly Journal of Economics*, the *Journal of Economic Perspectives*, and the *RAND Journal of Economics*, among others. I am a member of the Advisory Board of *Quantitative Marketing and Economics* and a former member of the Editorial Board of *The Journal of Industrial Economics*. I was an elected member of the Executive Committee of the American Economic Association. In 2006, I was elected to the American Academy of Arts and Sciences.

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5. My *curriculum vitae*, which is attached as Appendix A, gives more biographical details and lists my writings. Appendix B specifies the testimony that I have given in the past four years as an expert witness. Employees of Analysis Group, Inc., an economics research and consulting firm, working under my direction and supervision, have assisted me in this assignment. I am being compensated at an hourly rate of \$750 for time spent on this matter. In addition, I receive compensation based on the professional fees of Analysis Group. This compensation is not contingent upon the nature of my findings or on the outcome of this litigation.

**B. Assignment**

6. I understand that Plaintiffs, three individual authors and the Authors Guild, allege that Google, Inc. (“Google”) has infringed the Plaintiffs’ copyrights by scanning and indexing several million books as part of its Google Books project (“Google Books”), as well as by making certain related uses of those works, such as displaying snippets. I have been asked by counsel for Google to assess certain economic factors relevant to the Google Books Project and the effect of such scanning and related uses on authors and consumers.

**C. Summary of Conclusions**

7. I conclude, based on the evidence I have seen, that: (1) Google Books is a new good – it provides benefits to consumers that previous goods did not; (2) Google Books provides value to authors; (3) economic analysis provides no reason to believe that Google Books has superseded any potential market for books or licenses to scan and index books.
8. My opinions are contained in this report. In reaching these opinions, I have considered various materials, including depositions and documents produced in discovery, articles, and other public documents and data. The list of sources I have considered in preparing this report is attached as Appendix C. My work in this matter is ongoing, and I may amend or supplement this report in light of new information, additional discovery, or expert testimony and opinion in this case.

**II. The Google Books Project**

9. Google Books is a search tool developed by Google. Users of Google Books enter search terms into Google’s search engine; Google Books displays certain information about books with content that contains a match for that search term.<sup>1</sup> For any book that is part of the Google Books project, the user can see general information about the book – its title, author, publisher, date of publication, etc. The user is also provided with links to online booksellers and libraries carrying the book.<sup>2</sup>

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<sup>1</sup> See <http://books.google.com/googlebooks/about.html>, accessed April 30, 2012. See also Deposition of Daniel Clancy, February 10, 2012, pp. 122-123.

<sup>2</sup> Deposition of Daniel Clancy, February 10, 2012, p. 159.

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10. If a book has been determined to be in the public domain, Google Books provides the entire text of the book (“full view”) of that book and users can download a PDF of the book.<sup>3</sup> For books not in the public domain, if the author or publisher has given Google permission, users can see a limited number of pages from the book.<sup>4</sup> In other instances, Google Books provides only a “snippet view” – a small amount of text (about one-eighth of a page)<sup>5</sup> that displays the search term in context.<sup>6</sup> Google provides a snippet view for works that have not been confirmed to be in the public domain and for which the author or publisher has not requested that the book be removed from snippet view.<sup>7</sup> Finally, for some books, Google Books provides no preview;<sup>8</sup> these include books whose authors have requested that no preview be provided, as well as reference books and books of poetry.<sup>9</sup>
11. Google began developing Google Books in 2004 (at the time, it was known as “Google Print”); Google initially partnered with University of Michigan, Harvard University, Stanford University, Oxford University, and the New York Public Library to scan their collections (or portions thereof).<sup>10</sup> Partners today also include: University of California, Columbia University, Princeton University, the Austrian National Library, Ghent University Library, and Keio University Library.<sup>11</sup>
12. Books indexed in Google Books come from two primary sources – the “Partner Program” and the “Library Project.” Under the Partner Program, publishers or authors typically authorize Google to display multiple pages from a book.<sup>12</sup> More than 45,000 publishers participate in the Partner Program.<sup>13</sup>
13. The Library Project is the means by which Google has received millions of books from university and public libraries, which it scans and indexes.<sup>14</sup> Google returns the physical

<sup>3</sup> See <http://books.google.com/googlebooks/screenshots.html>, accessed April 30, 2012.

<sup>4</sup> See <http://books.google.com/googlebooks/screenshots.html>, accessed April 30, 2012.

<sup>5</sup> Declaration of Daniel Clancy in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, February 7, 2012, p. 2.

<sup>6</sup> See <http://books.google.com/googlebooks/screenshots.html>, accessed April 30, 2012.

<sup>7</sup> Defendant Google Inc.’s Supplemental Narrative Responses and Objections to Plaintiffs’ Second Request for Production of Documents and Things, pp. 6-7.

<sup>8</sup> See <http://books.google.com/googlebooks/screenshots.html>, accessed April 30, 2012.

<sup>9</sup> Deposition of Daniel Clancy, February 10, 2012, pp. 90, 188.

<sup>10</sup> Declaration of Daniel Clancy in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, February 7, 2012, p. 2; and Deposition of Daniel Clancy, February 10, 2012, p. 19. See also <http://books.google.com/googlebooks/history.html>, accessed April 30, 2012.

<sup>11</sup> See <http://books.google.com/googlebooks/partners.html>, accessed April 30, 2012.

<sup>12</sup> Declaration of Daniel Clancy in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, February 7, 2012, pp. 2-3. See also <http://books.google.com/googlebooks/screenshots.html>, accessed April 30, 2012.

<sup>13</sup> Declaration of Daniel Clancy in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, February 7, 2012, p. 3.

<sup>14</sup> Deposition of Daniel Clancy, February 10, 2012, pp. 17-18.

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books to the library; each library may also download a digital copy of each work it provided.<sup>15</sup>

14. To date, more than 20 million books have been scanned as part of Google Books.<sup>16</sup> Over 2.5 million books are included in Google Books through the Partner Program;<sup>17</sup> the remainder is included in Google Books through the Library Project.<sup>18</sup> Users of Google Books can see snippets in English for more than four million of these books.<sup>19</sup>

### III. Google Books is a “New Good”

#### A. The Introduction of Google Books

15. There is basic agreement in the field of economics that the introduction of new goods is an important contributor to improved consumer well-being. It is also generally agreed that a truly “new good” is one for which no close substitute is already available in the marketplace.<sup>20</sup> In other words, a central element that makes a good “new” is its ability to “satisfy previously unmet, or at the least badly met, needs.”<sup>21</sup> The ability of new goods to address previously unmet needs improves the well-being of society overall; this arises from the fact that existing goods are poor substitutes for new ones.

<sup>15</sup> Defendant Google Inc.’s Supplemental Narrative Responses and Objections to Plaintiffs’ Second Request for Production of Documents and Things, December 9, 2011, p. 8; Deposition of Daniel Clancy, February 10, 2012, p. 35; and Deposition of Stephane Jaskiewicz, February 14, 2012, pp. 63-65.

<sup>16</sup> Declaration of Daniel Clancy in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, February 7, 2012, p. 2.

<sup>17</sup> Declaration of Daniel Clancy in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, February 7, 2012, p. 3.

<sup>18</sup> Deposition of Daniel Clancy, February 10, 2012, pp. 17-18.

<sup>19</sup> Declaration of Daniel Clancy in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, February 7, 2012, p. 2.

<sup>20</sup> See, for example, Timothy Bresnahan and Robert Gordon, “Introduction,” *The Economics of New Goods*, eds. Timothy Bresnahan and Robert Gordon (University of Chicago Press, 1996): “An alternative view stresses the differences rather than the similarities of the new good. Automobiles and horses, or automobiles and railroads, are such poor substitutes that we should think of a new item in the utility function – automobile services.” p. 14; Jerry Hausman, “Valuation of New Goods under Perfect and Imperfect Competition,” *The Economics of New Goods*, eds. Timothy F. Bresnahan and Robert J. Gordon (University of Chicago Press, 1996): “...the appropriate measure of distance between two goods is really their cross-price elasticities, which relate to what extent consumers find the two goods to be close substitutes,” pp. 229-230; and Charles Schultze and Christopher Mackie, *At What Price?: Conceptualizing and Measuring Cost-of-Living and Price Indexes*, eds. Charles Schultze and Christopher Mackie (The National Academies Press, 2002): “Products also appear that are novel to the point that there is no place in the CPI item structure to accommodate them: cell phones, home computers, and VCRs are examples. These are products whose characteristics would be difficult to ‘repackage’... into existing goods and services no matter how broadly definitions are drawn,” pp. 155-156.

<sup>21</sup> Timothy Bresnahan and Robert Gordon, “Introduction,” *The Economics of New Goods*, eds. Timothy Bresnahan and Robert Gordon (University of Chicago Press, 1996), p. 5. While there is basic agreement on this principle, there is no precise dividing line between a new good and an improved version of an old good. See, for example, Charles Schultze and Christopher Mackie, *At What Price?: Conceptualizing and Measuring Cost-of-Living and Price Indexes*, eds. Charles Schultze and Christopher Mackie (The National Academies Press, 2002), pp. 159-160. See also Timothy Bresnahan, “The Apple-Cinnamon Cheerios War: Valuing New Goods, Identifying Market Power, and Economic Measurement,” Unpublished.

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16. Economists often model the introduction of a new good by describing a world in which the new good was always available in theory, but was only available at a prohibitively high price – a price at which no one would be willing to buy the good (often called the “choke price”).<sup>22</sup> Once a firm is able to offer the new good at a price that is not prohibitively high (i.e., at a price for which there will be positive demand and which makes sense, on the whole, for the firm), the firm will then introduce that good into the market.<sup>23</sup>
17. Therefore, a useful way to think about the introduction of Google Books is to employ the same perspective that economists use to measure the benefits from the introduction of a new good. Prior to the introduction of Google Books, some of the benefits provided were theoretically available to some users in a limited way, but likely at a prohibitive cost.<sup>24</sup> For example, consider a consumer who was interested in finding economics books that use the term “choke price.” Such a consumer could go to a very well-equipped library, and sift through all books related to economics in order to find books using the term “choke price.” As part of this search, the consumer would have to decide what books to look through. For example, the consumer could restrict her search to general economics textbooks or expand it to other, more specialized works. More comprehensive searching would take more time. Thus, the benefits of Google Books were partially available to a limited group of consumers (those with access to an excellent library), but the cost of obtaining those partial benefits was prohibitive. The user would have to spend a significant amount of time looking through many books, and much of that time would

<sup>22</sup> See, for example, Jerry Hausman, “Valuation of New Goods under Perfect and Imperfect Competition,” in *The Economics of New Goods*, eds. Timothy Bresnahan and Robert Gordon (University of Chicago Press, 1996): “The correct price to use for the good in the preintroduction period is the ‘virtual’ price which sets demand to zero.” p. 210; and Austan Goolsbee, “Subsidies, the Value of Broadband, and the Importance of Fixed Costs,” in *Broadband: Should We Regulate High-Speed Internet Access?*, eds. Robert Crandall and James Alleman (Brookings, 2002): “While this type of analysis is straight forward in principle, the problem in practice is that one typically observes data that are rather far removed from the ‘choke’ price at which demand would go to zero,” p. 279.

<sup>23</sup> The consumer surplus created from the introduction of the new good is modeled as equivalent to the consumer surplus created when the price of the good is reduced from the choke price to the market price.

<sup>24</sup> Google Books was not the first book scanning and digitization project to be launched. For example, the Million Book Project, launched in 2000 under the direction of personnel at Carnegie Mellon University, was a cooperative project with universities in China and India, the Biblioteca Alexandrina, and other partners. The project made scanned books accessible at websites in India and China. Other digitization projects include the Library of Congress’s American Memory project which scanned historical documents, photographs, sound recordings, moving pictures, books, pamphlets, and maps; and Project Gutenberg, a project that involved keying in texts. (Gloriana St. Clair, “The Million Book Project in Relation to Google,” *Journal of Library Administration*, 2008, 47:1-2, pp. 151-163.) The key difference between Google Books and past digitization projects relates to scale. Google Books is much more comprehensive and includes over 20 million books, whereas the Million Book Project, for example, included approximately 1.4 million books. The comprehensiveness of Google Books also makes it an effective search index, setting it apart from past digitization projects which primarily provided consumers an alternate means of accessing a book. Overall, the scale and accessibility of Google Books makes it much more valuable to consumers than past digitization efforts. To the extent that payments were made to authors whose books appeared in these earlier digitization efforts, this occurred, to my knowledge, only under circumstances where the full text of the work was available to users. See also Expert Report of Dr. Gloriana St. Clair, May 3, 2012, ¶¶ 5, 10-12, 25.

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- presumably be wasted because, for each book reviewed, the book might or might not refer to the term, which might or might not be indexed in a book where it did appear.<sup>25</sup> In contrast, searching for “choke price” in Google Books reveals, for example, that the concept is discussed in Austan Goolsbee’s chapter entitled “Subsidies and Broadband Deployment” in *Broadband: Should We Regulate High-Speed Internet Access* (James H. Alleman and Robert W. Crandall, editors), in addition to textbooks where one would expect to find a discussion of choke price.<sup>26</sup>
18. The introduction of Google Books to anyone with a computer and an internet connection provided the benefit of being able to find books efficiently using particular search terms chosen by the user. It thereby dramatically lowered the search costs of finding books. This point can be seen by comparing searches within Google Books to traditional means of finding books. Consumers have long browsed books in bookstores, for example, and could flip through the text of a book on a shelf. But no given bookstore could display more than a small fraction of the available books on a subject.<sup>27</sup>
19. Libraries could hold more books than a typical bookstore. Historically, libraries maintained index card catalogues of books. These cards recorded some basic information about a book, but did not allow a user to search its text. Later, widespread adoption of computers allowed library users to search words inside a title and subject heading, as well as some other data regarding the book. Again, however, users could not search the text of a book and could not necessarily choose the search terms that best suited their needs.<sup>28</sup> By contrast, Google Books effectively indexes each book using every word that appears in the book and allows users to search books according to their interests rather than a specification provided by someone else. By doing this, Google brought a new good, a text-searchable database of 20 million books, into being.<sup>29</sup>

<sup>25</sup> Expert Report of Dr. Gloriana St. Clair, May 3, 2012, ¶¶ 15, 40.

<sup>26</sup> A search for “choke price” on Google Books (with quotation marks) returns approximately 2,700 results, in less than one second. While not every result will relate specifically to economics, this nevertheless represents a significant time saving compared to older methods of search. [https://www.google.com/search?q=%22choke+price%22&btnG=Search+Books&tbn=bks&tbo=1#q=%22choke+price%22&hl=en&tbo=1&tbn=bks&psj=1&ei=CF6hT5mgIo6i8gTe-cCECA&start=0&sa=N&bav=on.2,or.r\\_gc.r\\_pw.r\\_qf.,cf.osb&fp=a9ec1c0f3e4f750d&biw=1024&bih=1167](https://www.google.com/search?q=%22choke+price%22&btnG=Search+Books&tbn=bks&tbo=1#q=%22choke+price%22&hl=en&tbo=1&tbn=bks&psj=1&ei=CF6hT5mgIo6i8gTe-cCECA&start=0&sa=N&bav=on.2,or.r_gc.r_pw.r_qf.,cf.osb&fp=a9ec1c0f3e4f750d&biw=1024&bih=1167), search performed on May 2, 2012.

<sup>27</sup> Expert Report of Professor Albert N. Greco, May 3, 2012, ¶ 13; and Expert Report of Bruce S. Harris, May 3, 2012, ¶ 9.

<sup>28</sup> Deposition of Paul Courant, April 23, 2012, Rough Transcript, p. 92; Deposition of Paul Aiken, April 19, 2012, Rough Transcript, pp. 114-115; and Expert Report of Dr. Gloriana St. Clair, May 3, 2012, ¶¶ 40-44. It is important to note that the search and index capabilities that define Google Books are feasible only through the scanning and digitization of the underlying book in its entirety. In order to present results that are relevant to each user’s search, the entire book must be scanned and digitized. Therefore, while it is true that an input to Google Books is the scanned, digitized book in its entirety, the output, which represents the actual use of Google Books, employs only small portions of the book, at most.

<sup>29</sup> Google accomplished this in less than 10 years. By contrast, University of Michigan estimated that it would take 900 years to digitize its collection of 8 to 9 million works. See Deposition of Paul Courant, April 23, 2012, Rough Transcript, pp. 90, 97.

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20. Google Books serves a different purpose than each of the constituent works that have been scanned and indexed as part of Google Books. Each constituent work serves to provide the reader content that expresses an author's ideas. Google Books, by contrast, is a text-searchable database that provides a means of searching for and identifying the book or books that best suit a reader's needs. Put differently, the complete collection of indexed terms based on the universe of scanned materials can hardly serve as a substitute for any individual book, and no full book can come close to providing the information incorporated in the complete indexed collection.

**B. The Effect of Google Books on Consumers**

21. As discussed above, a new good creates benefits that were not available with pre-existing goods. Here, I discuss in more detail the nature of those benefits. Most importantly from the consumer's point of view, Google Books reduces the search costs associated with finding relevant content.
22. Economists generally distinguish between direct costs and indirect costs in a transaction. Direct costs (or the "sticker price") refer to the cost of the item itself, while indirect costs can include search costs,<sup>30</sup> transaction costs,<sup>31</sup> or other ancillary costs that one or both parties incur in order to effect the transaction. In some circumstances, these indirect costs can be fairly insignificant; the purchase decision will depend exclusively or largely on the direct cost. In other circumstances, however, these indirect costs can be quite significant, so much so that their presence leads to different consumer choices than would be made in the absence of these indirect costs.<sup>32</sup>
23. Search costs can be particularly significant in the context of differentiated products such as books. A consumer often needs to expend significant time and effort in order to identify and locate the content that best matches her needs and interests.<sup>33</sup> Even if the direct cost of a book is one that the consumer is willing to pay, the search costs associated with identifying and locating the right books may be prohibitively high for the consumer. A consumer interested in the economics of new goods might be willing to pay the sticker

<sup>30</sup> Search costs refer to the value of time expended as well as other costs associated with identifying and locating a desired product. For example, a prospective employer may spend significant time at job fairs meeting prospective employees and may also advertise in a newspaper.

<sup>31</sup> Transaction costs refer to costs incurred in order to effect a desired transaction. These can include, for example, the time spent entering personal and credit card information in order to purchase items online. Consumers may choose one online vendor over another if their information is on file with one vendor, but not the other.

<sup>32</sup> See, for example, Erik Brynjolfsson, Yu (Jeffrey) Hu and Duncan Simester, "Goodbye Pareto Principle, Hello Long Tail: The Effect of Search Costs on the Concentration of Product Sales," *Management Science*, 2011, 57(8). The authors report: "[W]e find consumers' usage of Internet search and discovery tools, such as recommendation engines, are associated with an increase in the share of niche products. We conclude that the Internet's Long Tail is not solely due to the increase in product selection but may also partly reflect lower search costs on the Internet. If the relationships we uncover persist, the underlying trends in technology portend an ongoing shift in the distribution of product sales."

<sup>33</sup> See Expert Report of Professor Albert N. Greco, May 3, 2012, ¶ 12; Expert Report of Bruce S. Harris, May 3, 2012, ¶ 8; and Expert Report of Dr. Gloriana St. Clair, May 3, 2012, ¶ 7.

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- price for any book that extensively uses the term “choke price,” for example, but be unwilling (or unable) to spend hours in a bookstore or library finding the books that meet her needs.
24. Google Books has decreased the costs associated with identifying the content that best fits a consumer’s needs. As a result, Google Books has enabled increased dissemination of information and increased productivity.<sup>34</sup> Increased productivity may yield other tangible benefits such as accelerated progress in research and development. All of these factors result in increased social welfare.
  25. Another benefit of Google Books relates to its ability to improve the match between the consumer’s needs and the available content. The snippets provided by Google Books can be viewed as a form of “informational” advertising that gives users the ability to find content that is best-suited to their needs, and for authors to reach those users.
  26. As early as Alfred Marshall (1920), economists have examined the role of advertising in consumer markets. Marshall identified “constructive” advertising as advertising that conveys useful information to consumers in advance of a purchase.<sup>35</sup> Later work has developed models of advertising in which the role of advertising is to inform consumers about the existence of a product or its characteristics.<sup>36</sup> Under these circumstances, while advertising can benefit the seller through increased revenues, advertising also benefits the consumer, because advertising leads consumers to products that improve the consumer’s utility.
  27. Empirical studies have demonstrated that many advertisements inform the consumer about the existence of a product and its characteristics. This allows the consumer to determine whether the advertised bundle of characteristics meets the consumer’s needs.

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<sup>34</sup> Deposition of Paul Aiken, April 19, 2012, Rough Transcript, p. 43; and Expert Report of Dr. Gloriana St. Clair, May 3, 2012 ¶¶ 7, 44.

<sup>35</sup> Alfred Marshall, *Industry and Trade*, MacMillan and Company, 1920.

<sup>36</sup> See, for example, George Stigler, “The Economics of Information,” *Journal of Political Economy*, 1961, 69(3), pp. 213-225; Phillip Nelson, “Advertising as Information,” *Journal of Political Economy*, 1974, 82(4), pp. 729-754; and Gerard Butters, “Equilibrium Distributions of Sales and Advertising Prices,” *The Review of Economic Studies*, 1977, 44(3), pp. 465-491. See also Gene Grossman and Carl Shapiro, “Informative Advertising with Differentiated Products,” *The Review of Economic Studies*, 1984, 51(1), pp. 63-81: “...advertising does serve a useful social function; it informs customers about brands’ characteristics, and improves the matching of consumers and products,” p.77. Erdem and Keane (1996) develop a model in which consumers who were exposed to more advertisements had better information and were therefore more likely to persist with the most suitable alternative (Tulin Erdem and Michael Keane, “Decision-Making under Uncertainty: Capturing Dynamic Brand Choice Processes in Turbulent Consumer Goods Markets,” *Marketing Science*, 1996, 15(1), pp. 1-20.) Using data on 150 advertisements of Yoplait yogurt, Akerberg (2001) exploits variation in advertising effectiveness across consumers with different levels of experience about a product to show that advertising that provides information about inherent brand characteristics primarily affects inexperienced consumers. (Daniel Akerberg, “Empirically Distinguishing Informative and Prestige Effects of Advertising,” *RAND Journal of Economics*, 2001, 32(2), pp. 316-333.)

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Exposure to advertising can improve the matching of consumers and products in a variety of industries.<sup>37</sup>

28. Google Books, therefore, functions like Marshall's "constructive" advertising, in that it informs a consumer about the existence of specific books that meet the consumer's needs. Of course, unlike most forms of advertising, in which advertising messages are "pushed" to consumers, consumers affirmatively choose to undertake a search on Google to learn about content relevant to that consumer's particular interests and they are able to use search terms that they choose rather than terms chosen for them. Thus, Google Books can also lower a consumer's search costs in finding a particular book.
29. In this section, I have emphasized the benefit of Google Books to consumers. However, as I discuss in more detail below, authors and publishers also generally benefit from the existence of this advertising channel and from the lowering of search costs for consumers.

### C. Summary

30. Google Books is, therefore, clearly a "new" good. Google Books provides consumers a means of searching the entire text of works that are archived in the collection in order to obtain information about the most relevant works for the consumer. Google Books as a new good is related to, but distinct from, pre-existing goods. It is more comprehensive and more accessible than previous indexing systems such as card catalogues or computerized keyword search, and, unlike keyword search, it allows consumers to search based on their interests rather than on criteria or descriptions created by others. This new good creates benefits to consumers that were not previously available.

## IV. The Effect of Google Books on Authors

31. In the previous section, I discussed the welfare benefits to consumers of Google Books. In this section, I discuss the effect of the introduction of Google Books on authors. To analyze this effect, I examine whether Google Books is a complement to the purchase of books, or whether, by contrast, Google Books serves as a substitute for books. In addition, I consider whether, in the absence of Google Books, other markets might have arisen wherein authors could accrue rents that they do not currently accrue.

### A. Google Books is a Complement – Not a Substitute – to the Purchase of a Book

32. A major challenge faced by the author or publisher of a book is "getting noticed."<sup>38</sup> There are more books in print than any consumer could possibly read or use and more

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<sup>37</sup> For example, Akerberg (2001) empirically examines advertising exposures and grocery purchases and demonstrates that the advertising in that market's primary effect was to inform consumers of the product's existence. Anand and Shachar (2011) find that exposure to informational advertising in the form of television previews improves the match between consumers and their preferred network television shows. (Bharat Anand and Ron Shachar, "Advertising, the Matchmaker," *RAND Journal of Economics*, 2011, 42(2), pp. 205-245).

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than any physical bookstore could stock. The number of books released each year has expanded,<sup>39</sup> and some consumers presumably consider other educational or entertainment options when deciding whether to search for and possibly purchase a book.

33. As Mr. Bruce Harris, a publishing strategist and former President of trade sales and marketing at Random House explains, publishers and authors recognize that, in order for a book to have a market, consumers must first find or notice that book.<sup>40</sup> A major role of the publisher is to attempt to achieve consumer awareness of the publisher's books. Consequently, publishers employ many tools to generate publicity about the book and to get the book noticed. These include: provision of excerpts (often longer than the typical snippets at issue in this litigation) to publications and media outlets for use in articles and book reviews, provision of "blads" (an acronym for "book layout and design") to booksellers and consumers, as well as substantial excerpts of forthcoming books on a stand-alone basis or bundled with other promotional materials.<sup>41</sup>
34. I understand that it is Mr. Harris' view that the excerpts or snippets provided by Google Books in response to a user's search bear a resemblance to these mechanisms that consumers may use to "find" a book. Whether a more extensive sample of text is accessible (as in the case of the books that enter Google Books via the Partner Program) or whether snippets are available, Google Books makes it easier for a book to get noticed, which may increase demand for that book and benefit the author.<sup>42</sup>
35. The capacity of Google Books to help authors get noticed is echoed by deposition testimony provided in this case. Eric Zohn of William Morris Endeavor (WME), for example, testified that "if people are searching for information and it becomes easy to find your product in a very, very, very, very crowded marketplace where there are -- I don't even know the number of how many books are published every year, year after year after year, I think any tool that helps readers or buyers find your product above someone else's is beneficial."<sup>43</sup>

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<sup>38</sup> Expert Report of Bruce S. Harris, May 3, 2012, ¶ 7; and Expert Report of Professor Albert N. Greco, May 3, 2012, ¶ 12.

<sup>39</sup> See, for example, "Print Isn't Dead, Says Bowker's Annual Book Production Report," Press Release, May 18, 2011, available at [http://www.bowker.com/en-US/aboutus/press\\_room/2011/pr\\_05182011.shtml](http://www.bowker.com/en-US/aboutus/press_room/2011/pr_05182011.shtml), accessed May 2, 2012. See also "European Book Publishing Statistics," December 7, 2010, available at <http://www.fep-fee.be/documents/EUROPEANBOOKPUBLISHINGSTATISTICS2009websiteIEI.pdf>, accessed April 30, 2012.

<sup>40</sup> Expert Report of Bruce S. Harris, May 3, 2012, ¶¶ 7, 14; and Interview with Mr. Bruce S. Harris, April 10, 2012.

<sup>41</sup> Expert Report of Bruce S. Harris, May 3, 2012, ¶¶ 10-14; and Interview with Mr. Bruce S. Harris, April 10, 2012.

<sup>42</sup> Expert Report of Bruce S. Harris, May 3, 2012, ¶¶ 14, 16; and Interview with Mr. Bruce S. Harris, April 10, 2012.

<sup>43</sup> Deposition of Eric Zohn, April 13, 2012, p. 19. Paul Aiken, Executive Director of the Authors Guild, also testified that snippets provided by Google Books may be helpful to consumers in finding books. See Deposition of Paul Aiken, April 19, 2012, Rough Transcript, p. 120.

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36. Further evidence of the benefit to authors of Google Books can be seen by the success of the Google Partner Program, which has met the market test. That is, there is market-based evidence that market participants – authors and publishers – see value in Google Books, so much so that through the Partner Program, they have opted to have even larger excerpts than snippets available for consumers to read. From an economic perspective, the fact that publishers and authors participate in the program and provide such excerpts is evidence that they expect their participation in Google Books to help authors get noticed and to increase sales.
37. In fact, all of the top publishers in the U.S. have become partners with Google Books. According to Nielsen, a media industry research firm, the top publishers in the U.S. in 2011 were: Random House, Penguin Group, HarperCollins, Simon & Schuster, Hachette Book Group, Macmillan, Scholastic, Perseus, John Wiley and Sons, Harlequin Books, Houghton Mifflin Harcourt, Workman, Abrams, Kensington Publishing, and WW Norton. These publishers accounted for over 70 percent of all books sold in the U.S. in 2011.<sup>44</sup> All participate in the Partner Program.<sup>45</sup>
38. There is also anecdotal evidence that inclusion of books in Google Books has resulted in greater sales of those books. Publishers have noted increased sales of backlisted books.<sup>46</sup> Authors have also noted increased awareness and sales of their books upon inclusion in Google Books.<sup>47</sup>
39. I have discussed the demonstrated eagerness of publishers to embrace Google Books through the Partner Program. However, further market-based evidence that Google Books benefits authors and publishers derives from the fact that authors and publishers are eager, in a broad array of contexts, to provide excerpts of their works to readers, free of charge. The simplest example of this pre-dates the internet technologies that I discuss below. When book sales took place largely through physical bookstores, consumers were almost always allowed (indeed encouraged) to sample the books before buying by inspecting the book as displayed in the bookstore.<sup>48</sup> In general, the amount of time that consumers spent reading the book before buying was not limited by publishers or authors.

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<sup>44</sup> “U.S. Top 15 Publisher Sales Data,” Nielsen BookScan Report, received April 26, 2012.

<sup>45</sup> The popularity and success of the Partner Program was also a topic of testimony by Google employee Thomas Turvey. He testified that, in all, 45,000 publishers have joined the Partner Program, and that the number of partners continues to grow. See Deposition of Thomas Turvey, February 17, 2012, p. 33. This fact is further evidence that Google Books is beneficial to authors.

<sup>46</sup> For example, Edward Crutchley, Book Sales Director at Blackwell Publishing noted that “[a] 1999 Blackwell’s title, *Metaphysics: An Anthology*, has had 2,583 page views and 597 ‘buy this book’ click-throughs since it became part of the program” and the “[t]he high rate of ‘buy this book’ clicks is translating into sales for our deep backlist.” Evan Schnittman of Oxford University Press also noted an increase in sales: “We have seen overall traffic to our site increase, backlist sales rise, and we’ve acquired nearly 4,000 new direct book customers for free since the program launched.” See <http://books.google.com/intl/en/googlebooks/thoughts.html>, accessed April 17, 2012.

<sup>47</sup> For example, Richard Lowry, author of *The Gulf War Chronicles*, observed that after his book first appeared in Google Books, the sales ranking of his book on the Barnes & Noble index increased by 85 percent. See [http://books.google.com/googlebooks/author\\_lowry.html](http://books.google.com/googlebooks/author_lowry.html), accessed April 30, 2012.

<sup>48</sup> Expert Report of Bruce S. Harris, May 3, 2012, ¶ 15.

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Indeed, in more recent years, the location of coffee shops within bookstores appears to encourage consumers to sample a book extensively before buying. Thus, searching inside the book was always feasible, albeit limited to the stock of books in the bookstore and the time that the consumer had to spend there.

40. As consumers have turned to buying books online and downloading digital books as their primary means of consumption, publishers and internet retailers have created opportunities for consumers to sample excerpts of books.<sup>49</sup> Specific evidence that authors expect to benefit from the provision of excerpts to readers can be seen in the success of Amazon's "Search Inside The Book" program. "Search Inside The Book" allows users to search the full text of certain books for specific search terms and to view excerpts of the book that contain the search term.<sup>50</sup>
41. Many of the top U.S. publishers discussed above also use Amazon's "Search Inside The Book" feature for books that they publish. The fact that publishers and authors voluntarily provide extensive on-line access to users suggests that publishers and authors expect, on net, that doing so will help authors get noticed and provide a positive return. This is further market-based evidence that providing readers with excerpts of books helps to sell books.
42. In fact, Amazon reported that following the introduction of its "Search Inside The Book" program, sales of books with the "Search Inside The Book" capability increased by nine percent, relative to books without the "Search Inside The Book" capability.<sup>51</sup> Frank Urbanowski, Director of MIT Press, observed that the increased accessibility to backlist titles through the internet had resulted in a 12 percent increase in sales of these titles.<sup>52</sup> Similarly, Nora Rawlinson, the editor of *Publishers Weekly*, noted: "Publishers are finding that books on their backlists are suddenly selling well. Bookstores are great for browsing but they are difficult places to find a specific title...The Internet is providing access for people who just can't find the book they are looking for in a store."<sup>53</sup>
43. The benefits to authors of providing users the ability to read excerpts of books is also evidenced by the structure of the "Back In Print" program which is provided by iUniverse and promoted by the Authors Guild. Under the "Back in Print" program, authors provide a hard copy of their out-of-print book to iUniverse, which digitizes the book and

<sup>49</sup> Expert Report of Bruce S. Harris, May 3, 2012 ¶ 13; Interview with Mr. Bruce S. Harris, April 10, 2012; Expert Report of Professor Albert N. Greco, May 3, 2012, ¶ 14; and Deposition of Paul Aiken, April 19, 2012, Rough Transcript, pp. 145-146.

<sup>50</sup> See <http://www.amazon.com/Search-Inside-Book-Books/b?ie=UTF8&node=10197021>, accessed May 4, 2012.

<sup>51</sup> "Amazon.com Announces Sales Impact from New Search Inside the Book Feature," October 30, 2003, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irolnewsArticle&ID=502769&highlight=>, accessed April 30, 2012.

<sup>52</sup> Professional Publishing Report, "University Presses Credit Internet For Increased Sales," 1999, 3(2).

<sup>53</sup> Michael Lyster, "Printed Words Get Redefined In Digital Age," *Investor's Business Daily*, Computers and Technology Section, Page A6, June 2, 1999.

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facilitates the production of new, print-on-demand hard copies.<sup>54</sup> The Authors Guild recommends that authors participating in the “Back In Print” program should make the first chapter of the book available for browsing online, because it “believe[s] that allowing a book to be browsed in this way promotes the sale of the book.”<sup>55</sup>

44. All these observations about Google Books, Amazon’s “Search Inside The Book,” and iUniverse, are consistent with what economic theory would predict. Google Books is a search tool that gives consumers a means of identifying the book content that best suits their needs and interests. Economic theory predicts that technologies and processes that lead to better matches between buyers and sellers will, in general, lead to increased revenues (lower search costs lead to more search and better search). As a matter of economics, we would also expect that when a better match can be made between buyers and sellers, sellers will be able to sell more goods and command a higher price for the good. That is, a consumer is willing to pay more for a book that the consumer understands contains exactly the material (or the aesthetic experience) that the consumer is seeking than the consumer is willing to pay for a book that the consumer is uncertain about, or understands is an imperfect fit.<sup>56</sup>
45. I have described a number of mechanisms through which publishers and authors affirmatively choose to provide snippets and samples of book content to consumers in order to drive sales of those books. As I explained, Google Books also offers sampling opportunities that publishers and authors have found to be valuable. Some of the sampling methodologies that I have discussed (such as Amazon’s “Search Inside The Book”) are, in part, a response to a change in the way at least some consumers buy books.<sup>57</sup> Mechanisms like “Search Inside The Book” and the Google Partner Program have been embraced by publishers. These are not only a means of improving upon the traditional within-store browsing experience, they also provide mechanisms for promoting books beyond those that would have been stocked by any or many traditional physical books.
46. A related benefit of the search capability of Google Books is its ability to increase interest in and sales of books that may be relatively unknown, rare, or out-of-print. Research on the effect of the internet supports the theory of a “long tail” or the creation of marketplaces where buyers and sellers, who otherwise would not find each other, can meet.<sup>58</sup> I expect that Google Books has the same effect.

<sup>54</sup> Deposition of Paul Aiken, April 19, 2012, Rough Transcript, pp. 172 – 173.

<sup>55</sup> Deposition of Paul Aiken, April 19, 2012, Rough Transcript, p. 175.

<sup>56</sup> For example, Erdem et al. (2007) use Nielsen scanner data on various consumer experience goods to show that advertising raises consumers’ willingness to pay for a brand. (Tulin Erdem, Michael Keane and Baohong Sun, “The Impact of Advertising on Consumer Price Sensitivity in Experience Goods Markets,” *Quantitative Marketing and Economics*, 2007, 6 (2), pp. 139-176.

<sup>57</sup> Expert Report of Bruce S. Harris, May 3, 2012, ¶ 9.

<sup>58</sup> For a discussion of the “long tail” in the popular media, see, for example, Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More*, Hyperion, 2006; and Chris Anderson, “The Long Tail,” *Wired*, October 2004: “What’s really amazing about the Long Tail is the sheer size of it. Combine enough

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47. While I do find substantial evidence that Google Books is a complement to the purchase of a book and thus, should stimulate book sales, I have not found evidence that Google Books searches are a substitute for the purchase of books. That is to say, there is no reason to expect that authors have actually lost sales as a result of Google Books. Furthermore, I have seen no evidence that the snippets provided by Google Books – which are shorter than excerpts often voluntarily provided by publishers – have replaced sales of the underlying work.<sup>59</sup> On the basis of the discussion above, I conclude that Google Books is a complement to the underlying books, and would therefore be expected to increase sales of the underlying books. I conclude that Google Books benefits authors.

**B. Had Google Not Developed Google Books, It is Likely that No Alternative Market Would Have Arisen**

48. A related question to the one discussed above is whether, in the absence of Google Books, a market might have arisen in which authors stood to benefit in ways that they do not currently. I understand, in particular, that Plaintiffs argue that, were it not for Google Books, a market could have arisen in which firms would compete for rights to scan and index books; firms would pay authors for the right to scan and index their works, and perhaps display snippets; and any rents that would accrue (say, from advertising revenue or click-through royalties) would be shared with the author.
49. The underlying premise of any such hypothetical market runs counter to the basic economics of this industry outlined above – there is no reason to expect that a market would arise between copyright holders (as sellers) and Google (as the buyer), when, as discussed above, it is the copyright holder who is benefiting from the use of the copyrighted material.<sup>60</sup> For example, as discussed above, Amazon does not pay rights holders for allowing their books to be searched via the “Search Inside The Book” program, yet authors and publishers opt to allow books to be searched and they do so without payment.<sup>61 62</sup> In contrast to this evidence of market participants transacting to

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non/hits on the Long Tail and you've got a market bigger than the hits. Take books: The average Barnes & Noble carries 130,000 titles. Yet more than half of Amazon's book sales come from outside its top 130,000 titles. Consider the implication: If the Amazon statistics are any guide, the market for books that are not even sold in the average bookstore is larger than the market for those that are...” For academic research on the “long tail,” see, for example, Erik Brynjolfsson, Yu (Jeffrey) Hu, and Duncan Simester, “Goodbye Pareto Principle, Hello Long Tail: The Effect of Search Costs on the Concentration of Product Sales,” *Management Science*, 2011, 57(8): “The Internet channel’s ability to allow consumers to acquire product information with greater convenience and at lower costs leads to increased demand for niche products. Many offline book shoppers do not search deeply, simply because of the inconvenience of locating a niche product in a big-box store with thousands of products on its shelves;” and Anita Elberse and Felix Oberholzer-Gee, “Superstars and Underdogs: An Examination of the Long-Tail Phenomenon in Video Sales,” *Marketing Science Institute*, 2007.

<sup>59</sup> Publishers presumably provide excerpts because, in their business judgment, these excerpts will, on net, be complements to the actual book, not substitutes.

<sup>60</sup> See also Expert Report of Bruce S. Harris, May 3, 2012, ¶¶ 17-18; and Expert Report of Professor Albert N. Greco, May 3, 2012, ¶15.

<sup>61</sup> Indeed, some commercial services offer programs in which they charge authors fees to facilitate the searching of an author’s book using Google or Amazon. iUniverse, which the Authors Guild recommends

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allow search without payment, I have seen no evidence that any firm has paid, for example, for permission to display snippets.<sup>63</sup>

50. These facts suggest that authors and publishers recognize that search functionality, and particularly tools that enhance an author's ability to get noticed, provide benefits that flow to the author. This behavior is consistent with the conclusion that Google Books complements the sale of books rather than substituting for such sales. It does not stand to reason, then, that a market should arise in which payments would flow from the providers of these tools – like Google Books – to authors.<sup>64</sup>
51. With respect to libraries, I understand from Dr. St. Clair, the Dean of Libraries at Carnegie Mellon University, that, in her view, there was and is no likelihood that libraries will seek permission to digitize books merely for search or snippet display. First, when libraries have undertaken digitization efforts, it has been for the purpose of displaying the full text of certain books. To the extent libraries have licensed digitization, it has been for such full-text display.<sup>65</sup> From an economic perspective, the display of the full text of a book differs significantly from the search of a book's text or the display of snippets or other mere portions of a book. Full-text display of a book may well substitute for the purchase of a book, while the preceding analysis shows that search, snippet display, or even the greater display of excerpts authorized by publishers, does not.
52. Second, historically libraries have not focused on comprehensive digitization efforts. They have instead focused on public domain works or works of particular institutional or

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to its members, is one such company. Deposition of Paul Aiken, April 19, 2012, Rough Transcript, pp. 139-140, 176-177. For-fee services are also offered by iUniverse to assist authors in participating in Google Books, Amazon's "Search Inside The Book," and Barnes & Noble's "See Inside the Book" programs. See, for example, <http://www.iuniverse.com/ServiceStore/ServiceDetail.aspx?ServiceId=BS-471>, accessed April 27, 2012 and <http://www.iuniverse.com/ServiceStore/ServiceDetail.aspx?ServiceId=BS-911>, accessed May 2, 2012. In addition to offering these services, which help authors get noticed by consumers, iUniverse also offers a service to assist authors in getting noticed by book buyers, librarians, and researchers. See <http://www.iuniverse.com/ServiceStore/ServiceDetail.aspx?ServiceId=BS-538>, accessed May 2, 2012.

<sup>62</sup> Even the Authors Guild recommends that authors make a portion of their books searchable. See Deposition of Paul Aiken, April 19, 2012, Rough Transcript, p. 176.

<sup>63</sup> Author's Guild representative Paul Aiken was unable to identify such an example. Deposition of Paul Aiken, April 19, 2012, Rough Transcript, pp. 131-134. In contrast to the interactions we observe between publishers, authors, and Google and Amazon, music rights organizations like ASCAP and BMI arose as a solution to the problems of widely dispersed rights holders and widely dispersed music users. Music performance users consist of such disparate entities as radio stations, background music service providers, bars, restaurants, bowling alleys, and skating rinks. This dispersion of the potential licensees makes it prohibitively costly for rights holders to identify, negotiate with, and monitor all of the potential users of their music. Thus, the rights organization serves to coordinate and mediate the market in a far more cost-effective manner than if the rights holders and the potential infringers each had to negotiate separately. As distinct from music, widely dispersed users that would be costly to monitor do not exist for books.

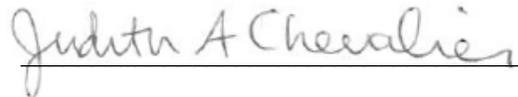
<sup>64</sup> Plaintiffs have argued that Congress (or another government agency) could create a new compulsory licensing regime. While perhaps true, nothing that Google has done precludes this from occurring, and the preceding analysis suggests that such a market could only be created by law because the relevant economic principles would not sustain it otherwise.

<sup>65</sup> Expert Report of Dr. Gloriana St. Clair, May 3, 2012, ¶¶ 5(a), 5(c), 25.

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local interests. Resource constraints have also limited such efforts. One general project preceding Google Books, at the University of Michigan, was estimated to require 900 years to complete.<sup>66</sup>

53. Third, libraries' experience with rights clearance has shown that, to the extent clearance is required for digitization, it is prohibitively costly to create a comprehensive digital resource such as Google Books. Carnegie Mellon University, Harvard University, and Cornell University have all reported great difficulty in finding rights holders.<sup>67 68</sup> Such limitations reduce the comprehensiveness, and thus the utility, of library digitization efforts relative to Google Books. These are also the type of costs that can make market participation infeasible for institutions that cannot bear those costs.
54. On the basis of the discussion above, I conclude that because the provision of snippets or excerpts is beneficial to authors, no market would arise in which payments flow from the provider of these tools, such as Google, to the author. I furthermore conclude that a market in which libraries would pay for the right to scan and index their entire collection for the purpose of search and snippet display is not likely to arise.



Judith A. Chevalier

May 4, 2012

<sup>66</sup> Deposition of Paul Courant, April 23, 2012, Rough Transcript, pp. 90, 97.

<sup>67</sup> See Letter from Sarah E. Thomas, Carl A. Kroch University Librarian at Cornell University to Jule L. Sigall, Associate Registrar for Policy & International Affairs at the U.S. Copyright Office, Re: Response by the Cornell University Library to the Notice of Inquiry Concerning Orphan Works, dated March 23, 2005, available at <http://www.copyright.gov/orphan/comments/OW0569-Thomas.pdf>, accessed May 1, 2012. See also Letter from Sidney Verba, Director, Harvard University Library and Pforzheimer University Professor at Harvard University to Jule L. Sigall, Associate Registrar for Policy & International Affairs at the U.S. Copyright Office, Re: Response by the Cornell University Library to the Notice of Inquiry Concerning Orphan Works, dated March 25, 2005, available at <http://www.copyright.gov/orphan/comments/OW0639-Verba.pdf>, accessed May 1, 2012. See also Denise Troll Covey, "Acquiring Copyright Permission to Digitize and Provide Open Access to Books," Digital Library Federation Council on Library and Information Resources, Washington, D.C., October 2005.

<sup>68</sup> In some cases even publishers are not clear on whether they own the rights to a book, meaning that even permissions that may be obtained carry some degree of risk that they are unreliable. See Expert Report of Dr. Gloriana St. Clair, May 3, 2012, ¶ 36.

DURIE TANGRI LLP  
DARALYN J. DURIE (*Pro Hac Vice*)  
ddurie@durietangri.com  
JOSEPH C. GRATZ (*Pro Hac Vice*)  
jgratz@durietangri.com  
DAVID MCGOWAN (*Pro Hac Vice*)  
dmcgowan@durietangri.com  
GENEVIEVE P. ROSLOFF (*Pro Hac Vice*)  
grosloff@durietangri.com  
217 Leidesdorff Street  
San Francisco, CA 94111  
Telephone: 415-362-6666  
Facsimile: 415-236-6300

Attorneys for Defendant  
Google Inc.

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., Associational  
Plaintiff, BETTY MILES, JOSEPH  
GOULDEN, and JIM BOUTON, on behalf of  
themselves and all other similarly situated,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 05 CV 8136 (DC)  
ECF Case

**DECLARATION OF DAN CLANCY IN SUPPORT OF DEFENDANT GOOGLE INC.'S  
MOTION FOR SUMMARY JUDGMENT**

I, Dan Clancy, hereby declare under penalty of perjury:

1. I am an Engineering Director at Google Inc. I submit this declaration in support of Defendant's Motion for Summary Judgment. I make this declaration based on personal knowledge of the facts and circumstances set forth herein.

2. I have been involved in the Google Books project since January of 2005. I had a central role in managing the development of that project. In addition to engineering, I have been involved in virtually all other areas of the Google Books project, and am familiar with its development and operation.

#### **I. THE PURPOSE OF GOOGLE BOOKS**

3. Google Books was born of the realization that much of the store of human knowledge lies in books on library shelves and thus is very difficult to find. Research libraries house millions of books. These works span all types: most are academic publications; most are out of print; many were obscure even when first published. Despite the importance of these vast stores of human knowledge, there exists no centralized way to search these texts to identify which might be germane to a particular topic.

4. Google Books aimed to solve that problem by giving everyone access to an index of these books. Armed with the results of a search of that index, users can borrow or buy those books of particular interest to them, either in hard copy from a bookstore down the street or in digital form if the book is so sold. (Of course, if the book is in the public domain, the user may read the book on Google Books for free.)

#### **II. BUILDING GOOGLE BOOKS**

5. In order to build that index, in 2004, Google began scanning books in the collections of several significant research libraries, including the University of Michigan and the University of California. Google entered into agreements with these libraries pursuant to which

the libraries' books would be scanned, after which the physical copies of the books would be returned to the libraries. The agreements also provide a mechanism for the libraries to make digital copies of the scans of their own books for their own uses, and the libraries promise contractually to abide by the copyright laws with respect to those copies that they make. A true and correct copy of one such agreement, with the University of Michigan, is attached hereto as Exhibit A.

6. A book is scanned at one of a small number of scan centers. Physical access to the centers is limited to Google employees and contractors. Google analyzes each scan and creates an overall index of all the books that have been scanned. This index links the words or phrases appearing in each book with all of the locations in all of the books in which that word or phrase is found. It allows a search for a particular work or phrase to return a result that includes the most relevant books in which that word or phrase is found.

### **III. USING GOOGLE BOOKS**

7. Google Books allows a user to search the full text of the Google Books corpus using a query of the user's own design. A search for "Archimedes" using Google Books, for example, locates many thousands of books in less than one second, and returns the most relevant books that contain any reference to Archimedes. This result can only be achieved by digitizing the full text of the books contained in the index. Without digitizing the whole book, there is no way to know whether a particular book mentions Archimedes (unless Archimedes happens to be one of the few subject headings assigned to the book by the librarian who cataloged it) without spending thousands of hours reading the index at the back of every book about ancient Greece (and even then one would miss the mention of Archimedes in, for example, novels).

8. When a user performs a search, Google Books uses the index to generate search results for a user's query, returning a list of books in which that user's search term appears.

Attached hereto as Exhibit B is a true and correct copy of a search results page for the query "Steve Hovley." This screen shot, as well as the others in this declaration, was taken on July 7, 2012; many factors may cause search results to change over time, so the results may be different if that search is run at a different time.

9. A user can click on a particular result to be directed to an "About the Book" page, allowing the user to obtain more information about the book in question. This page includes links to sellers of the book and/or libraries listing the book as part of their collections. No advertisements have ever appeared on any About the Book page for any book that is part of the Library Project. Attached hereto as Exhibit C is a true and correct copy of a portion of an About the Book page that is displayed when one clicks on Ball Four in the search results page pictured in Exhibit B.

10. In some cases, users will also see text from the book. Ball Four is in "snippet view," so the user looking for books which discuss Steve Hovley can see, on the About the Book page, that there are 34 references to Hovley in the book, and can see three of those references in the context of short "snippets," each about an eighth of a page long. Attached hereto as Exhibit D is a true and correct copy of a different portion of the About the Book page depicted in Exhibit C, showing the snippets which are displayed.

11. Not all books are placed in "snippet view." Works whose text is organized in short "chunks"-for example, dictionaries, cookbooks, and books of haiku-are excluded from snippet view altogether. This determination is made by human operators who examine each book to ascertain whether it is organized in short "chunks," and no book is designated for "snippet view" without such a manual review. Google also excludes works a rightsholder has asked Google not to display and renders the text of those books unsearchable. Any rightsholder

can exclude a book simply by filling out an online form which was been available since 2005.

12. For excluded works, users may view bibliographic information about the book but not text from the book itself. For example, Google has scanned several editions of Black's Law Dictionary, but none are searchable or viewable, as indicated by the "No preview" designation in the screenshot below-except the 1910 edition, which is in the public domain. Attached hereto as Exhibit E is a true and correct copy of an excerpt from a search page for "Black's Law Dictionary." Public domain books like the 1910 edition of Black's Law Dictionary can be viewed and downloaded in their entirety.

13. Rightsholders may also request that Google display more text through the Partner Program. The rightsholder can choose what percentage of the text of the book to display – usually at least 20%. For example, Jim Bouton's book *Foul Ball* is in the Partner Program, and his publisher has chosen to allow some pages to be viewed. Attached hereto as Exhibit F is a true and correct copy of a page showing *Foul Ball* in Partner Program preview.

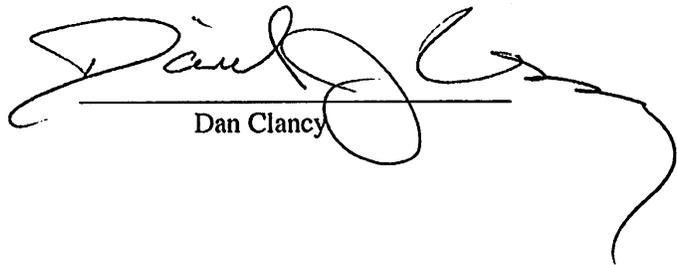
14. Over 45,000 publishers have included works within the Partner Program, including HarperCollins, Penguin, Simon & Schuster, and Macmillan.

15. Many users find Google Books to be of great assistance in performing traditional research tasks. Attached hereto as Exhibit G is a true and correct copy of a web page at <http://books.google.com/googlebooks/testimonials.html> reflecting user comments on Google Books. The corpus has enabled new types of research as well. Text from the books was used as an input to the "n-grams" research project. This project examines how frequently different terms or phrases appear in books published at different times. Attached hereto as Exhibit H is a true and correct copy of Jean-Baptiste Michel et al., Quantitative Analysis of Culture Using Millions of Digitized Books, 331 SCIENCE 176 (2011), available at

<http://www.sciencemag.org/content/early/2010/12/15/science.1199644>. I participated in the development of the "n-grams" project, and am named as one of the authors of that paper.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 26 day of July, 2012 at Mountain View, California.

  
\_\_\_\_\_  
Dan Clancy

**EXHIBIT A**

## COOPERATIVE AGREEMENT

This COOPERATIVE AGREEMENT (the "Agreement") is entered into by and between Google Inc., a Delaware corporation with offices at 1600 Amphitheatre Parkway, Mountain View, California 94043 ("Google"), and the Regents of the University of Michigan/University Library, Ann Arbor Campus, with its principal offices at 818 Hatcher South, Ann Arbor, MI 48109-1205 ("U of M"), and is effective on the date of the execution of this Agreement (the "Effective Date"). Google and U of M herein are sometimes referred to hereinafter individually as a "Party" and collectively as the "Parties".

### Background

1. U of M is a leading academic institution and has amassed an enormous collection of works in various media.
2. Google is a leader in providing the public with access to billions of web pages through a search engine that processes requests in less than half a second, and responds to more than 150 million search queries per day.
3. Google and the U of M share a mutual interest in making information available to the public. The Parties believe that working collaboratively will create mutually beneficial knowledge about standards and automated methods for organizing and indexing digitized works and to refine standard requirements for repositories of digital content.
4. Accordingly, the Parties desire to enter a nonexclusive agreement whereby Google will digitize works from the U of M collection to include them in Google's search services, and to make them available to the University of Michigan for preservation, archival or other purposes of its choosing (e.g., inclusion in Michigan's search services).

### Definitions

1. **DEFINITIONS.** Capitalized terms will have the meanings set forth below unless defined elsewhere in the Agreement.
  - 1.1 "Available Content" means the U of M print book and journal Collection, but excludes Special Collections materials. Available Content also includes U of M Digital Content in an amount corresponding to the amount of digital content that Google provides to U of M via the U of M Digital Copy.
  - 1.2 "Brand Features" means trade names, trademarks, service marks, logos, and other distinctive brand features, of which Google's Brand Features include but are not limited to Google, the Google logo, other marks that incorporate the word "GOOGLE," PAGERANK, and of which U of M's brand features include but are not limited to the University of Michigan name, University of Michigan identification marks, and the University Library name and logo.
  - 1.3 "Digitize" means to convert content from a tangible, analog form into a digital representation of that content.
  - 1.4 "Distribution Price" means an amount equal to or greater than a per-page amount multiplied by the number of Digitized pages involved. The per-page amount shall be equal to the amount charged by Google for distributing to the general public the same Digitized pages ("Google Amount"). If there exists no Google Amount for the same Digitized pages, the per-page amount shall be the amount charged by Google for distributing to the general public similar pages digitized pursuant to the same Project Plan ("Similar Google Amount"). To the extent no Google Amount or Similar Google Amount exists, the per-page amount shall be an amount mutually agreed upon in good faith by Google and U of M.
  - 1.5 "End User" means a person or entity that uses the Services.

1.6 "Enterprise Search Services" means the Search Services provided by Google to companies for use by employees of those companies and others.

1.7 "Google Digital Copy" means a digital copy retained by Google of the Available Content that is Digitized by Google.

1.8 "Google Search Services" means the Search Services provided by Google directly through the web sites located at [www.google.com](http://www.google.com) and corresponding International and other domains (e.g., [www.google.de](http://www.google.de), [www.google.info](http://www.google.info), etc).

1.9 "U of M Collection". means materials identified in section 1.2 above.

1.10 "U of M Digital Copy" means a digital copy transferred by Google to U of M of the Available Content that is Digitized by Google.

1.11 "Partner Search Services" means the Search Services provided by Google to an End User via a partner site that has entered into an agreement with Google to provide some or all of the Search Services through its own website.

1.12 "Pilot Project" means the onsite work at the University of Michigan, beginning from the Effective Date of this contract and ending on April 15, 2005.

1.13 "Project" means a project for Digitizing certain Selected Content.

1.14 "Initial Term" means the first six years of the Project, including the Pilot Project period.

1.15 "Project Form" means a form, pursuant to this Agreement, that contains the details of a Project Plan, similar to the sample attached as Exhibit A.

1.16 "Project Plan" means a plan for implementing a Project. The Project Plan shall include the following: (1) instructions by U of M regarding how the Selected Content is to be collected and returned by Google; (2) if required, the amount of time available to U of M for performing conservation efforts; (3) the amount of time available to Google from receipt of the Selected Content until it is due to be returned to U of M; and (4) a budget for the Project.

1.17 "Requested Portion" means a portion of the U of M Digital Copy requested by a third party.

1.18 "Search Services" means the search services provided by Google to an End User pursuant to which the End User can view, inter alia, content consisting of or derived from the Google Digital Copy (subject to the restrictions set forth in this Agreement) in response to search or browsing requests.

1.19 "Selected Content" means the portion of the Available Content that Google desires to Digitize or incorporate into the Services, both collectively and its component parts, including any and all other works of authorship included therein.

1.20 "Services" means collectively the Google Search Services, the Partner Search Services, and the Enterprise Search Services.

1.21 "U of M Digital Content" means content that U of M already has in its possession in Digitized form, as of the Effective Date.

1.22 "Website," "World Wide Web," "the Internet," and other technical terms in this Agreement and project plans refers to the current common usage of such terms and successor facilities of equal or greater capability.

## **2. RESPONSIBILITIES**

**2.1 Identifying Content to be Digitized.** The parties shall cooperate to identify Available Content to be Digitized. Upon agreeing to such Selected Content, the Parties shall cooperate in good faith and with diligence to develop a timetable for completing the Project Plan for the Selected Content. The Parties shall then memorialize the Project Plan in a Project Form.

**2.2 Collecting the Selected Content.** Upon commencement of a Project, U of M shall be responsible for performing any conservation efforts that U of M determines are required for the associated Selected Content. On a rolling basis, as this conservation effort is completed, U of M shall provide the conserved Selected Content to Google for Digitizing. If agreed upon by the parties in a particular Project Plan, this collection function may instead be assigned to Google.

**2.3 Locating the Digitization Operation.** For each Project, U of M shall attempt in good faith to provide Google with adequate physical space to Digitize the Selected Content. If U of M is unable to provide such space, U of M shall cooperate with Google to identify and obtain space that Google can use at reasonable rates. The location of any such physical spaces shall be mutually agreed upon by the parties.

**2.3.1 Transporting and Storing the Selected Content.** On a Project-specific and material-specific basis, U of M may authorize Google to remove some or all of the Selected Content from U of M premises to perform digitization in facilities controlled by Google. All risk of loss, damage, or destruction of the materials will lie with Google from the time Google accepts possession of the materials until such time as they are returned to U of M on U of M premises. Google will carry reasonably sufficient insurance against the risk of loss, damage or destruction of materials entrusted to Google's custody. In general, for all materials, Google will provide a transport method and temporary storage area that is reasonably clean, dry, cool, free from insects and other pests, protected from fire, and secure against theft and vandalism. Because the value of the materials and the environmental conditions necessary for transporting them and maintaining them in good condition will vary based on the particular materials involved, U of M will inform Google of the requirements for transport and storage of particular materials on a Project-specific basis. For insurance purposes, U of M (relying on guidelines from its Risk Management office) will provide Google with a good faith estimate of the value of any materials approved for removal from U of M premises, and will provide Google with an itemized list of any such materials.

**2.3.2 On-Site (i.e., not transported) Conversion of Selected Content.** The terms in 2.3.1 regarding insurance, accessibility to print materials for U of M users, and precautions taken to ensure protection of the materials shall also apply to materials digitized on-site in the Buhr storage facility.

**2.4 Digitizing the Selected Content.** Google will be responsible for Digitizing the Selected Content. Subject to handling constraints or procedures specified in the Project Plan, Google shall at its sole discretion determine how best to Digitize the Selected Content, so long as the resulting digital files meet benchmarking guidelines agreed to by Google and U of M, and the U of M Digital Copy can be provided to U of M in a format agreed to by Google and U of M. U of M will engage in ongoing review (through sampling) of the resulting digital files, and shall inform Google of files that do not meet benchmarking guidelines or do not comply with the agreed-upon format. Should U of M encounter a persistent failure by Google to meet these guidelines or supply the agreed-upon format, U of M may stop new work until this failure can be rectified. Any restrictions on Google's discretion shall be specified on a project-by-project basis via the corresponding Project Form(s) or by amendment to this Agreement.

**2.5 U of M Digital Copy.** Google agrees to provide to U of M a copy of all Digitized Selected Content that has been "Successfully Processed" within thirty (30) days after the Selected Content is Digitized, or in a timeframe mutually agreed by the Parties. Digitized Selected Content is "Successfully Processed" when Google determines it has satisfactorily gone through all stages of Google's digitization, post processing and quality assurance procedures (not to exceed thirty days for material received by Google, unless otherwise agreed to by the parties). Within thirty (30) days after the Selected Content is Digitized, or in a timeframe mutually agreed by the Parties, Google shall provide the U of M Digital Copy

to the U of M. Unless otherwise agreed by the Parties in writing, the U of M Digital Copy will consist of a set of image and OCR files and associated information indicating at a minimum (1) bibliographic information consisting of the title and author of each Digitized work, (2) which image files correspond to that Digitized work, and (3) the logical order of those image files. Google shall provide the U of M Digital Copy via a network connection, or in any other manner mutually agreed upon by the Parties.

2.5.1 Google may delay transferring Digitized Selected Content to U of M if it decides not to use that content due to a dispute with a third-party. In this case, Google must inform U of M, in writing, of the details of the dispute and the specific content to be delayed. Google may delay transfer of this content until such time as Google makes any use (including indexing) of that Digitized content (or the same content acquired from another source, if that Digitized content is in the public domain or out-of-print) beyond storage in a dark archive.

2.5.2 Within 3 years of the time Google has transferred Digitized Selected Content to U of M, if Google decides not to use that content due to a dispute with a third-party, U of M will destroy that content (so long as it is in print and protected by copyright) from the U of M Digital Copy. In this case, Google must inform U of M in writing of the details of the dispute and the specific content to be destroyed. If, at any time, Google subsequently makes any use (including indexing) of that Digitized content (or the same content acquired from another source, if that Digitized content is in the public domain or out-of-print) beyond storage in a dark archive, Google will retransfer that Digitized Content to U of M.

2.6 **Returning the Selected Content.** Once completed with the Digitizing process, Google will be responsible for returning the Selected Content to the source from which Google obtained it and in the like manner in which it was collected, within three (3) weeks unless otherwise specified in the Project Form or otherwise agreed upon by the parties. If Google reasonably determines that it will require longer to Digitize some or all of the Selected Content than the time frame set forth in the Project Form, the Parties will discuss in good faith whether a time extension is feasible. If the Parties agree upon an extension, they shall record such agreement as an amendment to the Project Form. If the Parties can not agree upon an extension, Google shall return the Selected Content within the time frames set forth in the Project Form.

2.7 **Responsibility for damage to the Selected Content.** While certain Selected Content is within Google's possession, Google shall make commercially reasonable efforts to minimize damage to the Selected Content, including handling the Selected Content in accordance with handling instructions set forth in the Project Form, if any. If Google, due to its negligence, damages certain Selected Content, Google shall, at its own cost, have the damaged Selected Content restored to the condition in which Google received it. Restoration of all materials must be performed by or under the management of U of M Conservation Services.

### 3. **COSTS**

3.1 **Costs borne by U of M.** U of M shall bear the following costs: U of M employees (other than staff scanning operators and staff employed to pull and return materials to the shelves, including reshelving) whose participation is contemplated by this Agreement (including all cost of U of M employees required to provide Selected Content to Google as well as project management costs incurred by U of M), network bandwidth and data storage required by U of M to receive some or all of the U of M Digital Copy or existing bandwidth available for use by Google to transfer Digitized files from U of M facilities to Google's data centers and U of M space that may be available to Google.

3.2 **Costs borne by Google.** Google shall bear the following costs: Google employees or agents whose participation is contemplated by this Agreement (including all cost of Google employees required between receipt/collection of the Selected Content from U of M and return of the Selected Content to U of M), hardware and software required to Digitize the Selected Content, space required to Digitize the Selected Content (to the extent not provided by U of M), transportation of Selected Content from the U of M facility in which the Selected Content is normally kept (if required), and resolving copyright issues associated with Google's use of the Google Digital Copy.

3.3 **Budgets.** Notwithstanding the foregoing, U of M and Google may jointly develop a budget for each Project Plan, pursuant to which the parties can allocate the cost of researching and identifying the Selected Content, conducting conservation assessments, performing conservation work, and

performing any required copyright research and clearances. Any such budget shall take precedence over the general obligations set forth above in sections 3.1 and 3.2.

#### **4. OWNERSHIP AND USE OF DIGITAL COPIES AND SERVICES**

**4.1 Copyright Law.** Both Google and U of M agree and intend to perform this Agreement pursuant to copyright law. If at any time, either party becomes aware of copyright infringement under this agreement, that party shall inform the other as quickly as reasonably possible.

**4.2 Copyright Status.** As Selected Content is provided by U of M to Google for Digitizing, U of M shall to the best of its knowledge notify Google which portions of the Selected Content are in the public domain and which portions may be subject to copyright. Notwithstanding the foregoing, Google shall be responsible for ensuring that Google's digitization and its use of the Google Digital Copy is authorized by the relevant copyright holders or by law. If either party reasonably determines that a portion of the Selected Content that was previously thought to be in the public domain is actually subject to copyright, that party shall promptly notify the other party in a writing that particularly identifies the portion(s) and provides an explanation for why the portion(s) are believed to be subject to copyright.

**4.3 Searching Free to the Public:** Google agrees that to the extent that it or its successors make Digitized Available Content searchable via the Internet, it shall provide an interface for both searching and a display of search results that shall have no direct cost to end users. Violations of this subsection, 4.3, not cured within thirty days of notification by U of M shall terminate U of M's obligations under section 4.4.

**4.4 Ownership and use of U of M Digital Copy.** Neither U of M nor Google shall have any ownership or license rights to the Available Content that is Digitized (i.e., to the materials underlying the digitization process), except where UM already has such rights. As between Google and U of M and subject to the provisions in this section 4, U of M shall own all rights, title, and interest to the U of M Digital Copy.

**4.4.1 Use of U of M Digital Copy on U of M Website.** U of M shall have the right to use the U of M Digital Copy, in whole or in part at U of M's sole discretion, as part of services offered on U of M's website. U of M shall implement technological measures (e.g., through use of the robots.txt protocol) to restrict automated access to any portion of the U of M Digital Copy or the portions of the U of M website on which any portion of the U of M Digital Copy is available. U of M shall also make reasonable efforts (including but not limited to restrictions placed in Terms of Use for the U of M website) to prevent third parties from (a) downloading or otherwise obtaining any portion of the U of M Digital Copy for commercial purposes, (b) redistributing any portions of the U of M Digital Copy, or (c) automated and systematic downloading from its website image files from the U of M Digital Copy. U of M shall restrict access to the U of M Digital Copy to those persons having a need to access such materials and shall also cooperate in good faith with Google to mutually develop methods and systems for ensuring that the substantial portions of the U of M Digital Copy are not downloaded from the services offered on U of M's website or otherwise disseminated to the public at large.

**4.4.2 Use of U of M Digital Copy in Cooperative Web Services.** Subject to the restrictions set forth in this section, U of M shall have the right to use the U of M Digital Copy, in whole or in part at U of M's sole discretion, as part of services offered in cooperation with partner research libraries such as the institutions in the Digital Library Federation. Before making any such distribution, U of M shall enter into a written agreement with the partner research library and shall provide a copy of such agreement to Google, which agreement shall: (a) contain limitations on the partner research library's use of the materials that correspond to and are at least as restrictive as the limitations placed on U of M's use of the U of M Digital Copy in section 4.4.1; and (b) shall expressly name Google as a third party beneficiary of that agreement, including the ability for Google to enforce the restrictions against the partner research library.

**4.5 Ownership and use of Google Digital Copy.** Neither U of M nor Google shall have any ownership or license rights to the Available Content that is digitized (i.e., to the materials underlying the digitization process), except where UM already owns such rights. As between Google and U of M and subject to the provisions in this section 4, Google shall own all rights, title, and interest to the Google Digital Copy.

**4.5.1 Google use of Google Digital Copy.** Subject to the restrictions set forth in this section, Google may use the Google Digital Copy, in whole or in part at Google's sole discretion, as part of the Services. For portions of the Google Digital Copy that correspond to works mutually identified as being in the public domain or for which Google has obtained permission from the relevant copyright owner(s), Google may among other things index the full text and serve and display full-sized digital images corresponding to those portions. For all other portions of the Google Digital Copy, Google may index the full text but may not serve or display the full-sized digital image unless Google has appropriate legal authority to do so; Google instead may serve and display (1) an excerpt that Google reasonably determines would constitute fair use under copyright law and (2) bibliographic (e.g., title, author, date, etc) and other non-copyrighted information. If U of M discovers that digital images being served and displayed full-size by Google are subject to copyright restrictions, U of M shall notify Google in writing and Google shall cease serving and displaying such images full-size. Furthermore, to address situations where Google believed it had the right to serve full-sized digital images but was incorrect in such belief, Google shall implement processes (e.g., notice and takedown) that facilitate the ability of copyright owners to request removal of such digital images from the index.

**4.5.2 Security and Privacy Regarding Google's Use of the Google Digital Copy.** Google shall implement technological measures (e.g., through use of the robots.txt protocol) to restrict automated access to any portion of the Google Digital Copy or the portions of the Google website on which any portion of the Google Digital Copy is available. In addition, Google shall maintain on its website a privacy policy that governs collection and use of information that Google obtains from a user of the Google Search Services.

**4.5.3 Distribution of Google Digital Copy.** To the extent portions of the Google Digital Copy are either in the public domain or where Google has otherwise obtained authorization, Google shall have the right, in its sole discretion, to make copies of such portions of the Google Digital Copy and to provide, license, or sell such copies to any party, subject to such copies being used consistent with the copyright-related restrictions set forth in section 4.5.1.

**4.6 Ownership and Control of Services.** As between the parties, the Services and all content therein is, and at all times will remain, the exclusive property of Google or its partners; nothing in this Agreement implies any transfer to U of M of any ownership interest in the Services. U of M acknowledges and agrees that Google retains control of the Services, and that the design, layout, content, functions and features of the Services are at Google's discretion. Notwithstanding anything to the contrary in this Agreement, Google is not required to make any or all of the Google Digital Copy available through the Services.

**4.7 No other rights.** Except as set forth above, nothing in this subsection shall be interpreted as a grant of right from either party to the other party.

## **5. ACCESS, AUTHORIZATION, AND SUPPORT**

**5.1 Access.** On a project-specific basis, Google shall have the right to access Selected Content during U of M business/staff hours (8:00am to 5:00pm, Monday through Friday) without first being required to notify U of M. On a project-specific basis, U of M may make reasonable efforts to provide Google with access to Selected Content outside of U of M business hours provided that Google notify U of M at least three days in advance of its desire to access such materials.

**5.2 Authorization.** The U of M program manager responsible for the Selected Content involved in any Project Plan shall have authority to agree with Google on the time frames and procedures (e.g., collection, conservation, handling) associated with that Selected Content. If Google in good faith believes that the time frames and procedures requested by the U of M program manager are unreasonable, Google shall escalate the matter to the U of M administrative contact; in which case Google, the U of M program manager, and the administrative contact shall meet to resolve the issue.

**5.3 Support.** U of M shall appoint one person to serve as the administrative contact for Google, should administrative questions or issues arise during the course of this Agreement. This administrative contact shall be available during business hours at a telephone number and e-mail address to be provided by U of M. U of M shall also appoint one person to serve as the technical contact for Google, for obtaining or regulating the use of the U of M Digital Copy. This technical contact shall be available during

regular U of M business hours (8:30 to 4:30, Monday through Friday) at a telephone number and e-mail address to be provided by U of M. Upon execution of this contract, both Google and U of M shall identify these individuals in writing, and the resulting document shall serve as an addendum to this contract.

## **6. CONFIDENTIALITY**

**6.1 Confidential Information.** By virtue of this Agreement, each Party may have access to information of the other Party which is considered confidential and proprietary, including the terms of this Agreement, Project Plan or Project Form, product plans, customer lists, and proprietary technology or methods ("Confidential Information"), whether disclosed in tangible or intangible form. Information disclosed in tangible form will be considered Confidential Information if it is marked as "Confidential" or a similar designation. Information disclosed in intangible form will be considered Confidential Information if the disclosing party clearly indicates that it is confidential at the time of disclosure.

**6.2 Obligations.** Each Party shall exercise at least the same degree of care to avoid the publication or dissemination of the Confidential Information of the other Party as it affords to its own confidential information of a similar nature which it desires not to be published or disseminated. The receiving Party shall not use Confidential Information of the disclosing Party except in the furtherance of this Agreement or the performance of its obligations hereunder. The obligation of the Parties not to disclose Confidential Information survives expiration, termination or cancellation of this Agreement.

**6.3 Exceptions.** Neither Party is obligated to protect Confidential Information of the other Party that: (i) is rightfully received by the receiving Party from another party without restriction, or (ii) is known to or developed by the receiving Party independently without use of, or reference to, the Confidential Information, or (iii) is or becomes generally known to the public by other than a breach of duty hereunder by the receiving Party, (iv) has been or is hereafter furnished to others by the disclosing Party without restriction on disclosure, or (v) required to be disclosed by any governmental authority. Google understands that U of M, as a public institution, is subject to the Michigan Freedom of Information Act, and any disclosure of Confidential Information required by that statute will not constitute a breach of this agreement.

## **7. MARKETING**

**7.1 Press Releases or Announcements.** Other than as has been mutually agreed upon by the Parties, neither Party may make any press announcements about the relationship or this Agreement without the prior written approval of the other Party, which will not be unreasonably withheld or delayed. U of M and Google, as practicable, will coordinate regarding the timing of any press release(s) and will mutually agree upon appropriate talking points.

**7.2 License to Marks.** Each party will submit all materials of any kind containing the other party's Brand Features (other than its name in customer lists) to the other party for approval prior to release to the public. Except as set forth in this section, nothing in this Agreement shall be deemed to grant to one party any right, title or interest in or to the other party's Brand Features. All use by Google of U of M's Brand Features (including any goodwill associated therewith) shall inure to the benefit of U of M and all use by U of M of Google's Brand Features (including any goodwill associated therewith) shall inure to the benefit of Google. At no time during the Term shall one party challenge or assist others to challenge the Brand Features of the other party (except to the extent required to protect its own Brand Features) or the registration thereof by the other party, nor shall either party attempt to register any Brand Features or domain names that are confusingly similar to those of the other party

## **8. TERM AND TERMINATION**

**8.1 Term** This Agreement is effective as of the Effective Date and continues in full force and effect until April 30, 2009, unless earlier terminated as provided herein at the end of the Pilot Project. Upon the expiration of the Initial Term, this Agreement shall automatically renew for additional one year terms (each a "Renewal Term") unless either Party notifies the other Party to the contrary at least thirty (30) days before the end of either the Pilot Project, the Initial Term or a Renewal Term. The "Term" of this Agreement shall comprise the Initial Term and any Renewal Terms.

**8.2 Effect of Expiration or Termination.** Within thirty (30) days after expiration or termination of this Agreement for any reason, each Party shall return to the other Party (or, at that Party's request,

destroy) any Confidential Information of that Party that is in its possession. The following sections survive expiration or termination of this Agreement: 1, 2.51, 2.5.2, 2.6, 2.7, 4.4 (so long as Google or a successor continues to exist), 4.5, 4.7, 4.8, 6, 8.2, and 9-12.

## **9. WARRANTIES AND DISCLAIMER**

**9.1 Mutual Warranties.** Each Party represents and warrants to the other that (i) it has full right, power and authority to enter into this Agreement and to perform all of its obligation hereunder; (ii) this Agreement constitutes its valid and binding obligation, enforceable against it in accordance with its terms; and (iii) its execution, delivery and performance of this Agreement will not result in a breach of any material agreement or understanding to which it is a Party or by which it or any of its material properties may be bound.

**9.2 Disclaimer.** THE WARRANTIES EXPLICITLY SET FORTH ABOVE ARE THE ONLY WARRANTIES PROVIDED HEREIN AND ARE IN LIEU OF ALL OTHER WARRANTIES BY THE PARTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, GOOGLE SPECIFICALLY DISCLAIMS ANY WARRANTY REGARDING NON-INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY.

## **10. INDEMNIFICATION.**

**10.1 By Google.** Google shall defend and indemnify the U of M, its Regents, employees, and agents against any third party claim based on an allegation that the U of M's (or its Regents', employees', or agents') or Google's actions, pursuant to this Agreement, violate that third party's copyrights or other legal rights. The foregoing indemnification includes U of M's receipt of the U of M Digital Copy, but excludes any third party claim that relates to U of M's use or distribution of the U of M Digital Copy or that arises from U of M's (or its Regents', employees' and agents') negligence under this Agreement. Google shall select counsel reasonably appropriate for such defense and shall pay for all costs incurred by such counsel. In addition, Google shall pay any damage awards or settlement costs that may be incurred. U of M may participate in the defense with counsel of its own choice, at its own expense.

**10.2 By U of M.** U of M shall defend and indemnify Google, its employees and agents against any third party claim based on an allegation that U of M's use or distribution of the U of M Digital Copy violates third party copyrights or other legal rights. U of M shall also defend and indemnify Google, its employees and agents against any third party claim based on an allegation that any third party's use or distribution of the U of M Digital Copy violates third party copyrights or other legal rights. U of M shall select counsel reasonably appropriate for such defense and shall pay for all costs incurred by such counsel. In addition, U of M shall pay any damage awards or settlement costs that may be incurred. Google may participate in the defense with counsel of its own choice, at its own expense.

**10.3 Disclaimer.** EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 10, EACH PARTY EXPRESSLY DISCLAIMS ANY FURTHER OBLIGATION TO INDEMNIFY, DEFEND OR HOLD HARMLESS THE OTHER PARTY FROM ANY THIRD PARTY CLAIM OR ACTION. THE FOREGOING PROVISIONS OF THIS SECTION 10 STATE THE ENTIRE LIABILITY AND OBLIGATIONS OF INDEMNIFYING PARTY, AND THE EXCLUSIVE REMEDY OF INDEMNIFIED PARTY, WITH RESPECT TO ANY ACTUAL OR ALLEGED INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHTS UNDER THIS AGREEMENT.

## **11. LIMITATION OF LIABILITY**

EXCEPT FOR DAMAGES ARISING FROM BREACH OF SECTION 6 (CONFIDENTIALITY) OR DAMAGES ARISING FROM BREACH OF SECTIONS 4.4 - 4.6 (AND ASSOCIATED SUBSECTIONS), IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER FOR LOST PROFITS OR ANY FORM OF INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY CHARACTER FROM ANY CAUSES OF ACTION OF ANY KIND WITH RESPECT TO THIS AGREEMENT, WHETHER BASED ON BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, AND WHETHER OR NOT THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. EXCEPT FOR DAMAGES ARISING FROM BREACH OF SECTION 6 (CONFIDENTIALITY)

OR DAMAGES ARISING FROM BREACH OF SECTIONS 4.4 - 4.6 (AND ASSOCIATED SUBSECTIONS), EACH PARTY'S LIABILITY UNDER THIS AGREEMENT SHALL BE LIMITED TO THE FEES EXPENDED BY THE OTHER PARTY AS OF THE DATE OF SUCH CLAIM.

**12. GENERAL PROVISIONS**

**12.1 No Obligation.** Notwithstanding the foregoing, Google shall have no obligation to Digitize any portion of the Available Content nor to use any portion of the Google Digital Copy as part of the Services. U of M shall not be obligated to participate in any Project Plan to the extent U of M does not have sufficient funds to perform its budgeted obligations under that Project Plan. Furthermore, notwithstanding anything in this Agreement to the contrary, in the event Google determines, at its sole discretion, not to Digitize some or all Selected Content in connection with one or more specific Projects, whether due to cost issues, conservation concerns or otherwise, Google shall have no obligation to the U of M with respect to digitizing or delivering the U of M Digital Copy with respect to such Selected Content.

**12.2 Assignment.** Neither Party may assign this Agreement without the other Party's prior written consent, which consent shall not be unreasonably withheld. Any attempt to assign this Agreement other than as permitted above will be null and void. Subject to the foregoing, this Agreement is binding upon and shall inure to the benefit of each of the Parties, and the successors and permitted assigns of each.

**12.3 Notices.** Any notice required or permitted by this Agreement will be deemed given if sent by facsimile or by registered mail, postage prepaid, addressed to the other Party at the address set forth at the top of this Agreement. Delivery will be deemed effective upon transmission by facsimile (with receipt acknowledgement) or three (3) days after deposit with postal authorities. Unless otherwise specified by Google, notices directed to Google shall be sent to Google Inc., Attn: General Counsel, 2400 Bayshore Pkwy, Mountain View, CA 94043, or via facsimile to Google Inc., Attn: General Counsel, 650-618-1499. Unless otherwise specified by U of M, notices directed to U of M shall be sent to University Library, Attn: Associate University Librarian LIT, University of Michigan, Ann Arbor, MI 48109-1205.

**12.4 Independent Contractors.** The Parties to this Agreement are independent Parties and nothing herein shall be construed as creating an employment, agency, joint venture or partnership relationship between the Parties. Neither Party shall have any right, power or authority to enter into any agreement for or on behalf of, or incur any obligation or liability, or to otherwise bind, the other Party.

**12.5 Severability.** If any term or provision of this Agreement is held to be invalid, illegal, or otherwise void against public policy, such term or provision shall be stricken and shall not affect the validity or enforceability of the remaining terms and provisions of this Agreement.

**12.6 Force Majeure.** Performance by either party under this Agreement shall be excused during the period such performance is prevented or delayed by government restrictions, war or warlike activity (e.g., acts of terrorism), insurrection or civil disorder, labor disputes, or any other causes similarly or dissimilar to the foregoing that are beyond the control of either party and are not foreseeable at the time the Agreement (or relevant amendment) is executed.

**12.7 General.** The Agreement shall be governed by Federal law without giving effect to applicable conflict of laws provisions. In the event of any dispute or litigation arising out of or relating to this Agreement, each Party agrees that it shall attempt to resolve such dispute in good faith. If such dispute cannot be resolved within thirty days of being raised, the dispute shall be elevated to the highest level at each Party. If the dispute still cannot be resolved within an additional thirty days, the aggrieved party may file a lawsuit in the state or federal courts with jurisdiction to hear such suits in the State of Michigan. This Agreement, including any Project Forms and attached Exhibits, constitutes the entire understanding and agreement with respect to its subject matter, and supersedes any and all prior or contemporaneous representations, understandings and agreements whether oral or written between the Parties relating to the subject matter of this Agreement, all of which are merged in this Agreement. For avoidance of doubt, as of the Effective Date, this Agreement supersedes and replaces any other Cooperative Agreements between the parties to the extent they exist. No modification of or amendment to this Agreement, nor any waiver of any rights under this Agreement, will be effective unless in writing signed by the Party to be charged, and the waiver of any breach or default will not constitute a waiver of any other right hereunder or any subsequent breach or default. All amendments or modifications of this

Agreement shall be binding upon the Parties despite any lack of consideration so long as such amendment or modifications are in writing and executed by the Parties. If any provision of this Agreement is found to be invalid or unenforceable pursuant to judicial decree or decision, the remainder of this Agreement shall remain valid and enforceable according to its terms. In such event, the Parties agree to negotiate in good faith, a legal and enforceable substitute provision which most nearly conforms to the Parties' intention in entering into this Agreement. The section and paragraph headings used in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement. This Agreement may be executed by exchange of signature pages by facsimile and/or in any number of counterparts, each of which shall be an original as against any Party whose signature appears thereon and all of which together shall constitute one and the same instrument.

Accepted and Agreed:

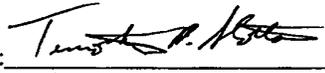
Google Inc.

By:  6/14/05  
(Authorized signature)

Name: David Drummond

Title: V.P., Corporate Development

On behalf of the Regents of the University of Michigan

By:  6/15/05  
(Authorized signature)

Name: Timothy Slottow

Title: Executive Vice President and Chief Financial Officer

**EXHIBIT A**

**SAMPLE PROJECT FORM**

Project Name:

Program Manager:

Estimated Start Date:

Estimated Completion Date:

Description of Works Involved:

Out-of-circulation Time:

Location of Works:

Conservation Requirements:

Collection Instructions:

Transportation Instructions:

Special Handling Instructions:

Infrastructure Requirements (e.g., space, power, scanner size and quantity, environmental parameters, etc.):

Hours of Operation:

Known Copyright Restrictions:

Budget Allocations (if any):

Other comments:

**EXHIBIT B**

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- Maps
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- Shopping
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[The 1969 Seattle Pilots: major league baseball's one-year team - Page 71](#)  
books.google.com  
Kenneth Hogan - 2006 - 198 pages - Preview  
Milkes replaced them with another left-handed pitcher, Gary Roggenburk, who was acquired on the waiver wire from Boston, and young outfielder **Steve Hovley**. Hovley was a talented college ballplayer who had not endeared himself to ...

[Baseball Digest - Feb 1983 - Page 72](#)  
books.google.com  
Vol. 42, No. 2 - 96 pages - Magazine - Full view  
1969 SEATTLE PILOTS Batters HR Avg. 1B DonMincher 25 .246 2B John Donaldson 1 .234 SS Ray Oyler 7 .165 3B Terry Harper 9 .235 LF Tommy Davis 6 .271 CF Wayne Comer 15 .245 RF **Steve Hovley** 3 .277 C Jerry McNertney 8 .241 Pitchers WL ERA ...

[Ball four](#)  
books.google.com  
Jim Bouton, Leonard Shecter - 1990 - 504 pages - Snippet view  
**Steve** said he thought that was pretty interesting, because when Joe says to dress like a major-league ballplayer he means there's a certain style of dress followed by baseball players and you're supposed to conform. In fact **Hovley** and I ...  
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[2011 Standard Catalog Of Baseball Cards - Page 443](#)  
books.google.com  
Bob Lemke, Robert F. Lemke - 2010 - 1848 pages - Google eBook - Preview  
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... 16 Ken Singleton 2.00 1.00 .60 103 Rich Severson 2.00 1.00 .60 496 Steve Whitaker 2.50 1.25 .70 17 Billy Sorrell ... .70 22 Phil Roof 2.00 1.00 .60 109 **Steve Hovley** 2.00 1.00 .60 502 Rollie Fingers 16.00 8.00 4.75 23 Oscar Gamble ...

[Angels Journal: Year by Year and Day by Day With the Los Angeles ... - Page 91](#)  
books.google.com  
John Snyder - 2010 - 448 pages - Google eBook - Preview  
In the fifth, Ryan made his third error on yet another attempted pick off at first base, this time with Freddie Patek on the bag. Ryan had a no-hitter in progress until **Steve Hovley** led off the eighth with a single.  
More editions

[Nine Innings: The Anatomy of a Baseball Game - Page 128](#)  
books.google.com  
Daniel Okrent - 2000 - 288 pages - Preview  
"For **Steve Hovley** and Jerry McNertney!" Hovley and McNertney were notably undistinguished ball players who typified the Seattle talent; the "ten eight" especially galled Selig when he learned, in 1981, that the New York Mets had been ...  
More editions

[Ebony - Jun 1972 - Page 162](#)  
books.google.com  
Vol. 27, No. 6 - 192 pages - Magazine - Full view  
... Richie Sheinblum and **Steve Hovley**— are expected to make the team even stronger offensively. Cookie Rojas had a comparatively good year defensively and at the plate, and was heavily credited— along with Amos Otis— for making Kansas ...

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**EXHIBIT C**



Steve Howley



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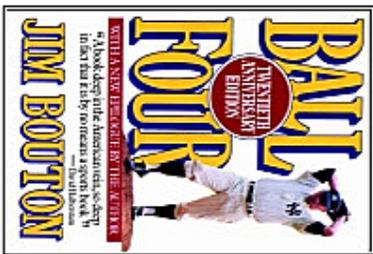


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# Ball four



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Jim Bouton, Leonard Shecter

163 Reviews

John Wiley & Sons, Jul 26, 1990 - 504 pages

Twentieth-anniversary edition of a baseball classic, with a new epilogue by Jim Bouton.

When first published in 1970, Ball Four stunned the sports world. The More »

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Steve Howley

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Page 233

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Steve Howley

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Page 233

Steve Howley has been called up. Old Tennis Ball Head hasn't had a haircut since he left. Which means Joe Schultz had four comments to him the very first day.

"Where's your barber?"

"Don't you need a haircut?"

Page 237

wen, I think it looks horse-shit, Marty returns says.

Moments later, perhaps feeling bad about his comment, or perhaps wishing to stick the needle in further, Parth approaches Howley and says, "I don't care how long you wear your hair, Howley. You can wear it down to your ass as far as I'm concerned."

Page 288

At the start of this trip Joe Schultz called in Steve Howley and said, "I want you to start dressing like a major-league ballplayer."

Joe only said that because Steve wears Levi's to the park sometimes

Where's the rest of this book?

What people are saying - Write a review

**EXHIBIT E**

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 Henry Cambell Black, JOSEPH R. NOLAN., M. J. CONNOLLY. - 1983 - 851 pages - No preview  
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**Black's law dictionary**  
 books.google.com  
 publisher's editorial staff - 1136 pages - No preview

**Law Dictionary**  
 books.google.com  
 Henry Campbell Black - 1994 - 1500 pages - No preview  
 More editions

**Garner on Language and Writing - Page 351**  
 books.google.com  
 Bryan A. Garner, Ruth Bader Ginsburg - 2009 - 839 pages - Preview  
 ta, ta, ta, Preface to the First Pocket Edition of **Black's Law Dictionary** Every SUBJECT HAS its seminal reference book — the one that becomes a household word. When you think of world records, you think of Guinness; of encyclopedias, ...  
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11 Reviews

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### Foul Ball: My Life and Hard Times, Trying to Save an Old Ballpark, Part 2

By Jim Bouton

Link Feedback



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Page 18



problems: the parking lot floods when it rains, the plumbing is held together with tape and chewing gum, the locker rooms are cramped, there are no exercise facilities, and the sun shines in the batters' eyes, causing "sun delays," which can hold up a game for ten minutes.

Having done our homework, Chip and I matched their enthusiasm: the flooding might be alleviated by lowering a dam downstream from the park, the plumbing could be repaired or replaced, the locker rooms could be expanded, and the "sun delay" could be sold as the quirky feature of a historic ballpark, just as Fenway Park's "Green Monster" turns a short left field into a marketing asset.

They smiled tolerantly at us. Hadn't we been listening?

Chip and I energetically challenged their "economic development" theory. We cited studies that showed there is no economic benefit to having a new minor league baseball stadium. Zero. Zip. Nada. We said we would restore Wahconah Park at no cost to the taxpayers, and that the city could spend the \$18.5 million on a completely different reason for people to come to Pittsfield. And furthermore, if they decided to build an arena instead of a stadium, we could provide a hockey team. We explained that our partner Eric Margenau was president of United

**EXHIBIT G**



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## User Stories

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#### Message from: **Jennifer**

*Teacher, Spokane, WA*

"Thanks for turning me on to this service! It is just like browsing in a book store but online. I foresee my pocketbook getting lots of use!"

---

#### Message from: **John**

*Retired, Godalming, Surrey, UK*

"Today I was browsing Google [Book Search] for the first time and immediately found three in-print books on the subject I am researching. That's three books I am about to buy."

---

#### Message from: **Kay**

*Attorney, San Diego, CA*

"I heard about Google's additional features at a genealogical society meeting, so I decided to try out Google [Book Search] by checking the names of a couple of ancestors. The first search produced a photograph of a relative I had never seen before—I immediately ordered a copy of the book it was in. The second search turned up several references to an ancestor in historical works I would probably never have found without Google [Book Search]."

---

#### Message from: **Blake**

*Attorney, Pelham, NY*

"[Google Books] is now is a search tool that cannot be ignored by local historians...the Google [Book Search] service is as easy to use as -- well -- Google!...I have successfully purchased a number of books in this fashion."

---

#### Message from: **Kirsten**

*Policy Communications Analyst, Bear, DE*

"I used Google Books for the first time today, and have already ordered a copy of a book for our company library. I would never have found this book, or been able to determine if it was worth ordering, without Google Books."

---

#### Message from: **Chris**

*Bookseller, Denton, TX*

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"I was fooling around with Google [Book Search] today and discovered that I am cited in *Hybrid Fictions: American Literature and Generation X*. Far out. The first thing I did was go to Amazon to order a copy."

---

**Message from: Richard**

*Web Analyst, New Zealand*

"I gave Google [Book Search] a test run...I came across a fascinating result when I searched for my own name "macmanus". The first search result was a book by Stephen Fox called *The Mirror Makers: A History of American Advertising and Its Creators*. I'm off to go buy that Stephen Fox book ;-)"

---

**Message from: Fred**

*Consultant, Newton, PA*

"I've been waiting for this since I first learned about the web...thank you for finally delivering it. In 5 minutes, with my first search, I found a facsimile, written in his own hand, of Lincoln's Gettysburg address buried in the middle of a children's book published in 1896. And it was simple."

---

**Message from: Zohair**

*Student, Sacramento, CA*

"I love Google Books because you get to look at the book, check out how the print looks, see if it is the right edition, and see if you'd be interested. Today I found a book on here I couldn't find anywhere in town and I was able to buy it from Amazon because of it. Thank you Google."

---

**Message from: John**

*Author, Editor, Publisher, Cincinnati, OH*

"[Google Books] is an indispensable service that benefits readers, researchers, writers, authors, and publishers by making information accessible to all rather than merely to those who live near a research library. I cannot physically nor financially travel to distant libraries for my research on Latin American history that is contained in hard to find or out of print books. I hope Google will continue this service unhindered and in fact expand it to include libraries around the world."

---

**Message from: Kathleen**

*Pleasant Hill, CA*

"I tested [Google Books] by typing in my maiden name. Wow! I had no idea that my uncle was mentioned in a book -- The Book of Renee by Renn Martin -- that he built an x-ray machine, and that the author of the book wondered where he was today and wished him well! I passed that information on to him -- I am sure he has already bought the book by now!"

---

**Message from: O. Ali**

*Student, India*

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"I went to search for some very old books written in about 1968-9, which were a part of my HR training, and found them online at Google Books. I couldn't find them for last 7 months. Now I am definitely going to buy them."

---

**Message from: Penny**

*Book Marketing Specialist and Publicist, San Diego, CA*

"As a publicist I'm front line everyday trying to push my authors into the spotlight and the facts are brutal. I have seen authors with great books struggle to get \*anyone's\* attention. To me, Google [Book Search] is another way for them to get noticed in a noisy world and it's another way for readers to find the books they might not otherwise be exposed to. Forgive the cliché but it sounds pretty win-win to me. So if you're an author looking for another way to "get out there" give Google [Book Search] a look-see. In my opinion if you're not using every avenue to promote your book then you're not only doing your career a disservice but cheating your potential reader out of some pretty great stuff."

---

**Message from: Bob**

*Ph.D. Candidate, New York, NY*

"I just came across a copy of the classic philosophy text *Principia Ethica* in your catalog of books and what I want to tell you is WOW!!! Thank you, thank you, thank you. The fact that the book retains the pagination of the original but is fully searchable is a dream come true for scholarly research. This is an extraordinary service to the public. Again, my thanks and my congratulations to you. This is an advancement of historic significance... I own a hard copy and have read many article on this book, but what Google offers has really made it easier to write on this book... I'm working on a Ph.D. dissertation in philosophy and education, and there are a few books that you have placed on line that are pertinent to my dissertation. All of these books are classics and I own them all. What is interesting, though, is that for those books you have online that are different editions from the one I own, I am inclined to buy the books anew so as to be able to refer to the copy you have online... I know of no better method for doing textual analysis than by using your service."

---

**Message from: David**

*Editor/Writer, Alexandria, VA*

"My own verdict: Google [Book Search] is potentially an extremely useful service, especially if publishers understand this is a help, not a threat. Books in most cases will benefit if included. If a book is already in the database and mentions a phrase of interest, you can find it lickety-split. The famous Google interface works great."

---

**Message from: Yvonne**

*Product Manager, Sunnyvale, CA*

"I was looking to find symptoms of different knee injuries to see which ones matched what I had experienced...there was a section at the top of the page offering Google [Book Search] titles, and I clicked through to the book *Disorders of the Patellofemoral Joint*. I read a few of the passages describing the treatment and surgery. Based on what I had read, I diagnosed my condition as a lateral patellar dislocation...I was very relieved to convince myself that it was not an ACL tear. When my doctor got the MRI results back, my diagnosis was right on!"

**Message from: Jerry**

*Retired Teacher, Portland, OR*

"Years ago I was cycle touring with my sons in France and we came across a church in Avranches that held in a special display case a skull. I had forgotten the details so my first search on Google [Book Search] pulled up the story of Saint-Aubert and how he allegedly came to have a hole in his skull. The story was found in the [Theosophical Quarterly Magazine 1927-1928](#), a source I would have never likely found other than through Google [Book Search]. Pretty dam cool."

---

**Message from: Brendan**

*Student, West Chester, PA*

"I would like to comment on how useful Google [Book Search] truly is. While trying to write a comparative paper on a novel, I remembered a passage of text I wanted to reference, but had no clue as to where in the book it was. I was able to find the novel with great ease on Google [Book Search] and then search the text for the passage I was looking for. The page I needed was restricted however enough of the query context appeared to guide me to the right spot in my own copy of the book. Even factoring in the amount of time it took me to IM a friend of mine, tell her how excited I was about the whole situation and write this feedback letter, I'm still saving time by not having to read large swaths of the book again."

---

**Message from: Anonymous**

"I live in Brazil and I am doing a Master degree in Translation Studies. Many books that are good for my research are not easy to find over here and I found them in Google [Book Search]."

---

**Message from: Jean**

*Melbourne, Australia*

"My family found out a couple of years ago that we were descended from a small aristocratic Scottish family. By using Google Books, I've been able to discover many references to my ancestors in 18th and 19th century books that are not accessible in Australian libraries. I even found a record of my family tree back to King Alfred the Great! Google Books makes it a real possibility for us to write a comprehensive and interesting family history!"

---

**Message from: Nicole**

*Student, UK*

"Just wanted to send you the largest possible thank you – I'm doing my dissertation on Samuel Richardson's *Clarissa* – It's 1500 pages and too long to search manually, and too old/long/dense for anyone else to have it online. My boyfriend showed me this site when I was close to a nervous breakdown trying to find specific passages. Thank you, thank you, thank you for having so much of it available. You have kept me sane."

---

**Message from: Rex**

*Student, Austin, TX*

"As a researcher and author at a major university, I use Google Books to find relevant portions of books that my university holds in its library which I could not sort through in a timely manner otherwise. This has revolutionized my capability to perform literature reviews for my work and to spend more time synthesizing my own ideas from the work that has already been done."

---

**Message from: Lucy**

*Website Editor, Palo Alto, CA*

"I think it's a great idea that Google is scanning books of publishers so that more texts can be available online. I hope lots of publishers are participating! ... I have two preschool age children and we are passionate about books. It would be so wonderful if I could read some or all of these books online to decide whether I want to buy them. Publishers need to understand that offering text online will only HELP not hinder their sales. For no online experience can ever equal the joy of curling up on your couch with a good book...or the joy of having your child on your lap as you read."

---

**Message from: Rachel**

*Librarian, Columbia, MO*

"I am a librarian at a large academic library. I have been promoting Google [Books Search] to all the students and faculty who come to our reference desk...Faculty like it both as a research tool and as a tool that helps them make their cases for tenure - - they can now find out about books that cite their work. Heck, this could be a great tool for publishers, to see what books on their backlists are still getting play and might use a new edition or a reprint. I am also using Google [Book Search] as a tool to help me decide how to spend that part of my book budget that is discretionary. If a book cites another book that I already know is good, if it cites a faculty author, if it has information on a certain, narrow topic of interest to a particular faculty member, I can now go out of my way to buy that book...The fact that Google keeps readers from paging through the whole book online means that readers get an excellent teaser which helps commit them to a sale or a request that their library buy the book."

---

**Message from: Kalyan**

*Engineer, Evanston, IL*

"I was searching for a topic called "Simulated annealing in VLSI". I've searched in local libraries, but I couldn't find [anything]. "Simulated annealing" is a small topic. the local library searches allow the search only by title, author etc. I searched for that in Google [Book Search] and found many books, and I immediately bought two of those books..."

---

**Message from: Bernie**

*Technology Professional, Columbia, SC*

"While searching the collection in Google's virtual library for instances of my family

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surname, Robichau, I found something remarkable. A book by James W. Baker titled *Plymouth Labor and Leisure (Images of America)* contained an instance of the word "Robichau," and clicking through the link brought me to a photo of my great uncle, Earl Robichau, from 1914. I could tell who the Robichau in the photograph was...the family resemblance is remarkable. Never before could I have found such an obscure and wonderful gem. Tonight, Google [Book Search] prompted me to buy two "hardcopies" of books that I never would have purchased, or even known about."

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**Message from: Patrick**

*Educational Director, Worcester, MA*

"I run a nonprofit computer lab. We have a large amount of unprivileged children in the lab. Just thought you would like to know that they discovered Google [Book Search] and loved it. They were using it for school work and showing others how to use it. Thanks again for the great products!"

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**Message from: Jaemi**

*Goshen, NY*

"Earlier this week our new Teen Services librarian came in with this story: She was helping a fifth-grader try to find a book for a report...She had looked in all the sections she thought were applicable in the shelves and found nothing. So she tried...Google Books. In the end, they found a book in a section they would never otherwise have thought to look. Child: happy, staff: happy, homework: saved."

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**Message from: Erich**

*Geotechnical Engineer, Seattle, WA*

"Great tool for finding technical books. I'm a geotechnical engineer and one of the hardest things for me is finding references. I'll do a library online catalog search find the book that interests me based on the title, then physically go to the library only to find out that it wasn't what I was looking for. Now I can look inside the book, then determine if I would like to check the book out...Thanks a lot!"

---

**Message from: Anonymous**

"I LOVE Google [Book Search]!!! I am writing a paper on the history of statistics and was disheartened when I picked up Claude Bernard's *Introduction to Experimental Medicine* - because it did not have an index. But then I found you."

---

**Message from: Joanna**

*PhD Student, Poland*

"I am a PhD student and Google Books is of great help to me. I can browse through books which are unavailable in Polish libraries."

---

**Message from: Don**

*Author, Las Vegas, NV*

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"As an author whose books appear in Google [Book Search], I want to express my support for the project. I appreciate potential readers being able to find my book, examine an excerpt – as they might do while leafing through the book at a store, or as they might do on a major seller like Amazon – and deciding for themselves if the book is for them...Google is not in any way alleviating the need for books to exist or be purchased, and in fact are making these books more noticeable and accessible than ever before."

---

**Message from: Tom**

*Student, Gloucester, MA*

"For the third time in the past week, I've been able to answer thorny reference questions using Google [Book Search] that I otherwise would have simply given up on...on a lark I tried Google [Book Search], since it had been so helpful in my assisting other patrons in finding what had seemed to be unfindable via the traditional routes of library research. And lo and behold -- there was my mystery reference...Although the bibliography was itself within copyright, I was permitted to view the page on which the search engine had found a match, and that was more than enough to steer me to the proper volume on the shelves here at the library. Mission accomplished! The implications of this mass digitization movement are nothing less than staggering. For a long time I despaired for the future of humanistic studies. But Google [Book Search] and similar endeavors have given me a burst of optimism. Not only will scholarship in these fields be enhanced as a result of digitization, but it will become more relevant as well ...The more that is scanned and made searchable, the more humanity as a whole will benefit..."

---

**Message from: Paul**

*Retired, Adelaide, Australia*

"I discovered Google [Book Search] this evening and what a delight it is...I belong to several libraries, and all of them have a suggestion box for "requests to buy new books", I will now be able to suggest many more using Google [Book Search]. I will now have the greatest choice in making recommendations."

---

**Message from: Euan**

*UK*

"My gob is well and truly smacked! Google [Book Search] is up and running, looks very impressive, and has already introduced me to two facts that blew me away. I did a search for books referring to my home town of Strathaven in Lanarkshire and came up with two real surprises."

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**EXHIBIT H**

# Quantitative Analysis of Culture Using Millions of Digitized Books

Jean-Baptiste Michel,<sup>1,2,3,4,5\*</sup>† Yuan Kui Shen,<sup>2,6,7</sup> Aviva Presser Aiden,<sup>2,6,8</sup> Adrian Veres,<sup>2,6,9</sup> Matthew K. Gray,<sup>10</sup> The Google Books Team,<sup>10</sup> Joseph P. Pickett,<sup>11</sup> Dale Hoiberg,<sup>12</sup> Dan Clancy,<sup>10</sup> Peter Norvig,<sup>10</sup> Jon Orwant,<sup>10</sup> Steven Pinker,<sup>5</sup> Martin A. Nowak,<sup>1,13,14</sup> Erez Lieberman Aiden<sup>1,2,6,14,15,16,17\*</sup>‡

We constructed a corpus of digitized texts containing about 4% of all books ever printed. Analysis of this corpus enables us to investigate cultural trends quantitatively. We survey the vast terrain of ‘culturomics,’ focusing on linguistic and cultural phenomena that were reflected in the English language between 1800 and 2000. We show how this approach can provide insights about fields as diverse as lexicography, the evolution of grammar, collective memory, the adoption of technology, the pursuit of fame, censorship, and historical epidemiology. Culturomics extends the boundaries of rigorous quantitative inquiry to a wide array of new phenomena spanning the social sciences and the humanities.

Reading small collections of carefully chosen works enables scholars to make powerful inferences about trends in human thought. However, this approach rarely enables precise measurement of the underlying phenomena. Attempts to introduce quantitative methods into the study of culture (1–6) have been hampered by the lack of suitable data.

We report the creation of a corpus of 5,195,769 digitized books containing ~4% of all books ever published. Computational analysis of this corpus enables us to observe cultural trends and subject them to quantitative investigation. ‘Culturomics’ extends the boundaries of scientific inquiry to a wide array of new phenomena.

The corpus has emerged from Google’s effort to digitize books. Most books were drawn from over 40 university libraries around the world. Each page was scanned with custom equipment (7), and the text was digitized by means of optical character recognition (OCR). Additional volumes, both physical and digital, were contributed

by publishers. Metadata describing the date and place of publication were provided by the libraries and publishers and supplemented with bibliographic databases. Over 15 million books have been digitized [~12% of all books ever published (7)]. We selected a subset of over 5 million books for analysis on the basis of the quality of their OCR and metadata (Fig. 1A and fig. S1) (7). Periodicals were excluded.

The resulting corpus contains over 500 billion words, in English (361 billion), French (45 billion), Spanish (45 billion), German (37 billion), Chinese (13 billion), Russian (35 billion), and Hebrew (2 billion). The oldest works were published in the 1500s. The early decades are represented by only a few books per year, comprising several hundred thousand words. By 1800, the corpus grows to 98 million words per year; by 1900, 1.8 billion; and by 2000, 11 billion (fig. S2).

The corpus cannot be read by a human. If you tried to read only English-language entries from the year 2000 alone, at the reasonable pace of 200 words/min, without interruptions for food or sleep, it would take 80 years. The sequence of letters is 1000 times longer than the human genome: If you wrote it out in a straight line, it would reach to the Moon and back 10 times over (8).

To make release of the data possible in light of copyright constraints, we restricted this initial study to the question of how often a given 1-gram or *n*-gram was used over time. A 1-gram is a string of characters uninterrupted by a space; this includes words (“banana”, “SCUBA”) but also numbers (“3.14159”) and typos (“excess”). An *n*-gram is a sequence of 1-grams, such as the phrases “stock market” (a 2-gram) and “the United States of America” (a 5-gram). We restricted *n* to 5 and limited our study to *n*-grams occurring at least 40 times in the corpus.

Usage frequency is computed by dividing the number of instances of the *n*-gram in a given year by the total number of words in the corpus in that year. For instance, in 1861, the 1-gram “slavery” appeared in the corpus 21,460 times, on 11,687

pages of 1208 books. The corpus contains 386,434,758 words from 1861; thus, the frequency is  $5.5 \times 10^{-5}$ . The use of “slavery” peaked during the Civil War (early 1860s) and then again during the civil rights movement (1955–1968) (Fig. 1B).

In contrast, we compare the frequency of “the Great War” to the frequencies of “World War I” and “World War II”. References to “the Great War” peak between 1915 and 1941. But although its frequency drops thereafter, interest in the underlying events had not disappeared; instead, they are referred to as “World War I” (Fig. 1C).

These examples highlight two central factors that contribute to culturomic trends. Cultural change guides the concepts we discuss (such as “slavery”). Linguistic change, which, of course, has cultural roots, affects the words we use for those concepts (“the Great War” versus “World War I”). In this paper, we examine both linguistic changes, such as changes in the lexicon and grammar, and cultural phenomena, such as how we remember people and events.

The full data set, which comprises over two billion culturomic trajectories, is available for download or exploration at [www.culturomics.org](http://www.culturomics.org) and [ngrams.googlelabs.com](http://ngrams.googlelabs.com).

**The size of the English lexicon.** How many words are in the English language (9)?

We call a 1-gram “common” if its frequency is greater than one per billion. [This corresponds to the frequency of the words listed in leading dictionaries (7) (fig. S3).] We compiled a list of all common 1-grams in 1900, 1950, and 2000, based on the frequency of each 1-gram in the preceding decade. These lists contained 1,117,997 common 1-grams in 1900, 1,102,920 in 1950, and 1,489,337 in 2000.

Not all common 1-grams are English words. Many fell into three nonword categories: (i) 1-grams with nonalphabetic characters (“18r”, “3.14159”), (ii) misspellings (“becuase”, “abberation”), and (iii) foreign words (“sensitivo”).

To estimate the number of English words, we manually annotated random samples from the lists of common 1-grams (7) and determined what fraction were members of the above nonword categories. The result ranged from 51% of all common 1-grams in 1900 to 31% in 2000.

Using this technique, we estimated the number of words in the English lexicon as 544,000 in 1900, 597,000 in 1950, and 1,022,000 in 2000. The lexicon is enjoying a period of enormous growth: The addition of ~8500 words/year has increased the size of the language by over 70% during the past 50 years (Fig. 2A).

Notably, we found more words than appear in any dictionary. For instance, the 2002 *Webster’s Third New International Dictionary* (W3), which keeps track of the contemporary American lexicon, lists approximately 348,000 single-word wordforms (10); the *American Heritage Dictionary of the English Language, Fourth Edition* (AHD4) lists 116,161 (11). (Both contain additional multiword entries.) Part of this gap is because dictionaries often

<sup>1</sup>Program for Evolutionary Dynamics, Harvard University, Cambridge, MA 02138, USA. <sup>2</sup>Cultural Observatory, Harvard University, Cambridge, MA 02138, USA. <sup>3</sup>Institute for Quantitative Social Sciences, Harvard University, Cambridge, MA 02138, USA. <sup>4</sup>Department of Psychology, Harvard University, Cambridge, MA 02138, USA. <sup>5</sup>Department of Systems Biology, Harvard Medical School, Boston, MA 02115, USA. <sup>6</sup>Laboratory-at-Large, Harvard University, Cambridge, MA 02138, USA. <sup>7</sup>Computer Science and Artificial Intelligence Laboratory, Massachusetts Institute of Technology (MIT), Cambridge, MA 02139, USA. <sup>8</sup>Harvard Medical School, Boston, MA, 02115, USA. <sup>9</sup>Harvard College, Cambridge, MA 02138, USA. <sup>10</sup>Google, Mountain View, CA 94043, USA. <sup>11</sup>Houghton Mifflin Harcourt, Boston, MA 02116, USA. <sup>12</sup>Encyclopaedia Britannica, Chicago, IL 60654, USA. <sup>13</sup>Department of Organismic and Evolutionary Biology, Harvard University, Cambridge, MA 02138, USA. <sup>14</sup>Department of Mathematics, Harvard University, Cambridge, MA 02138, USA. <sup>15</sup>Broad Institute of Harvard and MIT, Harvard University, Cambridge, MA 02138, USA. <sup>16</sup>School of Engineering and Applied Sciences, Harvard University, Cambridge, MA 02138, USA. <sup>17</sup>Harvard Society of Fellows, Harvard University, Cambridge, MA 02138, USA.

\*These authors contributed equally to this work.

†To whom correspondence should be addressed. E-mail: [jb.michel@gmail.com](mailto:jb.michel@gmail.com) (J.-B.M.); [erez@erez.com](mailto:erez@erez.com) (E.L.A.)

exclude proper nouns (fig. S4) and compound words (“whalewatching”). Even accounting for these factors, we found many undocumented words, such as “aridification” (the process by which a geographic region becomes dry), “slenthem” (a musical instrument), and, appropriately, the word “deletable.”

This gap between dictionaries and the lexicon results from a balance that every dictionary must strike: It must be comprehensive enough to be a useful reference but concise enough to be printed, shipped, and used. As such, many infrequent words are omitted. To gauge how well dictionaries reflect the lexicon, we ordered our year-2000 lexicon by frequency, divided it into eight deciles (ranging from  $10^{-9}$  to  $10^{-8}$ , to  $10^{-2}$  to  $10^{-1}$ ) and sampled each decile (7). We manually checked how many sample words were listed in the *Oxford English Dictionary* (OED) (12) and in the *Merriam-Webster Unabridged Dictionary* (MWD). (We excluded proper nouns, because neither the OED nor MWD lists them.) Both dictionaries had excellent coverage of high-frequency words but less coverage for frequencies below  $10^{-6}$ : 67% of words in the  $10^{-9}$  to  $10^{-8}$  range were listed in neither dictionary (Fig. 2B). Consistent with Zipf’s famous law, a large fraction of the words in our lexicon (63%) were in this lowest-frequency bin. As a result, we estimated that 52% of the English lexicon—the majority of the words used in English books—consists of lexical “dark matter” undocumented in standard references (12).

To keep up with the lexicon, dictionaries are updated regularly (13). We examined how well these changes corresponded with changes in actual usage by studying the 2077 1-gram headwords added to AHD4 in 2000. The overall frequency of these words, such as “buckyball” and “netiquette”, has soared since 1950: Two-thirds exhibited recent

sharp increases in frequency ( $>2\times$  from 1950 to 2000) (Fig. 2C). Nevertheless, there was a lag between lexicographers and the lexicon. Over half the words added to AHD4 were part of the English lexicon a century ago (frequency  $>10^{-9}$  from 1890 to 1900). In fact, some newly added words, such as “gypseous” and “amplidyne”, have already undergone a steep decline in frequency (Fig. 2D).

Not only must lexicographers avoid adding words that have fallen out of fashion, they must also weed obsolete words from earlier editions. This is an imperfect process. We found 2220 obsolete 1-gram headwords (“diestock”, “alkalescent”) in AHD4. Their mean frequency declined throughout the 20th century and dipped below  $10^{-9}$  decades ago (Fig. 2D, inset).

Our results suggest that culturomic tools will aid lexicographers in at least two ways: (i) finding low-frequency words that they do not list, and (ii) providing accurate estimates of current frequency trends to reduce the lag between changes in the lexicon and changes in the dictionary.

**The evolution of grammar.** Next, we examined grammatical trends. We studied the English irregular verbs, a classic model of grammatical change (14–17). Unlike regular verbs, whose past tense is generated by adding -ed (jump/jumped), irregular verbs are conjugated idiosyncratically (stick/stuck, come/came, get/got) (15).

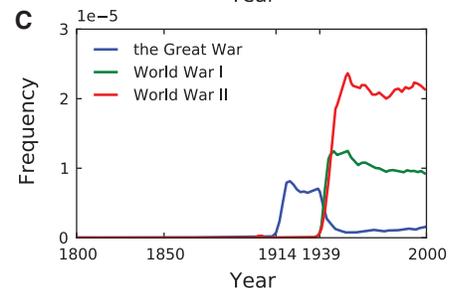
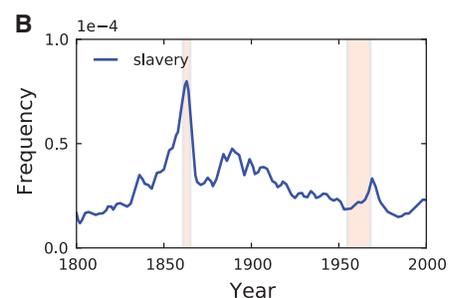
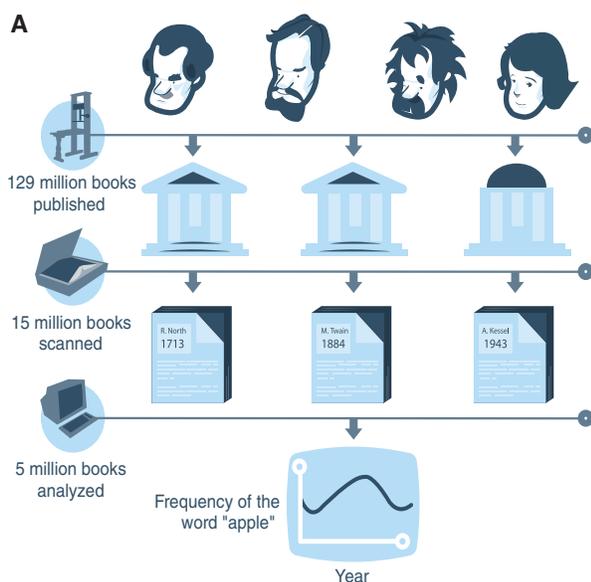
All irregular verbs coexist with regular competitors (e.g., “strived” and “strove”) that threaten to supplant them (Fig. 2E and fig. S5). High-frequency irregulars, which are more readily remembered, hold their ground better. For instance, we found “found” (frequency:  $5 \times 10^{-4}$ ) 200,000 times more often than we found “finded.” In contrast, “dwelt” (frequency:  $1 \times 10^{-5}$ ) dwelt in our data only 60 times as often as “dwelled”

dwelled. We defined a verb’s “regularity” as the percentage of instances in the past tense (i.e., the sum of “drived”, “drove”, and “driven”) in which the regular form is used. Most irregulars have been stable for the past 200 years, but 16% underwent a change in regularity of 10% or more (Fig. 2F).

These changes occurred slowly: It took 200 years for our fastest-moving verb (“chide”) to go from 10% to 90%. Otherwise, each trajectory was sui generis; we observed no characteristic shape. For instance, a few verbs, such as “spill”, regularized at a constant speed, but others, such as “thrive” and “dig”, transitioned in fits and starts (7). In some cases, the trajectory suggested a reason for the trend. For example, with “sped/speeded” the shift in meaning from “to move rapidly” and toward “to exceed the legal limit” appears to have been the driving cause (Fig. 2G).

Six verbs (burn, chide, smell, spell, spill, and thrive) regularized between 1800 and 2000 (Fig. 2F). Four are remnants of a now-defunct phonological process that used -t instead of -ed; they are members of a pack of irregulars that survived by virtue of similarity (bend/bent, build/built, burn/burnt, learn/learnt, lend/lent, rend/rent, send/sent, smell/smelt, spell/spelt, spill/spilt, and spoil/spoilt). Verbs have been defecting from this coalition for centuries (wend/went, pen/pent, gird/girt, geld/gelt, and gild/gilt all blend/blend into the dominant -ed rule). Culturomic analysis reveals that the collapse of this alliance has been the most significant driver of regularization in the past 200 years. The regularization of burnt, smelt, spelt, and spilt originated in the United States; the forms still cling to life in British English (Fig. 2, E and F). But the -t irregulars may be doomed in England too. Each year, a population the size of Cambridge adopts “burned” in lieu of “burnt”.

**Fig. 1.** Culturomic analyses study millions of books at once. (A) Top row: Authors have been writing for millennia; ~129 million book editions have been published since the advent of the printing press (upper left). Second row: Libraries and publishing houses provide books to Google for scanning (middle left). Over 15 million books have been digitized. Third row: Each book is associated with metadata. Five million books are chosen for computational analysis (bottom left). Bottom row: A culturomic time line shows the frequency of “apple” in English books over time (1800–2000).



(B) Usage frequency of “slavery”. The Civil War (1861–1865) and the civil rights movement (1955–1968) are highlighted in red. The number in the upper left ( $1e-4 = 10^{-4}$ ) is the unit of frequency. (C) Usage frequency over time for “the Great War” (blue), “World War I” (green), and “World War II” (red).

Although irregulars generally yield to regulars, two verbs did the opposite: light/lit and wake/woke. Both were irregular in Middle English, were mostly regular by 1800, and subsequently backtracked and are irregular again today. The fact that these verbs have been going back and forth for nearly 500 years highlights the gradual nature of the underlying process.

Still, there was at least one instance of rapid progress by an irregular form. Presently, 1% of

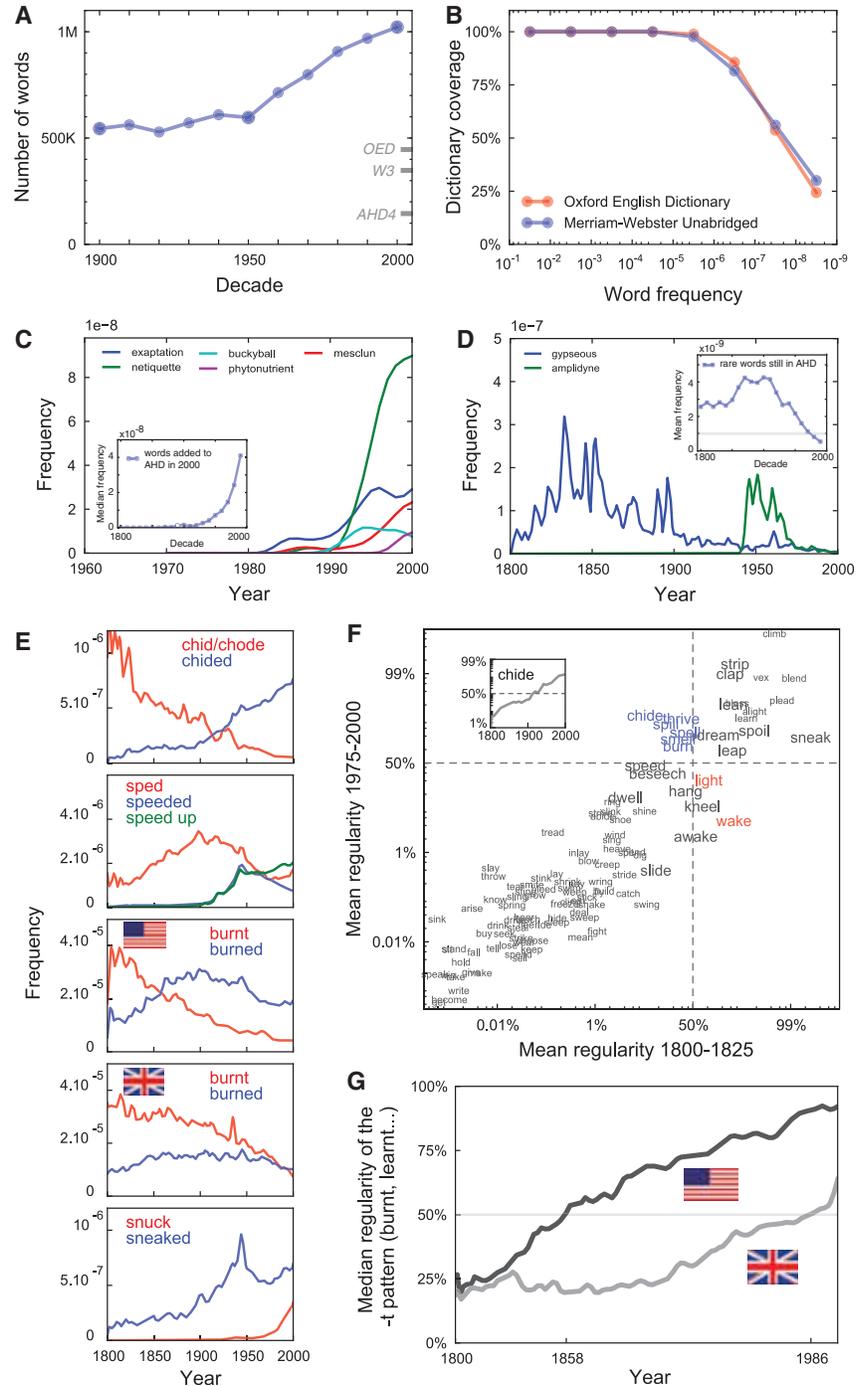
the English-speaking population switches from “sneaked” to “snuck” every year. Someone will have snuck off while you read this sentence. As before, this trend is more prominent in the United States but recently sneaked across the Atlantic: America is the world’s leading exporter of both regular and irregular verbs.

**Out with the old.** Just as individuals forget the past (18, 19), so do societies (20) (fig. S6). To quantify this effect, we reasoned that the fre-

quency of 1-grams such as “1951” could be used to measure interest in the events of the corresponding year, and we created plots for each year between 1875 and 1975.

The plots had a characteristic shape. For example, “1951” was rarely discussed until the years immediately preceding 1951. Its frequency soared in 1951, remained high for 3 years, and then underwent a rapid decay, dropping by half over the next 15 years. Finally, the plots

**Fig. 2.** Culturomics has profound consequences for the study of language, lexicography, and grammar. **(A)** The size of the English lexicon over time. Tick marks show the number of single words in three dictionaries (see text). **(B)** Fraction of words in the lexicon that appear in two different dictionaries as a function of usage frequency. **(C)** Five words added by the AHD in its 2000 update. Inset: Median frequency of new words added to AHD4 in 2000. The frequency of half of these words exceeded  $10^{-9}$  as far back as 1890 (white dot). **(D)** Obsolete words added to AHD4 in 2000. Inset: Mean frequency of the 2220 AHD headwords whose current usage frequency is less than  $10^{-9}$ . **(E)** Usage frequency of irregular verbs (red) and their regular counterparts (blue). Some verbs (chide/chided) have regularized during the past two centuries. The trajectories for “speeded” and “speed up” (green) are similar, reflecting the role of semantic factors in this instance of regularization. The verb “burn” first regularized in the United States (U.S. flag) and later in the United Kingdom (UK flag). The irregular “snuck” is rapidly gaining on “sneaked”. **(F)** Scatterplot of the irregular verbs; each verb’s position depends on its regularity (see text) in the early 19th century (*x* coordinate) and in the late 20th century (*y* coordinate). For 16% of the verbs, the change in regularity was greater than 10% (large font). Dashed lines separate irregular verbs (regularity < 50%) from regular verbs (regularity > 50%). Six verbs became regular (upper left quadrant, blue), whereas two became irregular (lower right quadrant, red). Inset: The regularity of “chide” over time. **(G)** Median regularity of verbs whose past tense is often signified with a -t suffix instead of -ed (burn, smell, spell, spill, dwell, learn, and spoil) in U.S. (black) and UK (gray) books.



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enter a regime marked by slower forgetting: Collective memory has both a short-term and a long-term component.

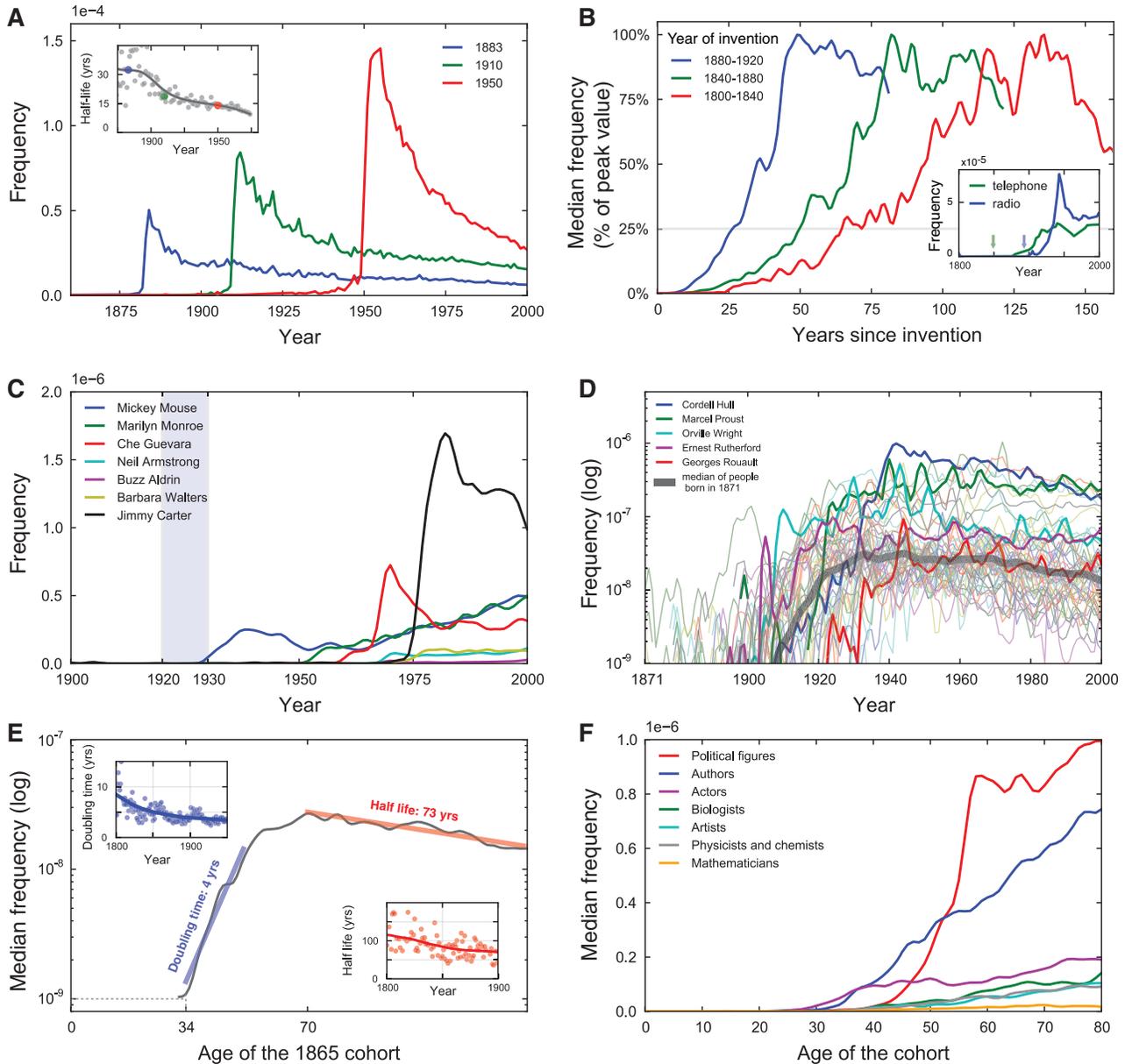
But there have been changes. The amplitude of the plots is rising every year: Precise dates are increasingly common. There is also a greater focus on the present. For instance, “1880” declined to half its peak value in 1912, a lag of 32 years. In

contrast, “1973” declined to half its peak by 1983, a lag of only 10 years. We are forgetting our past faster with each passing year (Fig. 3A).

We were curious whether our increasing tendency to forget the old was accompanied by more rapid assimilation of the new (21). We divided a list of 147 inventions into time-resolved cohorts based on the 40-year interval in which

they were first invented (1800–1840, 1840–1880, and 1880–1920) (7). We tracked the frequency of each invention in the  $n$ th year after it was invented as compared to its maximum value and plotted the median of these rescaled trajectories for each cohort.

The inventions from the earliest cohort (1800–1840) took over 66 years from invention



**Fig. 3.** Cultural turnover is accelerating. **(A)** We forget: frequency of “1883” (blue), “1910” (green), and “1950” (red). Inset: We forget faster. The half-life of the curves (gray dots) is getting shorter (gray line: moving average). **(B)** Cultural adoption is quicker. Median trajectory for three cohorts of inventions from three different time periods (1800–1840, blue; 1840–1880, green; 1880–1920, red). Inset: The telephone (green; date of invention, green arrow) and radio (blue; date of invention, blue arrow). **(C)** Fame of various personalities born between 1920 and 1930. **(D)** Frequency of the 50 most famous people born in

1871 (gray lines; median, thick dark gray line). Five examples are highlighted. **(E)** The median trajectory of the 1865 cohort is characterized by four parameters: (i) initial age of celebrity (34 years old, tick mark); (ii) doubling time of the subsequent rise to fame (4 years, blue line); (iii) age of peak celebrity (70 years after birth, tick mark), and (iv) half-life of the post-peak forgetting phase (73 years, red line). Inset: The doubling time and half-life over time. **(F)** The median trajectory of the 25 most famous personalities born between 1800 and 1920 in various careers.

to widespread impact (frequency  $>25\%$  of peak). Since then, the cultural adoption of technology has become more rapid. The 1840–1880 invention cohort was widely adopted within 50 years; the 1880–1920 cohort within 27 (Fig. 3B and fig. S7).

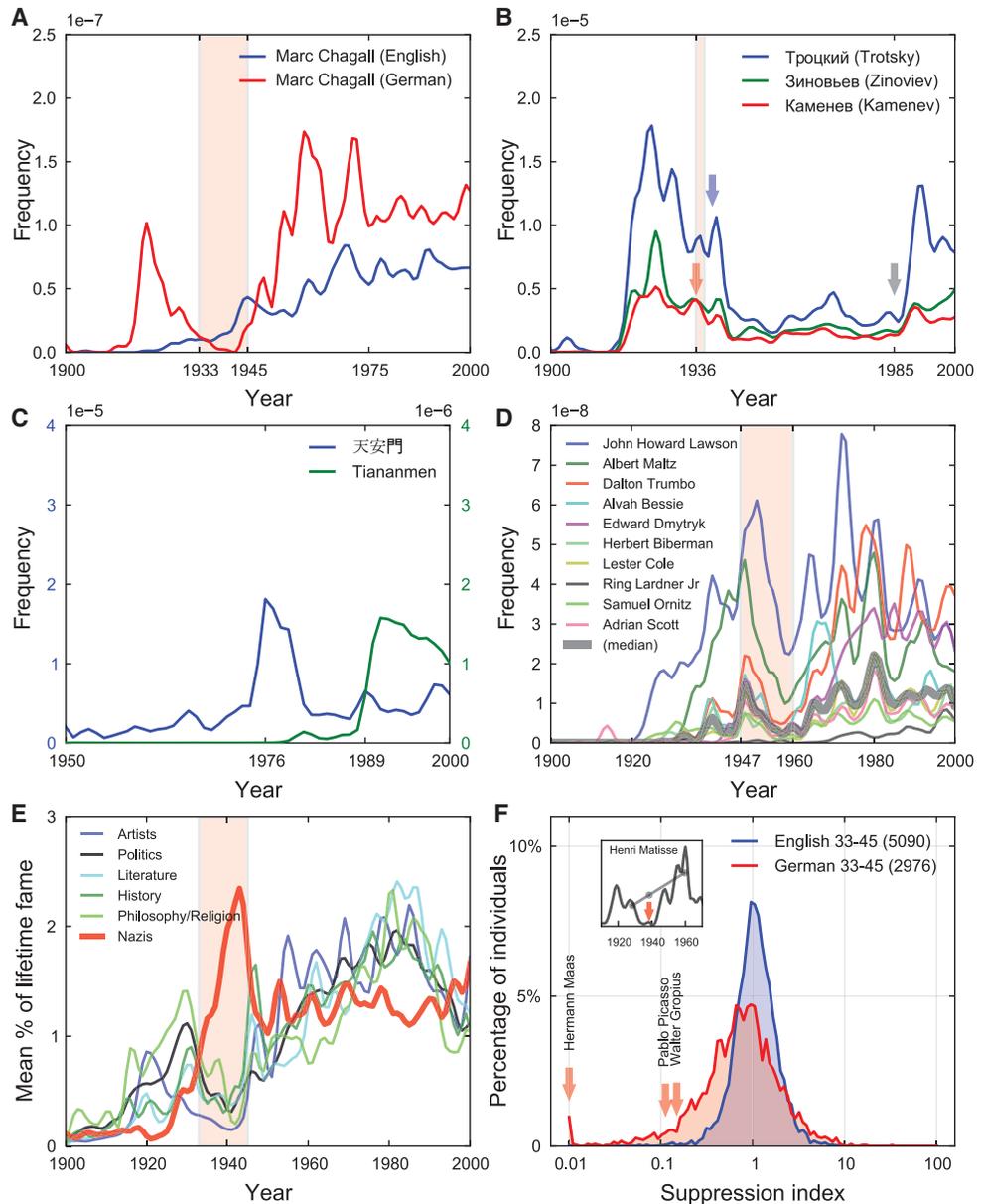
**“In the future, everyone will be famous for 7.5 minutes” – Whatshisname.** People, too, rise to prominence, only to be forgotten (22). Fame can be tracked by measuring the frequency of a person’s name (Fig. 3C). We compared the rise to fame of the most famous people of different eras. We took all 740,000 people with entries in Wikipedia, removed cases where several famous individuals share a name, and sorted the rest by birth date and frequency (23). For every year from 1800 to 1950, we constructed a cohort consisting of the 50 most

famous people born in that year. For example, the 1882 cohort includes “Virginia Woolf” and “Felix Frankfurter”; the 1946 cohort includes “Bill Clinton” and “Steven Spielberg”. We plotted the median frequency for the names in each cohort over time (Fig. 3, D and E). The resulting trajectories were all similar. Each cohort had a pre-celebrity period (median frequency  $<10^{-9}$ ), followed by a rapid rise to prominence, a peak, and a slow decline. We therefore characterized each cohort using four parameters: (i) the age of initial celebrity, (iii) the doubling time of the initial rise, (iii) the age of peak celebrity, and (iv) the half-life of the decline (Fig. 3E). The age of peak celebrity has been consistent over time: about 75 years after birth. But the other parameters have been changing (fig. S8).

Fame comes sooner and rises faster. Between the early 19th century and the mid-20th century, the age of initial celebrity declined from 43 to 29 years, and the doubling time fell from 8.1 to 3.3 years. As a result, the most famous people alive today are more famous—in books—than their predecessors. Yet this fame is increasingly short-lived: The post-peak half-life dropped from 120 to 71 years during the 19th century.

We repeated this analysis with all 42,358 people in the databases of the *Encyclopaedia Britannica* (24), which reflect a process of expert curation that began in 1768. The results were similar (7) (fig. S9). Thus, people are getting more famous than ever before but are being forgotten more rapidly than ever.

**Fig. 4.** Culturomics can be used to detect censorship. (A) Usage frequency of “Marc Chagall” in German (red) as compared to English (blue). (B) Suppression of Leon Trotsky (blue), Grigory Zinoviev (green), and Lev Kamenev (red) in Russian texts, with noteworthy events indicated: Trotsky’s assassination (blue arrow), Zinoviev and Kamenev executed (red arrow), the Great Purge (red highlight), and perestroika (gray arrow). (C) The 1976 and 1989 Tiananmen Square incidents both led to elevated discussion in English texts (scale shown on the right). Response to the 1989 incident is largely absent in Chinese texts (blue, scale shown on the left), suggesting government censorship. (D) While the Hollywood Ten were blacklisted (red highlight) from U.S. movie studios, their fame declined (median: thick gray line). None of them were credited in a film until 1960’s (aptly named) *Exodus*. (E) Artists and writers in various disciplines were suppressed by the Nazi regime (red highlight). In contrast, the Nazis themselves (thick red line) exhibited a strong fame peak during the war years. (F) Distribution of suppression indices for both English (blue) and German (red) for the period from 1933–1945. Three victims of Nazi suppression are highlighted at left (red arrows). Inset: Calculation of the suppression index for “Henri Matisse”.



Occupational choices affect the rise to fame. We focused on the 25 most famous individuals born between 1800 and 1920 in seven occupations (actors, artists, writers, politicians, biologists, physicists, and mathematicians), examining how their fame grew as a function of age (Fig. 3F and fig. S10).

Actors tend to become famous earliest, at around 30. But the fame of the actors we studied, whose ascent preceded the spread of television, rises slowly thereafter. (Their fame peaked at a frequency of  $2 \times 10^{-7}$ .) The writers became famous about a decade after the actors, but rose for longer and to a much higher peak ( $8 \times 10^{-7}$ ). Politicians did not become famous until their 50s, when, upon being elected president of the United States (in 11 of 25 cases; 9 more were heads of other states), they rapidly rose to become the most famous of the groups ( $1 \times 10^{-6}$ ).

Science is a poor route to fame. Physicists and biologists eventually reached a similar level of fame as actors ( $1 \times 10^{-7}$ ), but it took them far longer. Alas, even at their peak, mathematicians tend not to be appreciated by the public ( $2 \times 10^{-8}$ ).

**Detecting censorship and suppression.** Suppression of a person or an idea leaves quantifiable fingerprints (25). For instance, Nazi censorship of the Jewish artist Marc Chagall is evident by comparing the frequency of “Marc Chagall” in English and in German books (Fig. 4A). In both languages, there is a rapid ascent starting in the late 1910s (when Chagall was in his early 30s). In English, the ascent continues. But in German, the artist’s popularity decreases, reaching a nadir from 1936 to 1944, when his full name appears only once. (In contrast, from 1946 to 1954, “Marc Chagall” appears nearly 100 times in the German

corpus.) Such examples are found in many countries, including Russia (Trotsky), China (Tiananmen Square), and the United States (the Hollywood Ten, blacklisted in 1947) (Fig. 4, B to D, and fig. S11).

We probed the impact of censorship on a person’s cultural influence in Nazi Germany. Led by such figures as the librarian Wolfgang Hermann, the Nazis created lists of authors and artists whose “undesirable”, “degenerate” work was banned from libraries and museums and publicly burned (26–28). We plotted median usage in German for five such lists: artists (100 names) and writers of literature (147), politics (117), history (53), and philosophy (35) (Fig. 4E and fig. S12). We also included a collection of Nazi party members [547 names (7)]. The five suppressed groups exhibited a decline. This decline was modest for writers of history (9%) and literature (27%), but pronounced in politics (60%), philosophy (76%), and art (56%). The only group whose signal increased during the Third Reich was the Nazi party members [a 500% increase (7)].

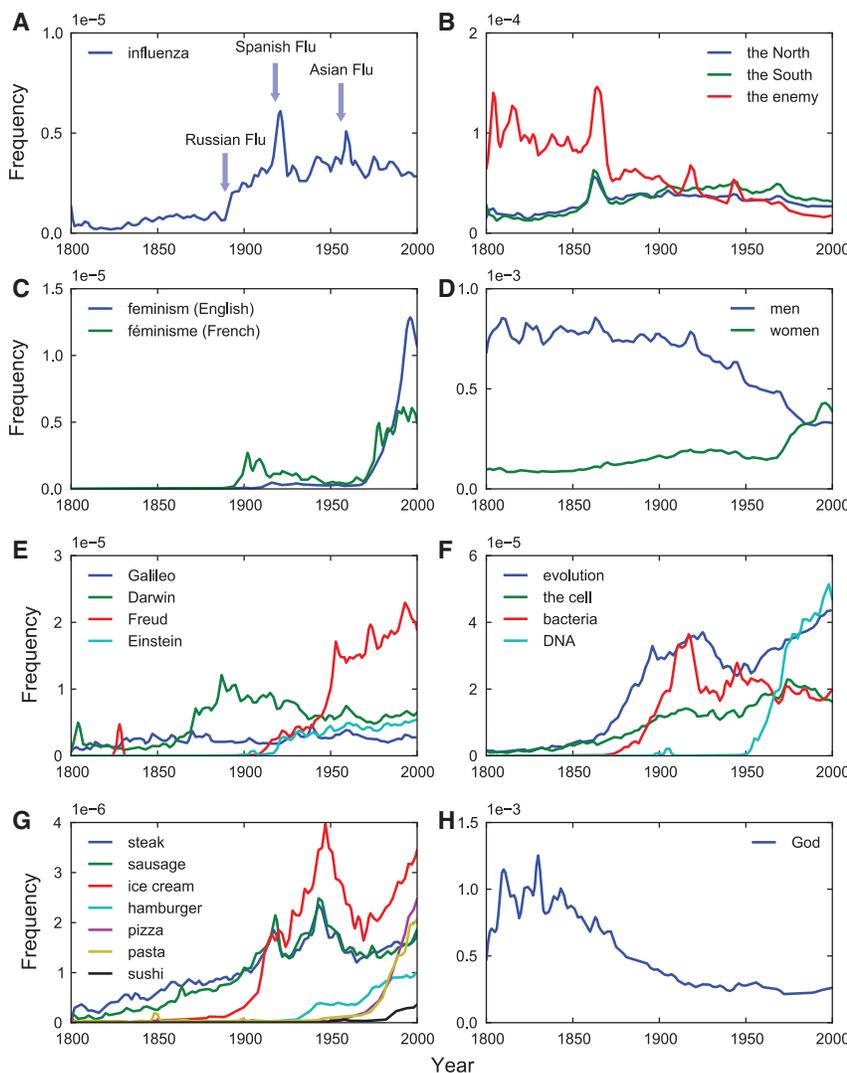
Given such strong signals, we tested whether one could identify victims of Nazi repression *de novo*. We computed a “suppression index” ( $s$ ) for each person by dividing their frequency from 1933 to 1945 by the mean frequency in 1925–1933 and in 1955–1965 (Fig. 4F, inset). In English, the distribution of suppression indices is tightly centered around unity. Fewer than 1% of individuals lie at the extremes ( $s < 1/5$  or  $s > 5$ ).

In German, the distribution is much wider, and skewed to the left: Suppression in Nazi Germany was not the exception, but the rule (Fig. 4F). At the far left, 9.8% of individuals showed strong suppression ( $s < 1/5$ ). This population is highly enriched in documented victims of repression, such as Pablo Picasso ( $s = 0.12$ ), the Bauhaus architect Walter Gropius ( $s = 0.16$ ), and Hermann Maas ( $s < 0.01$ ), an influential Protestant minister who helped many Jews flee (7). (Maas was later recognized by Israel’s Yad Vashem as one of the “Righteous Among the Nations.”) At the other extreme, 1.5% of the population exhibited a dramatic rise ( $s > 5$ ). This subpopulation is highly enriched in Nazis and Nazi-supporters, who benefited immensely from government propaganda (7).

These results provide a strategy for rapidly identifying likely victims of censorship from a large pool of possibilities, and highlight how culturomic methods might complement existing historical approaches.

**Culturomics.** Culturomics is the application of high-throughput data collection and analysis to the study of human culture. Books are a beginning, but we must also incorporate newspapers (29), manuscripts (30), maps (31), artwork (32), and a myriad of other human creations (33, 34). Of course, many voices—already lost to time—lie forever beyond our reach.

Culturomic results are a new type of evidence in the humanities. As with fossils of ancient creatures, the challenge of culturomics lies in the interpretation of this evidence. Considerations of space restrict us to the briefest of surveys: a



**Fig. 5.** Culturomics provides quantitative evidence for scholars in many fields. (A) Historical epidemiology: “influenza” is shown in blue; the Russian, Spanish, and Asian flu epidemics are highlighted. (B) History of the Civil War. (C) Comparative history. (D) Gender studies. (E and F) History of science. (G) Historical gastronomy. (H) History of religion: “God”.

handful of trajectories and our initial interpretations. Many more fossils (Fig. 5 and fig. S13), with shapes no less intriguing, beckon:

(i) Peaks in “influenza” correspond with dates of known pandemics, suggesting the value of culturomic methods for historical epidemiology (35) (Fig. 5A and fig. S14).

(ii) Trajectories for “the North”, “the South”, and finally “the enemy” reflect how polarization of the states preceded the descent into the Civil War (Fig. 5B).

(iii) In the battle of the sexes, the “women” are gaining ground on the “men” (Fig. 5C).

(iv) “fēminisme” made early inroads in France, but the United States proved to be a more fertile environment in the long run (Fig. 5D).

(v) “Galileo”, “Darwin”, and “Einstein” may be well-known scientists, but “Freud” is more deeply ingrained in our collective subconscious (Fig. 5E).

(vi) Interest in “evolution” was waning when “DNA” came along (Fig. 5F).

(vii) The history of the American diet offers many appetizing opportunities for future research; the menu includes “steak”, “sausage”, “ice cream”, “hamburger”, “pizza”, “pasta”, and “sushi” (Fig. 5G).

(viii) “God” is not dead but needs a new publicist (Fig. 5H).

These, together with the billions of other trajectories that accompany them, will furnish a great cache of bones from which to reconstruct the skeleton of a new science.

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#### Supporting Online Material

[www.sciencemag.org/cgi/content/full/science.1199644/DC1](http://www.sciencemag.org/cgi/content/full/science.1199644/DC1)  
Materials and Methods  
Figs. S1 to S19  
References

27 October 2010; accepted 6 December 2010  
Published online 16 December 2010;  
[10.1126/science.1199644](http://10.1126/science.1199644)

DURIE TANGRI LLP  
DARALYN J. DURIE (*Pro Hac Vice*)  
ddurie@durietangri.com  
JOSEPH C. GRATZ (*Pro Hac Vice*)  
jgratz@durietangri.com  
DAVID MCGOWAN (*Pro Hac Vice*)  
dmcgowan@durietangri.com  
GENEVIEVE P. ROSLOFF (*Pro Hac Vice*)  
grosloff@durietangri.com  
217 Leidesdorff Street  
San Francisco, CA 94111  
Telephone: 415-362-6666  
Facsimile: 415-236-6300

Attorneys for Defendant  
Google Inc.

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., Associational  
Plaintiff, BETTY MILES, JOSEPH  
GOULDEN, and JIM BOUTON, on behalf of  
themselves and all other similarly situated,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 05 CV 8136 (DC)  
**ECF Case**

**DECLARATION OF JOSEPH C. GRATZ IN SUPPORT OF DEFENDANT GOOGLE  
INC.'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE  
SUMMARY ADJUDICATION**

I, Joseph C. Gratz, hereby declare under penalty of perjury:

1. I am an attorney duly admitted to practice law in the State of California and in this Court. I am a member of Durie Tangri LLP, attorneys for Defendant Google Inc. in the above-captioned civil action. I submit this declaration in support of Defendant's Motion for Summary Judgment. I make this declaration based on personal knowledge of the facts and circumstances set forth herein.

2. Attached as Exhibit 1 is a true and correct copy of excerpted pages of the transcript of the deposition of Paul N. Courant taken herein on April 23, 2012.

3. Attached as Exhibit 2 is a true and correct copy of excerpted pages of the transcript of the deposition of Paul Aiken taken herein on April 19, 2012.

4. Attached as Exhibit 3 is a true and correct copy of excerpted pages of Plaintiffs' Responses and Objections to Defendant Google Inc.'s First Set of Interrogatories to Plaintiffs The Authors Guild, Inc., Jim Bouton, Joseph Goulden and Betty Miles herein, served on April 27, 2012.

5. Attached as Exhibit 4 is a true and correct copy of excerpted pages of the transcript of the deposition of Judith A. Chevalier taken herein on June 8, 2012.

6. Attached hereto as Exhibit 5 is a true and correct copy of a February 13, 2012, letter written by Professor Pamela Samuelson, UC Berkeley School of Law, to The Honorable Denny Chin, pertaining to this action.

7. Attached as Exhibit 6 is a true and correct copy of excerpted pages of the transcript of the deposition of Eric Zohn taken herein on April 13, 2012.

8. Attached as Exhibit 7 is a true and correct copy of Exhibit 2 to the deposition of Eric Zohn taken herein on April 13, 2012.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 27th day of July, 2012, at San Francisco, California.

/s/ Joseph C. Gratz  
Joseph C. Gratz

**EXHIBIT 1**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, et al.,  
Plaintiffs,

Master File No.

-vs-

05 CV 8136-DC

GOOGLE, INC.,  
Defendant.

\_\_\_\_\_ /

The Videotaped Deposition of PAUL N. COURANT,  
Ph.D., Taken at 503 Thompson Street,  
5021 Fleming Administration Building,  
Ann Arbor, Michigan,  
Commencing at 2:00 p.m.,  
Monday, April 23, 2012,  
Before Jennifer L. Ward, CSR-3717.

1 there.

2 Q. Great. So -- thank you. You mentioned  
3 that the digital files are used by people with print  
4 disabilities. Are those people limited to the  
5 University of Michigan community, or anyone?

6 A. With respect to works that are from the  
7 University of Michigan files, yes, I believe it is  
8 limited to just the University of Michigan certified  
9 users.

10 Q. And what is a certified user? What makes  
11 someone a certified user?

12 A. There's an office in the university that  
13 determines whether people have print disabilities, and  
14 then of course the person has to be a member of the  
15 university community.

16 Q. With respect to digital files of books that  
17 are in copyright and that were digitized without the  
18 authorization of the rights holder, to whom are those  
19 works or those digital files available for search  
20 purposes?

21 MR. PETERSEN: Objection to form.

22 BY MR. BONI:

23 Q. You said you made them available for search.  
24 I'm asking available to whom?

25 A. So to search for the -- search text as

1 where we do have authorization from the rights holder.

2 BY MR. BONI:

3 Q. Right. So let me limit it to those works  
4 where the rights holder did not give authorization.

5 A. So let me just try to see if I can get this  
6 set winnowed down to what it is. These are works that  
7 are in copyright, digitized by Google, a copy has come  
8 to the University of Michigan, and you're asking who  
9 can read the text of those works?

10 Q. Correct.

11 A. Right.

12 Q. You mentioned those at the University of  
13 Michigan with print disabilities and then staff for  
14 technical and computer purposes --

15 A. Yes.

16 Q. -- and I'm asking you whether there is  
17 anyone else.

18 A. There are some staff who are not staff at  
19 the University of Michigan associated with the mirror  
20 site at Indiana, and that's all I can think of.

21 Q. Okay. Do you know whether any research  
22 has been conducted on the digital files which -- where  
23 the research does not involve reading the text of the  
24 books?

25 MR. PETERSEN: Objection to form.

Page 85

1 A. She's the Chief Information Officer.

2 Q. All right, okay. Chief information, CIO,  
3 all right. Who replicated the digital works and  
4 associated metadata to the active mirror site at IU's  
5 Indianapolis campus?

6 MR. PETERSEN: Objection to form.

7 THE WITNESS: That work would have  
8 been done under the general direction of John Wilkin  
9 and his counterpoints at Indiana -- counterparts at  
10 Indiana.

11 BY MR. BONI:

12 Q. Okay. On page 19 in paragraph 67, it's  
13 right in the middle of the page, it says in the  
14 second sentence, Defendants also admit that the  
15 Hathi Trust Service preserves and secures books that  
16 are in copyright, published, and commercially  
17 available. Do you see that language, Dr. Courant?

18 A. I do.

19 Q. In what way does Hathi Trust preserve the  
20 books referenced here?

21 MR. PETERSEN: Objection to form.

22 THE WITNESS: The Hathi Trust is an  
23 operation of the library and has a time scale for  
24 preserving its assets that extends into the indefinite  
25 future.

1 BY MR. BONI:

2 Q. What are its assets?

3 A. Its holdings, copies of works. Assets may  
4 not have been the best word, but copies of works. And  
5 works are subject to -- print works are subject to all  
6 manner of risk of deterioration and destruction over  
7 time, and so the sense in which these works are  
8 preserved is that we would intend to keep a copy, as I  
9 said, into the indefinite future against the  
10 possibility that the -- that other copies would  
11 disappear.

12 MS. DURIE: Can you do me a favor?  
13 Can I just get you to move the bottle to one side? The  
14 videographer was just saying it was blocking.

15 THE WITNESS: Oh, sure.

16 MS. DURIE: Thanks.

17 BY MR. BONI:

18 Q. Let me ask you to turn to page 21, paragraph  
19 78.

20 A. I'm there.

21 Q. There is a block quote there. It appears to  
22 be a statement from Michigan Library. And it states,  
23 this tells us that our pilot process is flawed,  
24 referring to the potential orphan works. Can you tell  
25 me what that -- what is meant by the pilot process

1 that?

2 A. I thought it was an extremely interesting  
3 and positive development.

4 Q. Why was that?

5 A. So really a number of reasons. We had been  
6 digitizing our collections ourselves at the rate of  
7 about 10,000 volumes a year give or take, and at that  
8 rate it was going to take 900 years or so to get the  
9 job done. And in fact, it would have taken longer  
10 because we're still acquiring works.

11 And so suddenly it became possible  
12 to imagine digitizing close to the whole -- the whole  
13 library, and that provided in turn a number of benefits  
14 that struck me then and strike me now as being very,  
15 very important. One, which is really huge, is this  
16 notion of search that I talked about earlier. Having  
17 the full text available for search of the works in the  
18 library allows people, scholars, students, faculty, to  
19 find works that have subject matter that might not be  
20 apparent until the old card catalogs.

21 The old catalog would give you three  
22 entries, and if it turned out there was something else  
23 important that was number four, it's not there. But if  
24 it turns out that that 4th or 5th or 6th use has words  
25 that are characteristic, you can find them in the works

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1 in the library and then come to the library and use  
2 them.

3 The second enormous advantage has to  
4 do with preservation. Many works in the library,  
5 millions certainly, several millions, were printed on  
6 acid paper, which means that they have within them the  
7 seeds of their own -- their own destruction. It's a  
8 phenomenon you will have noticed. You know, from time  
9 to time you take an old paperback especially or an old  
10 newspaper off the shelf and it just turns into  
11 cornflakes and then dust in your hands. That's what  
12 happens to works on acid paper, and in time it happens  
13 to all of them.

14 And by -- knowing that there are  
15 millions of such works, identifying them one by one is  
16 sort of inconceivably difficult. You have to go to the  
17 shelves. I mean it just -- you know, millions or --  
18 that's a big number, and, you know, I just can't  
19 imagine the amount of effort that would be involved in  
20 finding them one by one.

21 If we go through this process of  
22 digitizing essentially the whole collection we then  
23 have a preservation copy of works that would otherwise  
24 disappear without replacement. These works now will in  
25 due course disappear, in due time, but we will be able

1 BY MS. DURIE:

2 Q. I'm sorry, I apologize. Is it correct that  
3 the University of Michigan has used copies of --  
4 digital copies of books that were scanned by Google to  
5 create a searchable index?

6 A. As part of this project?

7 Q. Yes.

8 A. Yes.

9 Q. And what was the reason for doing that?

10 A. I think I described it earlier, that it  
11 enables users to find things reliably and easily that  
12 they would otherwise not be able to find.

13 Q. You also mentioned the display, using the  
14 work to allow people with print disabilities to gain  
15 access to works that they otherwise would not be able  
16 to read. Has the University of Michigan made any  
17 actual displays of works in its collection of any of  
18 the works as part of the search -- strike that. That  
19 was terrible question.

20 In connection with this  
21 searchable index, does the University of Michigan allow  
22 users to read works that are returned from that  
23 searchable index if those works are deemed to be in  
24 copyright?

25 MR. PETERSEN: So we're off the

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1 subject of students with print disabilities?

2 MS. DURIE: Correct.

3 MR. PETERSEN: This is a  
4 different -- okay.

5 THE WITNESS: In cases where the  
6 rights holder has authorized it, yes.

7 BY MS. DURIE:

8 Q. To the extent that the rights holder has not  
9 authorized it, does the University of Michigan allow  
10 individuals to see the complete copies of works that  
11 are returned as search results if those works are in  
12 copyright?

13 MR. PETERSEN: And you're excluding  
14 students with print disabilities?

15 BY MS. DURIE:

16 Q. Excluding students with print disabilities.

17 A. If the works are either in copyright or not  
18 known to be not in copyright, no.

19 Q. Has the University of Michigan --

20 A. Did I get that grammar right?

21 Q. Yeah.

22 A. I believe so.

23 Q. Yes. Has the University of Michigan put  
24 security measures in place to protect all of the  
25 various digital copies that exist of these works?

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1           A.     Again, we're talking about this set of works  
2 that we do not know to be in the public domain?

3           Q.     Correct.

4           A.     Yes.

5           Q.     Are you aware of any breaches that have  
6 taken place that have allowed those works to become  
7 part of the public domain --

8           A.     No.

9           Q.     -- security breaches? Does the University  
10 of Michigan have a budget for the acquisition of new  
11 works?

12          A.     Yes.

13          Q.     Is that budget broken down in some fashion  
14 departmentally or --

15          A.     It's -- so actually I should back up. The  
16 University of Michigan Library has such a budget.  
17 Several other libraries have budgets. Departmental  
18 libraries have budgets. So there are probably dozens  
19 of entities within the University of Michigan who  
20 have -- make budgeted expenditures on library  
21 acquisitions, and by far the largest of those entities,  
22 but only one of them, is the one of which I am the  
23 dean.

24          Q.     With respect to the entity of which you are  
25 the dean, what is the acquisition budget for that

1 entity?

2 A. Approximately 20 -- a little bit under  
3 20 million dollars a year.

4 Q. Has that budget been affected in any way by  
5 the Google Library Project? In other words, has that,  
6 for example, caused your budget to go down?

7 MR. PETERSEN: When you say budget,  
8 for acquisitions?

9 BY MS. DURIE:

10 Q. For acquisitions, acquisitions.

11 A. Certainly not in any direct way. Indirectly  
12 the Google Library Project has enhanced the reputation  
13 of the library, therefore possibly improved our  
14 political ability to get resources from the provost.

15 Q. Okay. But it is not then the case I take it  
16 that the fact that you have digital copies of the works  
17 in your collection has itself caused you to start  
18 spending less money on book acquisition?

19 A. No.

20 Q. Have there ever been circumstances where the  
21 University of Michigan has bought additional paper  
22 copies of books that it has in digital form as a result  
23 of its participation in the Google Library Project?

24 A. So we have a dangling modifier here. So we  
25 have it in digital form as a result of the Google

Page 112

1 connection with search functionality?

2 BY MS. DURIE:

3 Q. Any. Just in general. Presumably yes,  
4 right?

5 A. Yes.

6 Q. Okay. And has the University of Michigan  
7 ever paid a rights holder for permission to include a  
8 work simply in that index?

9 A. Not to my knowledge.

10 Q. Okay. Now let me take indices that  
11 encompass the full text of the work. Has the  
12 University of Michigan ever paid a rights holder for  
13 permission to have that rights holder's work included  
14 in the index where it was an index of the full text of  
15 works?

16 A. Again --

17 MR. BONI: Object to form.

18 THE WITNESS: I had no knowledge of  
19 such circumstances.

20 BY MS. DURIE:

21 Q. Okay.

22 A. So no, as far as I know.

23 Q. Now, you also mentioned earlier in your  
24 testimony the importance of being able to maintain  
25 duplicate copies of works as part of a digital archive;

**EXHIBIT 2**

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3

THE AUTHORS GUILD, INC., et )

4 al., )Civil Action No.  
)05-CV-8136 (DC)

5 Plaintiffs, )

)

6 vs. )

)

7 GOOGLE, INC., )

)

8 Defendant. )

-----)

9 Thursday, April 19, 2012  
9:08 a.m.

10

11

12

13 Confidential Videotaped Deposition  
14 of PAUL AIKEN, held at the offices of  
Milberg, LLP, One Penn Plaza, New York,  
15 New York, pursuant to Rule 30 (b)(6)  
Notice, before Otis Davis, a Notary  
Public of the State of New York.

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25 (#442577)

1 Q. Correct.

2 A. My belief is that it will search within  
3 the text of the actual book as well as within the  
4 title and it will return results responsive to the  
5 search terms, whether or not the terms are in the  
6 title.

7 Q. Is there any way to create a searchable  
8 database of books without scanning the text of books  
9 to convert them into digital form?

10 MR. BONI: Object to form.

11 A. I don't know.

12 Q. Are you aware of any way to enable full  
13 text searching of a book without making a copy of the  
14 entire book?

15 MR. BONI: It's the same question.  
16 Object to form.

17 A. Repeat the question, please.

18 Q. Sure.

19 Are you aware of any way to create a  
20 searchable index of books without scanning the  
21 complete copy of the books included within that  
22 index?

23 MR. BONI: Objection.

24 THE WITNESS: Answer?

25 MR. BONI: You can answer.

1 Q. You can answer.

2 A. No.

3 Q. Prior to Google Books, were there any  
4 searchable databases of the text of books?

5 MR. BONI: Object to form. These  
6 questions all lack foundation.

7 A. Yes.

8 Q. What were those databases?

9 A. Amazon.com had such a database, others  
10 may have existed, I don't know the timing of Internet  
11 Archive's database, Yahoo! and Microsoft also were  
12 engaged in creating such databases.

13 Q. Did Microsoft ever have a database  
14 available to users that allowed for searching the  
15 full text of books?

16 MR. BONI: Object to form.

17 A. I believe it did.

18 Q. Do you know when that service was first  
19 made available to users?

20 A. No, I don't.

21 Q. Other than Amazon, Internet Archive,  
22 Yahoo! and Microsoft, are you aware of any other  
23 databases that allowed for the full text searching of  
24 books?

25 A. Barnesandnoble.com. That's all I can

1           Today, do you consider there to be a  
2 potential market for including excerpts of books in  
3 book reviews?

4           A.     No.

5           Q.     In your view, there is no such potential  
6 market because the inclusion of quotations in book  
7 reviews is sanctioned by law?

8           A.     Sanctioned by both I would say free  
9 speech and fair use grounds.

10          Q.     Earlier in your testimony, you also  
11 indicated that sometimes people will discover books  
12 in bookstores by browsing them; is that right?

13          A.     Yes.

14          Q.     And when I go into my neighborhood  
15 bookstore, typically books are available on counters  
16 for me to pick up and look through; is that right?

17          A.     That's right.

18          Q.     Rather than being, for example, like in a  
19 pharmacy behind the counter where I would only be  
20 able to see the cover but not look to see what was  
21 inside?

22          A.     Generally, bookstores make books  
23 available for browsing.

24          Q.     Do you have a view as to whether making  
25 books available for browsing helps or hurts the sale

1 of books?

2 A. You're talking about physical bookstores?

3 Q. Yes, physical bookstores.

4 A. Yes, I do.

5 Q. What is your view?

6 A. My view is that it helps the sale of  
7 books.

8 Q. Why is that?

9 A. Particularly in physical bookstores  
10 holding the book, flipping through the pages, getting  
11 a sense for the book makes a reader more likely to  
12 buy a book, particularly one from a little known  
13 author.

14 Q. Is that because sometimes the reader gets  
15 interested by seeing what's inside the book?

16 MR. BONI: Object to form.

17 A. Holding the book, reading it makes it  
18 interesting and you find the content interesting and  
19 you may want to purchase it.

20 Q. Amazon also has a feature that allows you  
21 to browse books electronically; is that right?

22 A. Yes. They have the Search Inside the  
23 Book.

24 Q. Is it likewise your view that the Search  
25 Inside the Book feature on Amazon serves to

1 facilitate the sales of at least some types of books?

2 A. Amazon representatives say that it's true  
3 and I believe it's true; publishers also say that it  
4 helps the sale of books.

5 Q. A number of publishers have entered into  
6 the Partner Program with Google and have made certain  
7 pages of works available on Google Books; is that  
8 right?

9 A. That's right.

10 Q. Do you have a view as to whether the  
11 ability to see a few pages of the book on Google  
12 Books helps or hurts the sale of those books?

13 A. I believe it helps the sale of  
14 commercially available books.

15 Q. Was there a period of time during which  
16 there was a clearinghouse for licenses for libraries  
17 to make archival digital copies of books?

18 A. I don't believe so.

19 Q. Has The Authors Guild ever had any role  
20 in providing a mechanism for libraries to make  
21 archival digital copies?

22 A. Well, let's see -- well, The Authors  
23 Guild has been involved, my predecessors and the  
24 lawyers at the Guild who preceded me, in legislative  
25 efforts to -- under Section 108 of the Copyright Act

1 physical copy of the member's book and creating a  
2 digital image file from it?

3 A. Yes. The Kaleidoscope Software did  
4 involve that.

5 Q. Who paid for that digital image file to  
6 be created?

7 A. Kaleidoscope Software, which became known  
8 as 2XL almost immediately.

9 Q. Did Kaleidoscope Software receive any  
10 compensation in any form for having created that  
11 digital file?

12 A. Well, it was part of a package. By  
13 making -- creating the digital file for the -- it was  
14 actually the digital template for the printing of  
15 print-on-demand books. Part of the agreement was  
16 that the book would then be marketed through 2XL's  
17 program.

18 Q. And 2XL would receive some share in the  
19 revenues from the sale of those books; is that  
20 correct?

21 A. That's correct.

22 Q. What share of the revenues did 2XL  
23 receive?

24 A. I can't recall.

25 Q. Is that the current instantiation of the

1 Back In Print Program?

2 A. Substantially. Kaleidoscope became 2XL,  
3 which changed its name to iUniverse, and then there  
4 has been some acquisitions that have -- now Author  
5 Solutions is the owner of essentially this in-print  
6 of reprinted formally out-of-print books.

7 The things that have changed since the  
8 inception of the program is there was at some point  
9 an amendment to the contract, which slightly changed  
10 the royalty rate, I can't remember what it was, what  
11 it changed from to, with the intention of having a  
12 substantially lower retail price.

13 Other changes have been that originally  
14 the books were available in trade paperback format,  
15 now they can be available as hard covers, some  
16 members have chosen to make their books available as  
17 e-books through the program.

18 Q. So let me see if I understand how it  
19 works. An author provides a physical copy of his or  
20 her book to iUniverse; is that right?

21 A. Right.

22 Q. If I refer to the entity that's currently  
23 making the digital files and providing these services  
24 as iUniverse, will you understand what I'm talking  
25 about?

1 A. Yes.

2 Q. iUniverse then makes a digital file from  
3 the physical copy, correct?

4 A. That's right.

5 Q. Where is that digital file stored?

6 A. That's a digital image file that is  
7 stored at -- it would be at Ingram's -- there was  
8 probably a copy retained by iUniverse, but the  
9 production copy is held with Ingram's Lightning  
10 Source program.

11 Q. What security measures are put into place  
12 to protect those digital files?

13 A. Ingram's Lightning Source program is the  
14 leading industry provider of these services. I don't  
15 specifically know, but it has commercial grade  
16 security that I'm sure that all major publishers have  
17 found satisfactory, to my knowledge.

18 Q. Have The Authors Guild ever performed any  
19 audit of the security measures that are in place at  
20 Ingram?

21 A. No. But these are digital image files.  
22 These are not digital text files.

23 Q. A digital image file can be turned into a  
24 digital text file, correct?

25 A. Yes; in fact, Google does that.

1 Q. Through the application of OCR?

2 A. Right.

3 Q. Have you ever been made aware of the  
4 results of any security audit performed relating to  
5 the storage of these digital files by Ingram?

6 A. No.

7 MS. DURIE: Let me have marked as the  
8 next exhibit a document titled "Authors Guild  
9 Backinprint.com On-Demand Book Application."

10 (Aiken Exhibit 8, Application form to  
11 participate in backinprint.com program, marked for  
12 identification, as of this date.)

13 Q. Do you recognize what has been marked as  
14 Exhibit 8?

15 A. Yes. This is an application form to  
16 participate in the backinprint.com program.

17 Q. This is a form that was prepared by The  
18 Authors Guild, correct?

19 A. Correct.

20 Q. And The Authors Guild makes this form  
21 available to its members; is that right?

22 A. That's right.

23 Q. Does it make this form available to its  
24 members on its Web site?

25 A. I believe so, but I'm not sure.

1 Q. Does The Authors Guild make any  
2 recommendations to its members regarding whether some  
3 portion of a work should be browsable in order to  
4 facilitate sales of the work?

5 A. We do so in this application form I  
6 believe somewhere.

7 Q. What recommendation does The Authors  
8 Guild make to its members in that regard?

9 A. I believe --

10 Q. And if it helps, I can direct you to page  
11 No. 9 at the bottom.

12 A. Thank you.

13 Yes. We recommend that authors make the  
14 first chapter of their book available.

15 Q. So The Authors Guild recommends to  
16 authors to make the first chapter of the author's  
17 book available for browsing online; is that correct?

18 A. Yes, in conjunction with the Back In  
19 Print Program.

20 Q. Why does The Authors Guild make that  
21 recommendation?

22 A. Because we have been told and believe  
23 that allowing a book to be browsed in this way  
24 promotes the sale of the book.

25 Q. How would a potential reader typically

1 term for these sorts of programs?

2 Q. Correct.

3 A. Yes. I believe there would be -- I  
4 believe there would have to be a conversion to  
5 digital text, something that hadn't occurred to me  
6 until I noticed that it appeared in the last few days  
7 that Back In Print books were not available in -- did  
8 not seem to be available in Search Inside the Book  
9 programs.

10 Q. Do you know whether an author who is  
11 making his work available through Back In Print can  
12 pay an additional \$75 to iUniverse in order to have a  
13 digital text file created and included within the  
14 Barnes & Noble See Inside the Book feature?

15 A. The only knowledge about that is what has  
16 been presented to me today.

17 Q. Is that likewise true with respect to the  
18 Amazon See Inside the Book feature?

19 A. Yes.

20 Q. Now, with respect to the Amazon Search  
21 Inside the Book feature, authors do not receive any  
22 compensation when portions of their book are shown in  
23 response to search requests, correct?

24 A. We're talking about the -- are we talking  
25 generally in the Amazon program or are we talking

1 about the iUniverse Back In Print Program?

2 Q. Generally, Amazon's Search Inside the  
3 Book.

4 A. Yes. My understanding is -- no. Authors  
5 generally do not receive compensation for their books  
6 being shown in Search Inside the Book with Amazon.

7 Q. And authors likewise do not typically  
8 give specific permission for their works to be shown  
9 in the Amazon Search Inside the Book program but  
10 publishers do; is that correct?

11 A. Typically, authors have in their  
12 contracts with their publishers a clause allowing the  
13 publisher to prevent portions of the text to be used  
14 to promote sales of the book.

15 So the author licenses or includes that  
16 right in the license to the publisher, and then the  
17 publisher authorizes in some cases Amazon, Google, or  
18 Barnes & Noble to make displays.

19 Q. Can authors opt out of the Amazon Search  
20 Inside the Book program?

21 A. I believe they can through their  
22 publishers.

23 Q. Has The Authors Guild made any  
24 recommendations to its members about whether to opt  
25 out of the Amazon Search Inside the Book program?

1 used, over books not in the program. Those figures  
2 from Amazon should be taken with a grain of salt  
3 because Amazon plays its cards very close to the  
4 past. They would never provide information on the  
5 types of books and how sales might be affected.

6 Publishers have also told me that it  
7 increases sales, but they've often been skeptical  
8 about how much and whether or not those figures are  
9 in any way artificially affected by Amazon in  
10 changing its search results within Amazon based on  
11 whether or not it's in the Search Inside the Book  
12 program. I don't know one way or another what may be  
13 done behind the scenes.

14 Q. Do you think it's more likely than not  
15 that Search Inside the Book on average has a net  
16 positive effect on sales?

17 A. Yes.

18 Q. Would you agree that Search Inside the  
19 Book has created a browsable bookstore?

20 MR. BONI: Object to form.

21 A. No.

22 MR. BONI: You can answer.

23 A. No.

24 MS. DURIE: Let me have marked as the  
25 next exhibit a multipage document, the first page of

**EXHIBIT 3**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

The Authors Guild, et al.	:	
	:	
Plaintiffs,	:	Master File No. NO. 05 CV 8136-DC
	:	
v.	:	
	:	
Google Inc.,	:	
	:	
Defendant.	:	

**PLAINTIFFS' RESPONSES AND OBJECTIONS TO  
DEFENDANT GOOGLE INC.'S FIRST SET OF INTERROGATORIES TO  
PLAINTIFFS THE AUTHORS GUILD, INC., JIM BOUTON, JOSEPH GOULDEN AND  
BETTY MILES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiffs hereby respond and object to Defendant Google Inc.'s First Set of Interrogatories to Plaintiffs The Authors Guild, Inc., Jim Bouton, Joseph Goulden and Betty Miles.

**General Objections**

1. Plaintiffs generally object to the Interrogatories and their instructions to the extent that they seek information not discoverable under, or impose procedures not required by, the Federal Rules of Civil Procedure or the Local Rules of the Southern District of New York.
2. Plaintiffs generally object to the Interrogatories to the extent that they seek the disclosure of information protected by the attorney-client privilege, the attorney work product doctrine and/or any other applicable privilege or protection. Responses hereunder shall not include information protected by such privileges or doctrines.
3. Plaintiffs generally object to the Interrogatories to the extent they seek information that may be ascertained by Google Inc. with substantially the same burden as plaintiffs.

4. Plaintiffs object to the Interrogatories on the ground that the term “YOUR BOOKS,” used throughout the Interrogatories, is not defined.

5. Plaintiffs reserve the right to supplement and/or amend the specific responses set forth below, and to rely on additional facts and law.

### **RESPONSES**

#### **INTERROGATORY 1:**

Identify all factual and legal bases supporting Your contention that Google’s Library Project is not fair use.

#### **Response:**

In addition to the General Objections, plaintiffs object to this Interrogatory on the grounds that the word “all” is overbroad and unduly burdensome in this context. Without waiving these objections, plaintiffs respond as follows:

- A. Google’s Library Project involves the following infringements of copyright:
- (1) Google digitally copies, and converts into separate, machine readable digital text copies, in-copyright books in their entirety for its own uses without the permission of the copyright owners in violation of 17 U.S.C. § 106(1);
  - (2) Google distributes digital copies of in-copyright books in their entirety to libraries without the permission of the copyright owners in violation of 17 U.S.C. § 106(3);
  - (3) Google publicly displays verbatim expression from in-copyright books on the Internet in response to requests by users of its website without the permission of the copyright owners in violation of 17 U.S.C. § 106(5).
- B. The above infringements are not protected by the fair use doctrine of 17 U.S.C.

§ 107: