University of Miami Law Review

Volume 61
Number 1 *Volume 61 Number 1 (October 2006)*

Article 4

10-1-2006

Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?

Hannibal Travis

Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?

HANNIBAL TRAVIS*

Google plans to digitize the books from five of the world's biggest libraries into a keyword-searchable book-browsing library. Publishers and many authors allege that this constitutes a massive piracy of their copyrights in books not yet in the public domain. But I argue that Google's book search capability may be a fair use for two interrelated reasons: it is unlikely to reduce the sales of printed books, and it promises to improve the marketing of books via an innovative book marketing platform featuring short previews. Books are an experience good in economic parlance, or a product that must be consumed before full information about its contents and quality becomes available. This makes new technologies that are capable of rapidly searching and previewing relevant passages from books a development that the law should encourage, not burden or restrain.

* Assistant Professor of Law, Florida International University College of Law; J.D., Harvard Law School, 1999. This Article was selected as one of five to be presented at the workshop on Intellectual Property and Competition at the Association of American Law Schools' 2006 Mid-Year Meeting in Vancouver, British Columbia. Many thanks are due to Alfred C. Yen, Keith Aoki, Mark Janis, and Roberta Rosenthal Kwall, for organizing the Mid-Year Meeting and the workshop on Intellectual Property and Competition, to Stacey L. Dogan for agreeing to serve as my commentator, to Jane La Barbera for logistical assistance, and to Ediberto Román, Tyler Ochoa, Diane Zimmerman, Merrill Travis, and Ryan Littrell for their insightful comments and advice.

I. INTRODUCTION

The litigation and public relations campaign launched against Google over its Google Print for Libraries project, now called Google Book Search, may decisively influence the marketing of experience goods such as books and entertainment content. Google Book Search promises not only to enhance scholarship and education, but to demonstrate how Internet technology can promote more efficient competition in industries reliant on intellectual property, specifically book publishing, music recording, and motion picture production. If Google is stopped, Internet companies may be prevented from facilitating the efficient sampling of experience goods.

Information, entertainment, and cultural products are known as experience goods in economic parlance because consumers must experience them, typically by purchase, before obtaining perfect information about their properties. The inability to obtain such information leads to systematic market failures, namely disappointing purchases or media sales that should never have been made, as well as missed opportunities such as transactions that would have benefited buyer and seller alike had information flowed better between them. Governments and market participants commonly resolve this economic quandary by permitting the free or inexpensive previewing and browsing of such products: reviews of books in newspapers and magazines, browsing in bookstores, broad-

cast of musical recordings on the radio, and exhibition of trailers in movie theaters and on television.

Internet technology has introduced new risks and opportunities for the marketing and sale of experience goods. First, the World Wide Web and file transfer protocol popularized ways of transmitting digital versions of text, photographs, music, and movies over the Internet.[1] Because most of the early digital copies of copyrighted informational and cultural works made available over the Internet were housed on central servers, however, they were vulnerable to demands from copyright holders that Internet service providers deny users the ability to access the works. These demands prompted the invention of peer-to-peer file-sharing software such as Napster, Scour, and Kazaa, all of which afforded Internet users the ability to create their own decentralized networks for sampling musical works, books, pictures, videos, and software, prior to or in lieu of purchase.

Copyright owners, software companies, economists, and legal scholars have vigorously debated whether the transmission of digital versions of copyrighted works over the Internet tends to solve or exacerbate the experience good problem. On the one hand, digital sampling permits consumers to explore literary or musical genres and excerpts before they buy, avoiding many inefficient purchases based on inadequate or misleading information.[2] On the other hand, by facilitating the unlimited reproduction of informational and cultural products, the Internet makes it easier to substitute the sample for the original, thereby reducing the incentive to produce new works.[3]

In recent years, the legality of diverse Internet technologies for sampling experience goods has been thrown into severe doubt, in large part due to the resolution of several important copyright cases in favor of copyright owners and against software and Internet service providers. With the shuttering of file-sharing software companies such as Napster and Grokster, the market for technologies used to sample experience goods has shifted dramatically away from relying on highly flexible formats such as MP3 and MPEG and toward proprietary digital rights management technologies such as Windows Media Audio, used in the new

1. *See* Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761, 830 n.428 (2006) (citing cases reviewing evidence that free downloads of MP3 samples may bolster music sales).

2. *See id.* at 789-91, 827-31.

3. *See, e.g.*, COMM. ON INTELL. PROP. RIGHTS AND THE EMERGING INFO. INFRASTRUCTURE, NAT'L RES. COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 28-51, 129-33 (2000); INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995), *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf.

licensed Napster service, and Fairplay, used in Apple Computer's popular iTunes service and iPod device.[4] The new Napster service, for example, permits users to stream for free or purchase to own only those songs that the recording companies wish to open up to digital access.[5] Apple's iTunes also remains restricted to basically the same catalogue as Napster and the other digital music services licensed by the recording industry.[6]

Like the World Wide Web and file-sharing software, Google Book Search will enable Internet users to sample works about which they lack adequate information to make an informed and efficient purchasing decision. In doing so, Google Book Search surpasses existing technology for sampling experience goods in two critical respects. First, unlike iTunes or Amazon's "Search Inside the Book" feature, Google aims to include all of the world's books unless, of course, their authors or publishers specifically request exclusion.[7] Apple and Amazon, by contrast, have reportedly obtained permission for the samples on their sites from individual copyright holders,[8] although Google appears to believe that document discovery on this issue may reveal some books or book excerpts that have been or are planned to be made available online without individualized permission.[9] Second, Google enables user-initiated

4. *See* Deborah Tussey, *Music at the Edge of Chaos: A Complex Systems Perspective on File Sharing*, 37 LOY. U. CHI. L.J. 147, 201 n.231, 207 n.252 (2005) (citing THE BERKMAN CENTER FOR INTERNET AND SOCIETY, iTUNES: HOW COPYRIGHT, CONTRACT, AND TECHNOLOGY SHAPE THE BUSINESS OF DIGITAL MEDIA – A CASE STUDY 11, 41-47 (2004), *available at* http://cyber.law.harvard.edu/home/uploads/370/iTunesWhitePaper0604.pdf).

5. For example, as of the fall of 2006 there were only three Beatles songs available to listen to or download. *See* Napster, The Beatles, http://www.napster.com/view/artist/index.html?id=10459301 (last visited Nov. 4, 2006).

6. *See Digital Music Options*, WASH. POST, Apr. 23, 2006, at M08 (reporting that iTunes, Napster, AOL Music Now, and Rhapsody all have about 1.5 to 2 million song titles available for purchase at 99 cents per song).

7. *See* Katie Hafner, *Microsoft to Join Book-Search Alliance*, INT'L HERALD TRIB. (S.F.), Oct. 27, 2005, at Finance-13.

8. *See* Associated Press, *Holdout Bands Give In to iTunes*, WIRED NEWS, Aug, 20, 2006, http://www.wired.com/news/wireservice/0,71624-0.html?tw=rss.index (noting that Apple respects requests from bands and labels not to include their songs on iTunes, as have the Beatles, Led Zeppelin, Garth Brooks, and Radiohead, among others); Jessica Mintz, *Google Seeks Info from Book Scanners*, ASSOCIATED PRESS / YAHOO! FINANCE, Oct. 7, 2006, http://biz.yahoo.com/ap/061006/google_subpoenas.html ("On its site, Web retailer Amazon.com lets shoppers search inside books and read whole pages, but only for works publishers have OK'd.");

9. Ben Charny, *Google Wants a Page from Its Rivals' Book Projects*, MARKETWATCH, Oct. 6, 2006, http://www.marketwatch.com/News/Story/Story.aspx?dist=newsfinder&siteid=google&guid=%7B3A86864B-CB57-4C40-AE6F-B16860375262%7D&keyword= ("Google has asked for a list of all the books available through [its] rivals' online book projects now, . . . what books will be added to their digital stacks through 2010, . . . a showing of a legal right to scan each book, . . . documents about any disputes the companies have had with The Authors Guild with respect to their book projects, . . . [and] the effect its book project has on Amazon's book sales."); Candace Lombardi, *Amazon Files Objection to Google Subpoena*, USA TODAY / CNET NEWS.COM, Oct. 26, 2006, http://www.usatoday.com/tech/products/cnet/2006-10-26-amazon-google_x.htm

and controlled sampling of copyrighted books, rather than the publisher-selected excerpts currently available. By expanding sampling to include the vast majority of books ever published, and providing more targeted previews from the user's perspective, Google is greatly improving the Internet's capacity to resolve the experience good problem.

Based on the distinctions between Google Book Search and the Amazon and iTunes models, the Author's Guild and the Association of American Publishers instituted copyright litigation against Google, coupled with a broad public relations effort to tarnish the Internet search engine's reputation. Publishers have cast Google's library digitization scheme as a revival of the old Napster, but for books, characterizing it as a way for Google to make a fast buck by the unauthorized distribution of millions of copyrighted works.[10] The Authors Guild seeks class action status for its suit, thereby potentially expanding the scope of the case from a handful of named plaintiffs and an organization representing about 8,000 member authors to embrace every person or company that owns a copyright in a book contained in the University of Michigan library, including hundreds of thousands of individual authors.[11]

This Article maintains that the courts will best serve intellectual property and antitrust policy by concluding that Google is making fair and permissible uses of copyrighted works when it enhances the efficiency with which they are marketed and sold. The key fact for purposes of a fair use analysis, I will argue, is that there is no evidence, and it is unlikely that there will ever be any evidence, that Google Book Search is causing a decline in sales of either printed books or e-books. Although Google's previews will be more inclusive and efficient than Apple's 30-second clips and Amazon's limited search functionality, they will represent tiny percentages of the entire book and will rarely substitute for it.[12] Unlike Napster, which was widely used to download songs and entire albums for free, users accessing listings of library books on

---

("Amazon.com has declined to hand over information on its book search tools to Google for use in a copyright lawsuit" because it argues that "the requested information is 'highly confidential, proprietary and constitutes trade secrets,'" and "the request was 'overly broad' and 'unduly burdensome,' requiring the company to essentially produce 'millions of documents.'"). Apple and Amazon have not necessarily obtained permission from artists and authors, who might have additional or conflicting claims to ownership *vis-à-vis* labels and publishers. This is the *Tasini* problem. *See infra* notes 188-193 and accompanying text.

10. *See, e.g.*, Andrew Albanese, *AAP Sues Google Over Scan Plan*, LIBR. J., Nov. 15, 2005, at 17 (publishing industry representative alleged that "Google is seeking to make millions of dollars by freeloading on the talent and property of authors and publishers").

11. *See* Complaint at ¶ 15, The Authors Guild et al. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Sept. 20, 2005).

12. *See* University of Michigan, U-M Statement on Google Library Project, Sept. 21, 2005, http://www.umich.edu/news/?Releases/2005/Sep05/r092105 ("It is important to note that we will not be sharing the full text of copyrighted works with the public. The Google library project will

Google Book Search do not see a single intact page of a book still under copyright. Instead, Google has pledged that users will be able to see only a few lines of text around a search term, or in other words a small "snippet" of the book, along with bibliographic information about it. Furthermore, Google is disabling the ability to copy or print copyrighted material altogether and is allowing publishers to opt out of the preview system altogether if they so desire.[13] Indeed, if there were any justifiable criticism of Google Book Search, it would be that copyright law has unduly hampered its development and utility.[14]

Rather than supplanting the demand for books, Google will drive readers to bookstores where a book relevant to a search term is sold, using links placed prominently alongside the search results. Google Book Search is therefore much more like the copyright-friendly iTunes than Napster, the original incarnation of which was forced into bankruptcy by the cost of defending copyright suits.[15] As the recording industry used iTunes to retreat from untenable positions hostile to fair use in the digital music context, the publishing industry should use Google Book Search to recognize and welcome the public's right and enthusiasm to view fair use samples of books.[16]

Lacking concrete evidence of harm to their revenue streams, authors and publishers stress Google's for-profit status, large market capitalization, and intentions to sell advertising in connection with

---

point searchers toward the works, and tell them how to buy or borrow a copy, but will not give them the full content of works in copyright.").

13. *See* Hafner, *supra* note 7, at Finance-13 (noting that "the 'opt-out' approach taken by the Google Print Library Project . . . has given copyright holders until [November 2005] to contact Google if they do not want their work scanned").

14. *See* Andrew Richard Albanese, *The Social Life of Books; Write, Read, Blog, Rip, Share Any Good Books Lately? A Conversation with Ben Vershbow*, LIBR. J. May 15, 2006, http://www.libraryjournal.com/article/CA6332156.html ("In order to pacify skittish publishers terrified of losing control of their works online, Google and Amazon figured out that the answer was to sell not copies of ebooks but controlled access to online editions. . . . [F]or security reasons, Google and Amazon ebooks will be antisocial spaces, bolted down in copyright enclosures and viewable only in your browser window while logged in.") (statement of Ben Vershbow, a fellow at the Institute for the Future of the Book). Google's access controls, including disabling the printing, saving, and copying functionality, were probably necessary concessions to copyright owners by an innovative company vigorously exercising the statutory right of fair use. Google does not forbid saving or printing pages from the public domain books it scans from libraries and indexes, or copying, printing, or linking to the Web sites it crawls and indexes.

15. *See* Joseph Menn, *Antitrust Officials Said to Be Watching Napster Suit*, L.A. TIMES, May 31, 2006, at C1.

16. *See Symposium: Public Appropriation of Private Rights: Pursuing Internet Copyright Violators*, 14 FORDHAM INTELL. PROP. MEDIA & ENTM'T L.J. 893, 902-3 (2004) (statement of Professor Justin Hughes, Cardozo Law School, Yeshiva University) (arguing that recording industry acquiesced in Apple's project to "enlarge[ ] the zone of fair use by including the capability within the iTunes digital rights management system for users to make up to ten 'non-transformative' copies")

previews of copyrighted books. Although Google is reproducing excerpts of copyrighted works for a profit, the courts have recognized that when a commercial search engine makes copies of protected work for a purpose other than simply reselling it, such as making information more accessible over the Internet, that is likely to be a fair use.[17] This is the same principle that allows Internet search engines to index billions of Web sites without asking permission from every one of them. To require search engines to get individualized permission slips would be just as absurd as requiring libraries to ask book authors one by one for permission to create card catalogs.

Some authors and publishers argue that by gathering so many books together in a single digital collection, Google threatens the publishing industry as a whole with "Napsterization." They argue that rogue employees, user hackers, or other security breaches may allow millions of titles to be uploaded to Internet file-sharing networks like Kazaa. I will argue that this concern has been overblown, however, because companies in Silicon Valley like Google, not to mention institutions such as the University of Michigan, have developed a variety of techniques for safeguarding confidential data. In any event, the Harry Potter novels and tens of thousands of other books have already been uploaded to file-sharing networks without Google's help, so that train has left the station.[18] On a broader level, the fact that digital marketing platforms are potentially subject to hacking does not justify shutting them down. iTunes and countless other databases of information are every bit as vulnerable to hacking as Google Book Search. Google should no more be excluded from providing book previews simply because the database used to store them could be hacked than credit card companies should be excluded from providing credit information to retailers simply because hackers have repeatedly stolen the resulting databases.

The publishers' and authors' case against the Internet leader is also a golden opportunity for the courts to stress the constitutional purposes and limitations of copyright law. Specifically, copyright exists to maximize the public's access to information, not to provide copyright owners

17. *See infra* Part V.B.

18. *See* David A. Bell, *The Bookless Future*, THE NEW REPUBLIC, May 2, 2005, at 27, *available at* http://www.tnr.com/doc.mhtml?i=20050502&s=BEll050205 ("Perhaps the surest sign of the insignificance of e-books is that for years electronic versions of best-sellers have been available on file-sharing services such as Kazaa without causing much scandal or even notice. The New York Times estimated recently that as many as 25,000 titles can be downloaded, including all the Harry Potter novels and *The Da Vinci Code* – but sales of the print versions have not been hurt enough to make the publishing industry worry. Most book editors I know are not even aware of the files' existence.").

with a roving veto power over advances in Internet technology.[19] The constitutional focus of copyright law on the progress of the arts and sciences was designed to harmonize copyright's restrictions on free competition with antitrust and trade policy, which aims to maximize consumer welfare by encouraging vigorous competition on price and quality among antagonistic rivals.[20] When pressed, the publishers and authors who challenge Google's right to make books just as searchable as Web sites argue that it is Google's failure to obtain prior individualized permission before launching the project that upset them the most.[21] This demand for exclusive control over the marketing and sale of their products by third parties raises troubling antitrust questions and tests the boundaries of copyright law. Napster raised similar antitrust concerns during the recording industry's case against it, but was driven out of business before these claims could be brought before a jury.[22] Google's case provides an opportunity for the courts to establish that efforts by copyright owners to prevent consumers from receiving information about their products is not unlimited and will be guarded strictly against overreaching.

II. WHAT IS GOOGLE BOOK SEARCH?

Google Book Search combines two principal services, or functions, depending on how they are conceived. One is based on agreements between Google and publishers, and the other on agreements between Google and research libraries. The former used to be called Google Print for Publishers, and the latter Google Print for Libraries. Both are now called Google Book Search to make clear that Google is not helping users print out documents.[23] For convenience, I will initially use the old names when distinguishing between the two, but will thereafter use Google Book Search to refer to both programs together.

---

19. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 587-88 (2d Cir. 1989); Ashley Packard, *Copyright Term Extensions, The Public Domain and Intertextuality Intertwined*, 10 J. INTELL. PROP. L. 1, 14-15, 20-21 (2002).

20. *Cf.* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); United States v. Paramount Pictures, Inc. 334 U.S. 131, 158 (1948).

21. *See, e.g.*, Albanese, *supra* note 10; Burt Helm, *Google's Escalating Book Battle*, BUS. WK., Oct. 20, 2005, *available at* http://www.businessweek.com/technology/content/oct2005/tc20051020_802225.htm.

22. *See infra* Part VI.

23. *See* Google Blog, http://googleblog.blogspot.com/2005/11/judging-book-search-by-its-cover.html (Nov. 17, 2005, 02:49 EST).

A. *Google Print for Publishers*

The first program, Google Print for Publishers, is premised upon a permission-based or "opt-in" system with publishers, coupled with a right of exclusion, where publishers could "opt-out" from the system at any time. Depending on a publisher's individual deal with Google, Google Print for Publishers allows Google users who sign in to browse about two pages before and after a search result, with additional limits on multiple searches or pages previewed per book. Google logs its users' page views to enforce aggregate browsing limits, so users must obtain a Google Account and sign in, enabling Google to track the pages they have viewed.[24] Users are not allowed to copy, save, or print from their Internet browsers.[25] The book preview pages feature multiple links to online retailers including the publisher's Web site, Amazon.com, Barnes & Noble, and Google's own Froogle comparison shopping site.[26] Google serves up contextually targeted advertising with the book previews, from which the publishers of each book receive the majority share of revenues.[27]

B. *Google Print for Libraries*

In the second program, Google Print for Libraries, Google scans all the books that a given library allows, which so far seems to be all seven million volumes at the University of Michigan Library, but only the public domain books from the University of Oxford's Bodleian Library and the New York Public Library, and select collections from Harvard and Stanford libraries.[28] The University of California's 100 libraries will also be contributing both public domain and in-copyright books, possibly millions of titles, for inclusion in Google Print for Libraries.[29]

---

24. *See* Google, Google Book Search: Common Questions, http://books.google.com/googlebooks/common.html (last visited Sept. 8, 2006).

25. Google, Google Book Search: Partner Program, http://books.google.com/intl/en_US/googlebooks/publisher.html (last visited Sept. 8, 2006).

26. *See id.*

27. *See id.*; Kevin Kelly, *Scan This Book!*, N.Y. TIMES, May 14, 2006, at § 6 (Magazine), at 43.

28. *See* University of Michigan Library, Google/U-M Project Opens the Way to Universal Access to Information (Dec. 14, 2004), http://www.umich.edu/news/?Releases/2004/Dec04/library/index ("Google will digitally scan and make searchable virtually the entire collection of the U-M library."); Bodleian Library, Oxford-Google Digitization Programme, http://www.bodley.ox.ac.uk/google (last visited Sept. 9, 2006); New York Public Library, NYPL Partners with Google to Make Books Available Online (Dec. 14, 2004), http://www.nypl.org/press/2004/google.cfm; Harvard University. Library, Harvard-Google Project, http://hul.harvard.edu/hgproject/faq.html (last visited Sept. 9, 2006); Stanford University Libraries and Academic Information Resources, Google Library Project: FAQ, http://www.sul.stanford.edu/about_sulair/special_projects/google_sulair_project_faq.html (last visited Sept. 9, 2006).

29. *See* Google & The Regents of the University of California, Cooperative Agreement, http:

Google Print for Libraries relies upon the same basic functionality as Google Print for Publishers, that is, the Google search engine and the Google Book Search display interface.[30] The search engine enables pinpoint inquiries by author, title, date of publication, and keyword, and it also integrates results from scanned books with the results of Web searches.[31] The display interface disables copying, printing, or saving excerpts from copyrighted works, as well as from some public domain works.[32] Moreover, absent further authorization, users who preview a copyrighted book will only receive a few-sentence-long snippet of text.[33] For the rest of the book, Google refers browsers to online bookstores such as Amazon, as well as to a local library that stocks the book, according to the WorldCat database.[34]

Google has already added thousands of public domain books to Google Print for Libraries.[35] There should be free access to all of these public domain books, but sometimes there is not. For example, Google offers only snippets of some congressional hearings published prior to

---

//www.cdlib.org/news/ucgoogle_cooperative_agreement.pdf (last visited Nov. 3, 2006); Associated Press, *University of California System Joins Google Book Project*, INTL. HERALD TRIB., Aug. 9, 2006, *available at* http://www.iht.com/articles/2006/08/09/business/google.php; Jeffrey R. Young, *U. of California System's 100 Libraries Join Google's Controversial Book-Scanning Project*, CHRON. OF HIGHER ED., Aug. 9, 2006, *available at* http://chronicle.com/free/2006/08/2006080901t.htm.

30. Google has patents on a great deal of its search technology. *See e.g.*, Ranking Search Results by ReRanking the Results Based on Local Inter-connectivity, U.S. Patent No. 6,725,259 (filed Jan. 17, 2003) (issued Apr. 20, 2004); Systems and Methods for Highlighting Search Results, U.S. Patent No. 6,839,702 (filed Dec. 13, 2000) (issued Jan. 4, 2005).

31. *See, e.g.*, Google, Google Book Search, http://books.google.com/books?q=inauthor:shakespeare+and+dateate:1500-1923&as_brr=0 (last visited Sept. 9, 2006) (searching for books on William Shakespeare between the years 1500-1923); *id.* at http://books.google.com/books?q=intitle:copyright&as_brr=0 (last visited Sept. 9, 2006) (searching for books with "copyright" in the title); *id.* at http://books.google.com/books?q=copyright+date:1900-1923&as_brr=0 (last visited Sept. 9, 2006) (searching for books on copyright between 1900-1923).

32. *See* John Markoff & Edward Wyatt, *Google Is Adding Major Libraries to Its Database*, N.Y. TIMES, Dec. 14, 2004, at A1.

33. *See id.*; Heidi Benson, *A Man's Vision: World Library Online*, S.F. CHRON., Nov. 22, 2005, at A1; Hiawatha Bray, *Google to Index Works at Harvard, Other Major Libraries*, BOSTON GLOBE, Dec. 14, 2004, *available at* http://www.boston.com/news/nation/articles/2004/12/14/google_to_index_works_at_harvard_other_major_libraries/?page=full.

34. *See* Paula Berinstein, *The Day of the Author Has Arrived: Rights and Business Models for Online Books*, 14 SEARCHER 26-32 (2006). WorldCat is a catalog of records for sixty eight million books, artifacts, and multimedia materials; it is produced and maintained by the OCLC Online Computer Library Center. WorldCat, http://www.oclc.org/worldcat (last visited Sept. 9, 2006); Online Computer Library Center, About OCLC, http://www.oclc.org/about/default.htm (last visited Sept. 9, 2006).

35. A couple of recent searches retrieved listings for 122 full-text public domain books with "Lincoln" in the title, and 26 with "copyright" in the title. Google, Google Book Search, http://books.google.com/books?q=intitle:lincoln+date:1500-1923&sa=&start=120 (last visited Sept. 9, 2006) (Lincoln); *id.* at http://books.google.com/books?q=intitle:copyright+date:1500-1923&lr=&sa=N&start=30 (last visited Sept. 9, 2006) (copyright).

1923, and therefore doubly in the public domain.[36] This is a chilling effect due to overbroad and ambiguous copyright laws, which have prompted Google to "err on the side of caution" by giving more books the snippet treatment than the law actually requires.[37]

Google has announced plans to scan fifteen million books by 2010.[38] This would be nearly half of all of the books ever published, by one count.[39] Google is reportedly investing $200 million in scanning books and has also apparently indemnified its library partners against any costs arising from lawsuits.[40] Each library gets to keep a digital copy of all the books in its collection that it let Google scan.[41]

Authorization for Google to scan these books is based on permission secured from libraries, not from publishers or authors. Negotiations for permission from publishers broke down after Google rejected the demand of the Association of American Publishers that it secure individualized permission or exclude every book published since 1967 with an International Standard Book Number (ISBN), whether in print or out-of-print. A very rough estimate is that three-quarters of the books ever published are not sold in bookstores and have yet to enter the public

---

36. *See, e.g., id.* at http://books.google.com/books?id=Wp3aanRTXk8C&vid=0mUFJmnnEYxRTGckmhfDGag&dq=hearings†ate%3A1918-1919&q=hearings+&pgis=1 (last visited Nov. 16, 2006) (displaying only snippets of 1919 congressional hearings on peace treaty with Germany).

37. Google, Librarian Center, http://www.google.com/librariancenter/articles/0606_03.html (last visited Sept. 9, 2006) ("Since whether a book is in the public domain is a tricky legal question, we err on the side of caution and display at most a few snippets until we have determined that the book has entered the public domain. These books may be in the public domain, but until we can be sure, we show them as if they are not.") (statement of Google Editor in response to comment that Google is unduly restricting access to U.S. government-authored and pre-1923 books). Google asks its users to inform it if it has given the "snippet" treatment to a book that should be in the public domain. Google, Google Book Search Help Center, http://books.google.com/support/bin/answer.py?answer=43739&ctx=sibling (last visited Sept.9, 2006).

38. *See Online Books: Several Initiatives for Virtual Libraries Without Offending Publishers*, TECH. EUR., Nov. 15, 2005, *available at* http://www.highbeam.com/doc/1G1:138841562/ONLINE+BOOKS%7eC%7e+SEVERAL+INITIATIVES+FOR+VIRTUAL+LIBRARIES+WITHOUT+OFFENDING+PUBLISHERS.html?refid=SEO.

39. Kelly, *supra* note 27. This count may not be accurate, however, because other estimates have placed the number of out-of-print books from 100 to 200 million. *See* Michael Rollins, *Amazon.com Rewriting Book on How We Shop*, THE OREGONIAN (Portland), Apr. 25, 1999, at A01; Beverley Slopen, *A Would-Be Ghost Misses Out on European Bestseller*, TORONTO STAR, Apr. 17, 1988, at A25.

40. *See* Charles Arthur, *As Long as Google Sells Ads, Publishers Be Damned*, THE GUARDIAN (London), Feb. 23, 2006, at 6; Burt Helm, *A New Page in Google's Books Fight*, BUS. WK. ONLINE, June 22, 2005, *available at* http://www.businessweek.com/technology/content/jun2005/tc20050622_4076_tc119.htm?chan=search.

41. *See* Posting of David Vise to http://www.washingtonpost.com (Nov. 15, 2005, 12:00 EST), *available* at http://www.washingtonpost.com/wp-dyn/content/discussion/2005/11/09/DI2005110901098.html.

domain.[42] Under the publishers' proposal, only out-of-print books without valid ISBN numbers could be included in Google Book Search absent the individualized permission of both the author and publisher.[43]

Google Print for Libraries also differs from Amazon's "Search Inside the Book" feature, as well as Apple's free 30-second music preview functionality on iTunes, by enabling more targeted, user-initiated sampling of copyrighted books rather than publisher-selected excerpts. Starting in 2003, Amazon expanded its limited program of displaying tables of contents and front and back covers of books to prospective buyers into a full-fledged "Search Inside the Book" database of over 120,000 books containing over thirty-three million pages and published by 190 distinct firms.[44] Amazon believes that "Search Inside the Book" is simply one of the limited promotional activities that publishers may conduct as part of their print publication rights to a book. The display of portions of a book in response to Amazon's customers' inquiries, and Amazon's incidental reproduction of books to produce full-text-searchable digitized versions, would thus be analogous to a publisher displaying the cover or excerpts from a book in television advertising or promotion.[45] When Apple launched its iTunes music store in 2003, it also included a 30-second preview for "each song" on the site, then only

---

42. *See* Brian Lavoie et al., *Anatomy of Aggregate Collections: The Example of Google Print for Libraries*, 11 D-LIB MAG., Sept. 2005, http://www.dlib.org/dlib/september05/lavoie/09lavoie.html ("Using the year 1923 as a rough break-off point between materials that are out of copyright and materials that are in copyright, more than 80 percent of the materials in the Google [participating libraries'] collections are still in copyright. . . . If it is assumed (falsely, of course) that no materials published between 1923 and 1963 had their copyright renewed, . . . [then] about 63 percent of the books in the combined Google [participating libraries'] collection[s] are still in copyright . . . .") (footnote omitted); Google, Librarian Center, *supra* note 37 ("[A]ccording to an OCLC study, . . . public domain books represent only 20 percent of the world's books. Estimates put the percentage of books that are in print and available in bookstores at only 5 percent. This leaves 75 percent or more in what O'Reilly Media CEO and Publisher Tim O'Reilly calls the 'Twilight Zone' – that is, they may no longer be in print, but since they were published after 1923, they may not yet be in the public domain. These books – the books you might find in your local library or used bookstore (but often nowhere else) – are an important focus of our digitization efforts at Google Book Search. That makes our project different from many others.").

43. Albanese, *supra* note 10; Helm, *supra* note 21.

44. Jonathan Kerry-Tyerman, *No Analog Analogue: Searchable Digital Archives and Amazon's Unprecedented Search Inside the Book Program as Fair Use*, 2006 STAN. TECH. L. REV. 1, ¶ 12 & nn.28-30 (citing Matt Marshall & Charles Matthews, *Amazon's New Search Finds Kudos*, SAN JOSE MERCURY NEWS, Oct. 25, 2003, at C1). Amazon's more limited program, "Look Inside the Book," started in 2001 with more than 25,000 titles from publishers such as Simon & Schuster, McGraw-Hill, Random House and Time Warner Trade Publishing. *See* David D. Kirkpatrick, *Amazon Plan Would Allow Searching Texts of Many Books*, N.Y. TIMES, July 21, 2003, at C1; Monica Soto, *Will Amazon Deliver on Its Profit Promise?*, SEATTLE TIMES, Oct. 11, 2001, at C1.

45. *See* Amazon.com, Search Inside!™ Participation Agreement, http://www.amazon.com/exec/obidos/tg/feature/-/530169/104-3731123-5417551 (last visited Sept. 9, 2006).

about one-tenth as many as it has today.[46]

Google Print for Libraries is not simply a marketing tool, but an extremely powerful research tool.[47] Both Amazon's and Apple's previews appear to be limited to those works that are in print, that is to say, currently marketed by a publisher or label. Moreover, they exclude many works that are in print, but to which the owners have not yet specifically authorized digital access. Google Print for Libraries, by contrast, will presumptively include all the books available in the University of Michigan libraries, plus those collections Oxford, Harvard, Stanford and the New York Public Library ultimately authorize for scanning and online search. Thus, Google's model will be far more comprehensive and ambitious than anything Amazon or Apple has attempted to date.

On August 12, 2005, Google suspended the scanning of books into Google Print for Libraries to give authors and publishers time to decide whether to request exclusion from the project.[48] Google offered copyright holders until November 1, 2005, to opt out of the program.[49] Before the deadline expired, both the Authors Guild and several publishers filed suit.[50]

C. *Google Print for Authors?*

Google has invited authors with valid ISBNs to submit their books for inclusion in Google Book Search. Once signed up, authors receive "detailed reports including information on page views, ad clicks, and 'Buy the Book' clicks."[51] Google promises authors contemplating inclusion that "Google Book Search is a book marketing program, not an online library, and as such, a full page of your book won't be viewable online unless expressly permitted by the copyright holder."[52]

Google's strategy to reach out beyond libraries directly to authors is

---

46. Richard Siklos, *Apple Tunes Out the Pirates*, TELEGRAPH (U.K.), May 11, 2003, at 6; *see also* David Pogue, *Online Piper, Payable by the Tune*, N.Y. TIMES, May 1, 2003, at G1. iTunes debuted with only about 200,000 songs, a number which surpassed three million by 2006. *Compare* OWEN W. LINZMAYER, APPLE CONFIDENTIAL 2.0: THE DEFINITIVE HISTORY OF THE WORLD'S MOST COLORFUL COMPANY 303 (2004), *with* Apple, Apple – iTunes – Overview, http://www.apple.com/itunes/overview (last visited Sept. 9, 2006).

47. I thank Stacey Dogan for her comments on a draft of this paper that highlighted this distinction.

48. *See* Verne Kopytoff, *Google to Return to Libraries; After Short Hiatus, Book Scanning Will Start Up Again*, S.F. CHRON., Nov. 2, 2005, at C1.

49. *Id.*

50. Edward Wyatt, *U.S. Publishers Sue Google over Searchable Library*, N.Y. TIMES, Oct. 20, 2005, at E2.

51. Google, Google Book Search Help Center, http://books.google.com/support/bin/answer.py?answer=43788 &topic=9011 (last visited Sept. 9, 2006).

52. *Id.* at http://books.google.com/support/bin/answer.py?answer=43785&topic=9011 (last visited Sept. 9, 2006).

vaguely reminiscent of the attempts by Napster and Grokster to bolster their fair use and substantial non-infringing use defenses by inviting famous musicians and unsigned bands to authorize the free downloading of their work from these services.[53] ISBNs are only sold in blocks of ten (for $250 plus), however, making signing up much more costly than was signing up for Napster.[54] The opening up of Google Book Search and similar functionality on other sites to new authors who would otherwise find it difficult to find readers, distributors, or retail outlets for their work may democratize the publishing process and bolster the claim that Google is improving access to information on the Internet rather than simply stealing from major authors and publishers. The ability of any individual to get their book into Google for a couple hundred dollars (much less if they share the cost of a 10-pack of ISBNs with other authors) may also raise Wikipedia-like questions regarding whether Google's book search results are credible (or even qualify as book results, given the brevity or format of some of the materials contributed), or violate tort and/or intellectual property laws.[55]

---

53. Napster and Grokster had difficulty basing their fair use claims on authorized use because they facilitated the unauthorized trading of other copyrighted works in their entirety, which Google Book Search most definitely does not do. Napster's New Artist Program "engage[d] in the authorized promotion of independent artists, ninety-eight percent of whom [were] not represented by the record company plaintiffs." A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 917 (N.D. Cal. 2000). Napster claimed that more than 17,000 unsigned artists authorized the distribution of their work over Napster. *See* Jon Hart & Jim Burger, *Will Appeals Court Exorcise Napster and Other Demons?*, WSJ.COM, Nov. 9, 2000, http://online.wsj.com/public/resources/documents/SB973734583104397441.htm. But the district court in *Napster* dismissed the program as not "a substantial or commercially significant aspect of Napster," because Napster "initially promoted the availability of songs by major stars," and "[i]ts purported mission of distributing music by artists unable to obtain record-label representation" was an afterthought. *Napster*, 114 F. Supp. 2d at 917. Grokster touted its "partnership with a company that hosts music from thousands of independent artists," and the use of its service to find "[a]uthorized copies of music by artists such as Wilco, Janis Ian, Pearl Jam, Dave Matthews, John Mayer, and others." Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2789 (2005) (Breyer, J., joined by O'Connor, J., and Stevens, J., concurring) (citations omitted). In their concurring opinion, Justices Ginsburg and Kennedy and Chief Justice Rehnquist dismissed this evidence as possibly reflective simply of "the huge total volume of files shared," including millions of allegedly infringing files, rather than the proportion of the Grokster service's uses that may be said to be noninfringing. *Id.* at 2786 (Ginsburg, J., joined by Rehnquist, C.J., and Kennedy, J., concurring).

54. *See* R.R. Bowker LLC, Application for an ISBN Publisher Prefix, http://www.isbn.org/standards/home/isbn/us/printable/isbn.asp (last visited Sept. 9, 2006). Napster, by contrast, suggested that artists create a profile, but the process of making music available over the service required no expense or any action other than placing their music in the files containing their MP3 music collection. *See* Napster, Artist Resources, http://web.archive.org/web/20000815072224/artist.napster.com/resources.html (last visited Sept. 9, 2006).

55. *See* Lauren Barack, *A Wiki War on Vandals*, SCH. LIBR. J., May 2006, *available at* http://www.schoollibraryjournal.com/article/CA6330761.html ("Wikipedia, the online encyclopedia that allows virtually anyone to edit or add to its entries, is continually vulnerable to vandals, who wreak havoc with information on the site or intentionally insert errors."); Robert Matthews,

III. THE INTERNET-BASED MARKETING OF EXPERIENCE GOODS

A. *Economic Characteristics of Experience Goods*

Experience goods often differ from other goods because they derive their value from intangible characteristics.[56] A book, song, or movie is great because of the ideas, characters, and poetic turns of phrase buried deep inside of it, not because of the high-quality materials that physically make it up. For this reason, experience goods possess a value that is often fleeting. Unlike durable goods such as real estate, automobiles, or gold jewelry, experience goods often lack enduring value to consumers at different points in time or later stages of life. An experience good, therefore, delivers a value which, as Adam Smith recognized, often "perishes in the very instant of its production."[57] Unlike "search" goods, experience goods may not disclose their qualities or characteristics "by inspection without the necessity of use."[58] Because their external appearance announces their quality level and characteristics, "the advertising of search goods mainly informs—gives information about price, quality, and location of suppliers . . . ."[59] By contrast, the quality and characteristics of experience goods typically "can be assessed only after they are bought," so that "the advertising of experience goods is light on information and mainly persuades . . . the consumer to buy now and make a judgment later about quality, based on experience with the good."[60]

Experience goods are less often standardized than search goods.[61] They are more often personalized, given that most consumers have diverging preferences for experience goods of an informational or enter-

---

Wikipedia's Search for the Truth, FIN. TIMES (London.), Dec. 23, 2005, at 12 (suggesting "that there are probably countless other lies, blunders and misconceptions still lurking on the website," based on one example of an allegedly defamatory entry out of 1.8 million entries). Wikipedia has apparently struggled with repeated incidents of copyright infringement, and as a result the Wikimedia umbrella organization has developed the shorthand phrase "copyvio" to designate an infringing submission, as well as archives of "copyvio" disputes. *See* Wiktionary, Copyvio, http://en.wiktionary.org/wiki/copyvio; Wikisource, Copyvio Archives (2005), http://wikisource.org/wiki/Wikisource:Copyvio_archives_(2005) (last visited Aug. 25, 2006).

56. *See* B. JOSEPH PINE II & JAMES H. GILMORE, THE EXPERIENCE ECONOMY: WORK IS THEATRE & EVERY BUSINESS A STAGE 1-2, 8-12, 171-72 (1999).

57. ADAM SMITH, THE WEALTH OF NATIONS bk. II, ch. 3 (1776), *available at* http://www.bibliomania.com/2/1/65/112/frameset.html.

58. Carl Shapiro, *Optimal Pricing of Experience Goods*, 14 BELL J. OF ECON. 497 n.1 (1983); *see also* Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312-13 (1970).

59. MICHAEL PARKIN, MICROECONOMICS 468 (2d ed., Addison-Wesley 1994).

60. *Id.* Cigarettes and alcoholic beverages are sometimes called experience goods, but for most consumers who have already smoked or drank the brand they are consuming perhaps for the thousandth time, their favorite brand may be a search good. *See id.*

61. *See* PINE & GILMORE, *supra* note 56, at 1-10, 71-72, 82, 86, 92.

taining nature.[62] Individual taste renders most experience goods unsuited to all consumers and generates continual uncertainty about purchasing decisions. This characteristic of experience goods has been called "experientialization," a characteristic of generating unique or incommensurate gratification which causes many experience goods to resist the process of "commodification" that many search goods undergo.[63] Reading just any book, or even a Brothers Grimm fairy tale, may not be an adequate substitute for reading a Harry Potter novel, which may sell at ten to twenty times the price depending on the format and retailer.

B. *The Paradox of Experience Good Marketing*

The central paradox of experience good marketing results from three facts: (1) consumers may be unable or unwilling to purchase many media products without experiencing them first; (2) the quality and value of a media product may be ascertainable to a consumer only after purchase; and (3) sellers need to exclude consumers from experiencing most of the contents of media products prior to purchase. Succinctly stated, "[y]ou can only tell if you want to buy some information once you know what it is—but by then it is too late."[64]

One-time purchases, such as books, recorded music, movie admissions, DVDs, and software are particularly impervious to consumer attempts to ascertain their contents or quality.[65] Empirical research has revealed that a desire to find out more about the quality of an experience good before buying it is a principal motivation for unauthorized copying of such goods.[66] The legislative history of the 1976 Copyright Act also acknowledged the frequent "impossibility of determining a work's value

---

62. *See id.*

63. *See id.* at 1-27.

64. Hal R. Varian, *Markets for Information Goods, in* MONETARY POLICY IN A WORLD OF KNOWLEDGE-BASED GROWTH, QUALITY CHANGE AND UNCERTAIN MEASUREMENT (Kunio Okina & Tetsuya Inoue eds., 2001), *available at* http://www.sims.berkeley.edu/~hal/Papers/japan/japan.html#SECTION00040000000000000000.

65. *See* Karen L. Gulick, *Creative Control, Attribution and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 96-97 (1994) ("The difficulty arises with one-time experience goods, as limited consumer information about the product's quality and an inability to inform the market through later boycott of a shoddy product increases the producer's monopoly power. Beyond the negligible exceptions of . . . repeat rentals, and purchases, motion pictures are classic one-time experience goods. . . . [I]nformation about quality is far more costly to obtain than information about cost. . . . [T]he efficiency of search for information on quality is quite low.").

66. *See* Ramnath K. Chellappa & Shivendu Shivendu, *Managing Piracy: Pricing and Sampling Strategies for Digital Experience Goods in Vertically Segmented Markets*, 16 INFO. SYS. RES. 400 (2005), *available at* http://asura.usc.edu/~ram/rcf-papers/piracy-pricing-sampling.pdf.

until it has been exploited."[67] Sellers of information must therefore develop ways to "transact in goods that [they] have to give away in order to show people what they are."[68]

C. *Market Solutions to the Paradox*

Prior to the invention and popularization of the Internet, sellers of information-based experience goods had developed a variety of ways to enable the sampling of their content. These included, most notably, permissive browsing at point of sale or exhibition, broadcast and print advertising, development of producer reputations and branding campaigns, handing out and winning awards for quality content, courting expert and/or consumer reviews and positive word of mouth advertising, and directories of available content.[69] With the development of the Internet, these methods of marketing experience goods were translated into digital form. Most notably, the browsing and sampling of experience goods has evolved with the following technologies: Amazon's "Search Inside the Book" and iTunes 30-second previews; advertising and branding on Internet portals and industry Web sites, which are more searchable and have more permanence than the occasional print or broadcast spot; expert reviews on the Web presences of major periodicals, broadcasters, and Web firms; lists of award winners and consumer reviews on sites such as Amazon or NetFlix; and online directories and searchable indexes of content such as the Internet Movie Database or

---

67. H.R. Rep. No. 94-1476, at 124 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5740.

68. Varian, *supra* note 64.

69. *See, e.g.*, CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 5 (1999); Varian, *supra* note 64; HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 126 (6th ed. 2004); Christopher Avery et al., *The Market for Evaluations*, 89 AM. ECON. REV. 564 (1999); Chrysanthos Dellarocas, *The Digitization of Word-of-Mouth: Promise and Challenges of Online Feedback Mechanisms*, 49 MGMT. SCI. 1407 (2003); Jehoshua Eliashberg & Steven M. Shugan, *Film Critics: Influencers or Predictors*, 61 J. OF MARKETING 68 (1997); Julia Liebeskind & Richard P. Rumelt, *Markets for Experience Goods with Performance Uncertainty*, 20 RAND J. OF ECON. 601 (1989); Thomas von Ungern-Sternberg & Carl Christian von Weizsacker, *The Supply of Quality on a Market for "Experience Goods,"* 33 J. OF INDUS. ECON. 531 (1985); Fred S. Zufryden, *Linking Advertising to Box Office Performance of New Film Releases - A Marketing Planning Model*, 36 J. OF ADVERTISING RES. 29 (1996); Judith A. Chevalier & Dina Mayzlin, *The Effect of Word of Mouth on Sales: Online Book Reviews*, (Nat'l Bureau of Econ. Research, Working Paper No. 10148, 2003), *available at* http://www.nber.org/papers/w10148.pdf; Chrysanthos Dellarocas, *The Impact of Online Opinion Forums on Competition and Marketing Strategies*, (Mass. Inst. of Tech., Working Paper, Sept. 10, 2003), *available at* http://scholar.google.com/scholar?hl=en&lr=&q=cache:Joc3iy1jrXgJ:catalyst.gsm.uci.edu/tools/dl_public.cat%3Fyear%3D2003%26file_id%3D127%26type%3Dcal%26name%3Donlineopinionforums-0910.pdf; Press Release, Marcus Corp., Survey Reveals Moviegoing Trends for Past 20 Years (May 5, 2003), *available at* http://www.presentationmaster.com/2003/05_may/news/cw_marcus_survey.htm (indicating that consumers gather information about movies from friends, trailers, (newspaper) critics, television, and radio).

Bibliofind.[70]

These market solutions do not adequately resolve the paradox of marketing experience goods, however. Despite strong sales, the publishing industry in particular seems to be facing a looming crisis in declining percentages of book readers.[71] Few consumers can spare the time and find the chair space at Barnes & Noble to browse through the physical pages of dozens and dozens of books prior to buying, even though that might be a better way to get an overall sense of each book's new contributions, organizational structure, and writing style. Directories of books are frequently cumbersome, incomplete, and difficult to cross-reference. Advertisements for books may not be reliable indicators of quality, and may contain little more than the author's name, the title, a graphic or two, and blurbs possibly taken out of context.[72] Publishers and other producers of experience goods also have a significant incentive to free-ride on their prior reputations or the reputations of other similar works or producers, a problem to which anyone disappointed by a sequel can attest.[73] Expert reviews are often unhelpful due to lack of detail, made-up blurbs, and financial inducements to so-called "junket

70. *Cf.* Thomas F. Cotter, *Some Observations on the Law and Economics of Intermediaries*, 67 MICH. ST. L. REV. 67, 70, 73 (2006) (noting that intermediaries assist consumers "by informing [them] about the existence and characteristics of products" so they "can find the products that best fit their needs," and that "there are many other intermediaries (such as eBay and Amazon) that didn't exist before the Internet"); Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 275 F. Supp. 2d 543, 550 (D.N.J. 2003) (describing how Amazon and Netflix tried to "provide their customers with the opportunity to view [short] previews prior to renting or buying the home videos").

71. Book sales are up dramatically over the past decade with American publishers releasing more books than ever in 2004, and British publishers releasing even more than American ones in 2005. *See Britain Published More New Books in 2005 than US*, YAHOO! NEWS, May 12, 2006, http://uk.news.yahoo.com/12052006/323/britain-published-new-books-2005.html. But "the percentage of Americans who read books has steadily declined over the last 20 years," with 43 percent of Americans now reading an average of zero books each year. *More Authors Than Readers*, EDSF REP., July-Aug. 2005, *available at* http://www.edsf.org/Images/EDSF_report_0705.pdf. At this rate, by 2052 there may be nearly 20 million more books published than Americans who read a book. *See id.*

72. *See* Daniel Ackerberg, *Empirically Distinguishing Informative and Prestige Effects of Advertising*, 32 RAND J. OF ECON. 316, 319 (2001) (summarizing economic literature indicating that quality claims in "advertising that informs consumers about a brand's experience characteristics . . . should not affect rational consumers because they are not verifiable and their marginal cost is zero given that advertising space has already been purchased") (citing Phillip Nelson, *Advertising as Information*, 82 J. OF POL. ECON. 729 (1974)); Daniel Akst, *The Problem in Aisle One*, OPINION J., Aug. 16, 2002, http://www.opinionjournal.com/taste/?id=110002143 ("[T]he book business publishes something like 122,000 titles annually and promotes almost none of them more than minimally.").

73. A consumer may come to associate a given writer, singer, actor, or director with highly entertaining content, only to be let down by a string of execrable releases from their favorite celebrity.

journalists" to write favorable reviews.[74]

The persistent difficulties that content producers and consumers face in resolving the paradox of experience good marketing may reduce the quality and diversity of content produced. Specifically, the high fixed costs of producing and the sometimes even higher costs of marketing books, videos, and other content may create a "sweet spot that favors the safe over the risky, imitation over experimentation, and experienced insiders over newcomers."[75] Where shelf space, programming time, or broadcast spectrum is limited, this may "motivate media producers to aggregate large audiences for any given . . . product," and privilege "the satisfaction of expressed majority tastes over expressed minority, or unexpressed, tastes."[76] The "category management" practices of book retailers remove titles with fewer sales from store shelves, and the publishing of "midlist" books has been scaled back as less profitable.[77] Given these realities, too many works appealing to minority tastes are "castoff artifact[s], forever exiled, beyond the reach of the reader, [the] authorial voice condemned to silence and all potential earning power gone."[78]

D. *Fair Use: Legal Shelter for Market Solutions to the Experience Good Paradox*

From the very "infancy" of copyright legislation in England and revolutionary America, courts and legislators have deemed liberal public entitlements to utilize copyrighted materials without seeking the permis-

---

74. *See* Sarah Gardner, MARKETPLACE, June 4, 2001, http://marketplace.publicradio.org/shows/2001/06/04_ mpp.html ("John Horn, a Newsweek reporter who was investigating the world of junket criticism, where movie studios wine and dine journalists on all-expenses-paid weekends in exchange for favorable movie reviews . . . [,] says . . . fictional quotes have been around for years . . . [and] that there are plenty of 'junket journalists' that are willing to wax rhapsodic over even the lousiest movie . . . ."); Ahmed E. Taha, *Controlling Conflicts of Interest: A Tale of Two Industries* 12 (ExpressO Preprint Series, Working Paper No. 750, 2005), *available at* http://law.bepress.com/expresso/eps/750 (discussing allegations that movie reviewers write biased reviews after being treated to free airfare, hotel rooms, meals, and cash, and that "studio employees sometimes have even tried to get critics who attend to consent to being quoted as giving a positive blurb that was actually written by the studio") (citing Robert Ebert, *Columbia Fakes it to the Next Level*, CHI. SUN TIMES, June 5, 2001, at 35).

75. Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1432 (2004) (footnotes omitted) (referring to motion pictures).

76. *Id.*

77. *See* Akst, *supra* note 72; DAVID D. KIRKPATRICK, REPORT TO THE AUTHORS GUILD MIDLIST BOOKS STUDY COMMITTEE 5, 36-46 (2000), http://www.authorsguild.org/miscfiles/midlist.pdf (describing how influence of chain-store marketing practices may reduce diversity of books published).

78. Google, Google Book Search: Thoughts from Authors, http://books.google.com/googlebooks/newsviews/author.html (last visited Sept. 9, 2006) (quoting Warren Adler, author of several books published by Ballantine Books, among others).

sion of their owners to be essential "to promot[ing] the Progress of Science and useful Arts,"[79] or, in the English formulation, to promote the "Encouragement of Learning."[80] Prior to the enactment of the first copyright statute, the Statute of Anne,[81] the Crown of England exercised a "prerogative power" to grant monopolies to publishers over Bibles, prayer books, statute books, volumes of case law, English grammars and spellers, Latin and Greek texts, and other indispensable fiction and nonfiction works.[82] Bibles and other religious texts, which constituted forty percent of English book production in the latter half of the sixteenth century, were often subject to patents such as that granted to the Queen's Printer, Christopher Barker, in 1577.[83] Even these printing patents, however, did not restrict the use of generous excerpts from the protected work; quite the contrary, the Bible, the law, and the classics could still be quoted, praised, imitated, criticized, and transformed into various seventeenth-century treatises on theology, law, political economy, and literary criticism.[84]

---

79. U.S. CONST., art. I, § 8, cl. 8.

80. Statute of Anne, 1710, 8 Ann., c. 19 § 1 (Eng.).

81. *See generally* HARRY RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON "AN ACT FOR THE ENCOURAGEMENT OF LEARNING," 1710 (1956). Venice, Germany, and France may have preceded England in enacting copyright regulations on the new technology of printing, but in the form of consular decrees, royal prerogatives, and court judgments, not parliamentary statutes. *See* GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 15-18 (1994); WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE, ch. 1 (photo. reprint 2000) (1994), *available at* http://digital-law-online.info/patry/patry2.html; MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 18-21 (1993). Prior to the invention of the printing press, authorship in the style of "individual intellectual effort related to the book as economic commodity—was virtually unknown," for many "[m]edieval scholars were indifferent to the precise identity of the 'books' they studied," and, as a "humble service organization" passing down many texts, "rarely signed even what was clearly their own." MARSHALL MCLUHAN & QUENTIN FIORE, THE MEDIUM IS THE MASSAGE 122 (1967).

82. *See* JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING 26-27, 35-36, 41-44 (Routledge 2006); BENJAMIN KAPLAN ET AL., AN UNHURRIED VIEW OF COPYRIGHT 3 (Iris C. Geik et al. eds., LexisNexis Matthew Bender 2005) (1967); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 5-6 (1968); NIGEL WHEALE, WRITING AND SOCIETY: LITERARY, PRINT, AND POLITICS IN BRITAIN 1590-1660 56 (1999); Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 389-90 (2004) ("[P]rivileges granted by letters patents . . . usually covered classes of books such as Bibles, psalters, or law books and . . . had the effect of granting the holder of the privilege the exclusive right to publish a work within the scope of the privilege for the term stated.") (footnotes omitted).

83. *See* WHEALE, supra note 82, at 56; David L. Gants, *A Quantitative Analysis of the London Book Trade 1614-1618*, 55 STUDIES IN BIBLIOGRAPHY 185, 202 (2002) ("As was the case with most commerce in early modern England, monopolies played a large role in determining who printed what texts . . . . Henry VIII awarded patents for printing on royal privilege . . . . Elizabeth, however, greatly expanded the concept of patents by awarding lifetime rights to print whole classes of books. It was during her reign that individuals began acquiring sole rights to biblical publication, prayer books, law books, Latin and Greek printing, almanacs, and the like.").

84. As the highest common-law court in England remarked in a later case, the King's

Despite some latitude for fair use, royal printing patents were not enforceable without substantial resistance. Printers flouted a "growing number" of patents by printing protected works without authorization, resulting in intervention by the Court of Star Chamber.[85] Meanwhile, a system of pre-publication licensing of unpatented books was developing alongside the printing patent system. After the conflict between Henry VIII and the Catholic Church, the crown used its prerogative power to institute licensing of books.[86] Queen Mary chartered the Company of Stationers in 1557 to police the licensing system, and Queen Elizabeth confirmed their charter upon taking power.[87] Elizabeth granted the Stationers' Company even more power in 1586 via a royal decree vesting the Stationers and the Court of Star Chamber with power over the regulation of printing.[88] The Court of Star Chamber restricted printing to Stationers licensed by the ecclesiastical authorities and authorized the Stationers to search for and seize banned books.[89]

During the reign of Queen Elizabeth, the smaller makers, printers, and sellers of books "complained fiercely against the monopolist patent-holders who were enjoying the profits from some of the most commercially successful titles, including popular materials such as ballads, prognostications, devotional chapbooks, sensational pamphlets and almanac books."[90] Such outrage at "[r]oyal abuse of the Crown's prerogative to grant monopoly" proved to be "a major cause of the English

---

"property" right in the English translation of the Bible did not necessarily restrain "any man [who] should turn the Psalms, or the writings of Solomon, or Job, into verse . . . ." Stowe v. Thomas, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514) (quoting Millar v. Taylor, (1769) 98 Eng. Rep. 201 (K.B.) (opinion of Lord Mansfield, C.J.)); *see also* Hannibal Travis, *Comment, Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 820 (2000). The Queen's Printers and the Universities of Oxford and Cambridge still claim to possess valid patents from the Crown of England "to print the King James version of the Bible and other books containing the rites and ceremonies of the Church of England," although the British courts have held that these patents cannot restrain the printing of new translations of the Bible. COPYRIGHT LAW REVIEW COMM., CROWN COPYRIGHT ch. 6, n.84 (2005), *available at* http://www.ag.gov.au/agd/WWW/clrHome.nsf/AllDocs/6684C5EDF392D498CA256FF00005B923?OpenDocument; Roger Syn, *(c) Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 11 (2001-2002) ("The Crown printer assumed [in the 1960s that] its rights extended even to translations made by others, since the patent [still] covered: 'all and singular Bibles . . . whatsoever in the English Language or in any other Language whatsoever of any Translation.'") (footnotes omitted).

85. Gants, *supra* note 83, at 202.

86. *See* KAPLAN, *supra* note 82, at 3.

87. *See* FEATHER, *supra* note 82, at 33.

88. *See id.* at 36.

89. *See* H. G. Aldis, *The Book-Trade, in* IV THE CAMBRIDGE HISTORY OF ENGLISH AND AMERICAN LITERATURE ch. XVIII, § 3 (A.W. Ward et al. eds, Bartleby.com 2000), *available at* http://www.bartleby.com/214/1803.html (summarizing Star Chamber decrees of 1566 and 1586); ROSE, *supra* note 81, at 31 (summarizing the Licensing Act of 1662).

90. WHEALE, *supra* note 82, at 61.

Civil War" which started in 1641.[91] After a second successful revolution against the English Crown, Parliament abolished licensing and the Stationers' Company monopoly on printing,[92] and erected in their place the Statute of Anne.[93]

The Statute of Anne checked the copyright power of Parliament by limiting it as to purpose (the "Encouragement of Learning" rather than vindication of preexisting common-law rights), beneficiaries ("Authors" or "Assignees" of books rather than their "publishers" or "rightful owners" as the publishing industry had demanded), scope ("sole Liberty of Printing and Reprinting [a] Book and Books"), and permissible duration (for specific times, namely an initial term of fourteen years and a renewal term of another fourteen years for authors surviving the initial term).[94] After the Statute of Anne, the Stationers' Company was just another copyright owner, and, for the most part, not a monopolist or roving censor.[95] Authorship, rather than guild membership, became the ultimate source and foundation of exclusive rights in books.[96]

The Framers of the American Constitution limited the copyright power of Congress in order to preclude the revival of "oppressive [publishing] monopolies."[97] Unique among clauses conferring powers upon Congress in Article I of the U.S. Constitution, the Copyright Clause circumscribes both "the objective which Congress may seek and the means

---

91. Brief of Petitioners at 24, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), *available at* http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/opening-brief.pdf (citation omitted); *see also* DAVID HUME, THE HISTORY OF ENGLAND: FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688 vol. V, ch. LIV (1778), *available at* http://oll.libertyfund.org/Texts/Hume0129/History/0011-5_Bk.html#toc_lf011.5.head.021 ("The most unpopular of all Charles's measures, and the least justifiable, was the revival of monopolies, so solemnly abolished, after reiterated endeavours, by a recent act of parliament."); Edward Grant Buckland, *Combinations and Trusts*, 16 NEW ENGLANDER AND YALE REV. 241, 246 (1890) ("Both James I and Charles I were unfortunately too obtuse or too stubborn to profit by Elizabeth's experience [in submitting to parliamentary indignation concerning monopolies by patent]; and, defying courts and parliament, began that series of abuses of the royal prerogative which ended with the execution of Charles and the first complete overthrow of English royalty.").

92. *See* J. D. Forrest, *Anti-Monopoly Legislation in the United States*, 1 AM. J. OF SOC. 411, 412 (1896) (after English Civil War, monarchy revived practice of granting monopolies by royal prerogative which Revolution of 1688 and English Bill of Rights curtailed).

93. The statute inaugurated a series of copyright reforms across Western Europe whereby the author supplanted the sovereign as the source of the right to prohibit unlawful copies. DAVIES, *supra* note 81, at 18 (quotation and citation omitted).

94. Statute of Anne, 1710, 8 Ann., ch. 19 (Eng.); *see* ROSE, *supra* note 81, at 44 (noting that publishers had pleaded for a "Booksellers Right to their Copies," a right that would last "for Ever") (citations omitted); Travis, *supra* note 84, at 811 (Statute of Anne "vested rights in the Authors, or Purchasers, of such Copies, rather than in the rightful Owners' of Books") (quotations and citations omitted).

95. *See* CYPRIAN BLAGDEN, THE STATIONERS' COMPANY: A HISTORY, 1403-1959 176 (1960).

96. *See* ROSE, *supra* note 81, at 4, 14.

97. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 164 (1975).

to achieve it."[98] The means to be used by Congress were to grant copyrights to authors, so that publishers would not take undue advantage or build up monopolies.[99] Copyrights were also to be restricted to writings rather than ideas or categories of works, so that other authors would be free to express the same idea by other means; the Supreme Court has also construed this requirement of a unique writing to mean only original writings, so that facts and public domain works are not monopolized.[100] Congress had to confine copyrights to a "short" duration so that books would return to uninhibited public use, transformation, and low-cost reprinting after a "short interval" of monopolistic exploitation.[101]

The Constitution decentralized the power to create and publish works of authorship, as it decentralized the power to make and enforce laws among multiple sovereigns and three coequal branches of federal government.[102] The "English experience" prompted Madison and the other framers of the U.S. constitution to "exclude publishers from the

98. Goldstein v. California, 412 U.S. 546, 555 (1973); *see also* Frantz Mfg. Co. v. Phenix Mfg. Co., 457 F.2d 314, 327 n.48 (7th Cir. 1972) (Stevens, J.) ("The congressional power . . . is . . . limited to that which accomplishes the stated purpose of promoting 'the Progress of Science and useful Arts.'") (quoting Lee v. Runge, 404 U.S. 887, 890 (1971) (Douglas, J., dissenting from denial of certiorari)).

99. *See* JAMES MADISON, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.*, in WRITINGS 756 (Jack N. Rakove ed., 1999) (under U.S. Constitution, monopolies restricted to "the authors of Books, and of useful inventions"); I ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 266 (1803) ("[I]f this [Copyright] clause of the [C]onstitution was relied upon, as giving congress a power to establish such monopolies, nothing could be more fallacious than such a conclusion. For the constitution not only declares the object, but points out the express mode of giving the encouragement; viz. 'by securing for a limited time to authors and inventors, the exclusive right to their respective writings, and discoveries.'"). Madison believed that monopolies were "justly classed as among the greatest nusances in Government," and "sacrifices of the many to the few," but that abolishing copyrights was not necessary to get rid of monopolies. EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 6-7 (2002) (footnote omitted).

100. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

101. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. XIX, § 558, 402-03 (photo. reprint 1987) (1833) (Copyright Clause "would promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint").

102. *See* Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 659 (1996) ("The reason the Constitution limits the recipient of the monopoly power to authors resides in the single, unifying theme of the entire constitutional enterprise: the decentralization of power."); Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause* 1, 6-9 (Cardozo. Sch. of Law Intell. Prop. Law Program, Occasional Paper No. 5, 1999), *available at* http://www.cardozo.yu.edu/news_events/papers/5.pdf.

copyright clause."[103] They determined that whatever reward publishers might reap from copyrights under their power "must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[104] Courts have therefore declined to enforce copyrights in a way that would diminish cultural progress and the broad dissemination of scientific, literary, and artistic works.[105]

Cognizant of its constitutional obligation not to obstruct the progress of literature and printing markets, Congress strictly limited copyright scope and duration for most of American history. The Copyright Act of 1790 resembled the Statute of Anne in several respects, including being named an "Act for the Encouragement of Learning," granting rights principally to authors rather than publishers, limiting the scope of these rights to "printing, reprinting, publishing, and vending" rather than merely copying, and restricting these rights to "the times therein mentioned," basically up to 28 years rather than the longer term of today.[106]

---

103. L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 32-33 (1987).

104. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); *see also* Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431-32 (1984).

105. *See, e.g.*, *Feist*, 499 U.S. at 349 (declining to enforce copyrights in compilations in a way that might frustrate "primary objective of copyright," which "is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'") (quoting U.S. Const., art. I, § 8, cl. 8); *Sony*, 464 U.S. at 477 (recognizing that overly "strict enforcement" of copyrights "would inhibit the very 'Progress of Science and Useful Arts' that copyright is intended to promote") (quoting U.S. Const., art. I, § 8, cl. 8). Courts have similarly declined to enforce patents or trademarks in a way that would retard the progress of technology and the nation's economic competitiveness. *See, e.g.*, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33-34 (2003) (refusing to construe trademark laws so as to undermine rule that "once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution"); TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 29 (2001) (refusing to countenance "misuse or over-extension" of trade dress rights in ways that would unduly restrain competition) (citing Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 213 (2000)); Morton Salt Co. v. G. S. Supplier Co., 314 U.S. 488, 492 (1942) (holding that the "public policy adopted by the Constitution and laws of the United States, 'to promote the Progress of Science and useful Arts,' . . . forbids the use of the patent to secure an exclusive right or limited monopoly" over an unpatented article) (quoting U.S. CONST., art. I, § 8, cl. 8); William R. Warner & Co. v. Eli Lilly & Co., 265 U.S. 526, 528 (1924) (refusing to enforce plaintiff's trademark so as to restrain another person from "truthfully describ[ing] his own product . . ., even if its effect be to cause the public to mistake the origin or ownership of the product") (citations omitted); Pennock v. Dialogue, 27 U.S. 1, 19 (1829) (declining to enforce patent that would "materially retard the progress of science and the useful arts" by encouraging patentees to sell inventions publicly without taking out a patent until "the danger of competition should force him to secure the exclusive right" for fourteen years).

106. Act of May 31, 1790, ch. XV, § 1, 1 Stat. 124 (repealed 1802); *see also* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 347-48 (1908). Today, the term of copyright stands at anywhere from 95 years to 70 years after the author's death. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 11 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.); Eldred v. Ashcroft, 537 U.S. 186, 242-43 (2003) (Breyer, J., dissenting).

Until the late nineteenth century, Congress also followed the lead of the Statute of Anne in denying copyright protection to works of foreign origin, thereby opening up a vigorous free market of inexpensive magazines and newspapers featuring reprints of British and continental European classics, contemporary literature, news, biography, scholarship, and opinion.[107]

Under both the Statute of Anne and the Copyright Act of 1790, fair use served as legal shelter for efforts to disseminate information about experience goods without having to seek prior permission first. Under both English and American law through the early nineteenth century, a doctrine of "fair abridgment" rendered it lawful to publish extracts of another's book as part of a new and original work, whether in a periodical version, abridged version, or translation from prose to verse or into another language.[108] In the mid-nineteenth century, American courts recognized a doctrine of fair use which allowed reviewers to publish "extracts sufficient to show the merits or demerits of the work," but not to "supersede the original book."[109] In 1841, Justice Joseph Story, riding circuit, held that fair use prohibits authors from "sav[ing] themselves trouble and expense, by availing themselves, for their own profit, of

107. The Statute of Anne did not "prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas . . . ." Statute of Anne, 1710, 8 Ann., ch. 19, § 7 (Eng.); *see also* L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry into the Need for a Federal Statute of Unfair Competition*, 17 DAYTON L. REV. 385, 399-400 (1992). The Copyright Act of 1790 went further than the Statute of Anne in denying copyright protection not only to works printed abroad in foreign languages, but also to English works printed by foreign citizens in foreign countries. *See* Act of May 31, 1790, ch. XV, § 5, 1 Stat. 124, 125 ("[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States."); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 61 (2003).

108. *See* Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514); Story v. Holcombe, 23 F. Cas. 171, 173-74 (C.C.D. Ohio 1847) (No. 13,497) ("A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment. . . . All the authorities agree that to abridge requires the exercise of the mind, and that it is not copying."); Newbery's Case, [1773] 98 Eng. Rep. 913 (Ch.) (lawful to print extracts of novel in abridged version); Dodsley v. Kinnersley, [1761] 27 Eng. Rep. 270, 271 (Ch.) (lawful to print extracts of novel in magazine); Gyles v. Wilcox, [1740] 27 Eng. Rep. 682 (Ch.) (lawful to print extracts of legal treatise in abridged version); Burnett v. Chetwood, [1720] 35 Eng. Rep. 1008, 1009 (Ch.) (lawful to print translation of another's work); Millar v. Taylor, [1769] 98 Eng. Rep. 201 (K.B.) (lawful to print translations of other works into verse or foreign languages, or to create imitations, abridgments, and derivative works that are not identical to the original work); *see also* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 3-28 (1995) (summarizing fair abridgment law in 18th century English and 19th century American cases); Travis, *supra* note 1, at 814-15 (same).

109. Lawrence v. Dana, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8,136); *see also Story*, 23 F. Cas. at 173; Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901); Gray v. Russell, 10 F. Cas. 1035, 1038-39 (C.C.D. Mass. 1839) (No. 5,728).

other men's works," an inquiry that would depend on "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[110]

The Copyright Act of 1976 reaffirmed American law's exclusion from the scope of copyright mere "comment" or "criticism" concerning a copyrighted work that serves to enhance, rather than detract, from its marketability.[111] It codified the fair use inquiry into four "factors,"[112] and specified that "fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by [distribution, public performance, public display, or preparation of derivative works], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[113] Congress endorsed the "purpose and general scope of the judicial doctrine of fair use" without "freez[ing] the doctrine in the statute, especially during a period of rapid technological change."[114]

IV. THE GOOGLE BOOK SEARCH COPYRIGHT LITIGATION

A. *Overview of the Litigation*

1. THE AUTHORS' PUTATIVE CLASS ACTION

In September 2005, the Authors Guild filed a proposed class action in the United States District Court for the Southern District of New York, asserting its status as an "Associational Plaintiff" representing 8,000 published authors seeking "injunctive and declaratory relief on behalf of its members."[115] In addition to the Guild, three authors are named plaintiffs in the suit, representing three principal genres of writ-

110. *Folsom*, 9 F. Cas. at 348-49 (citations and internal quotation marks omitted); *accord Gray*, 10 F. Cas. at 1038-39. For a critique of this decision as retracting the generous right of fair abridgement as previously recognized, see Travis, *supra* note 84, at 821-25, 846-51.

111. 17 U.S.C. § 107 (2006); *see* Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986) ("Copyright law is not designed to stifle critics. . . . Accordingly, the economic effect of a [use] with which we are concerned is not its potential to destroy or diminish the market for the original – any bad review can have that effect – but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it.").

112. 17 U.S.C. § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include – (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.").

113. *Id.*

114. H.R. REP. No. 94-1476, at 66 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

115. Complaint at ¶ 15, The Authors Guild et al. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Sept. 20, 2005).

ing: fiction, nonfiction, and poetry/criticism.[116] The named plaintiffs' works were published by Oxford University Press, Knopf, and Viking Press, which raises potential questions as to whether these publishers also own all electronic rights or whether the authors reserved them.[117] The suit alleged the imminent infringement by Google of copyrights in millions of books and seeks class action status on behalf of "all persons or entities that hold the copyright to a literary work that is contained in the library of the University of Michigan."[118] In addition to injunctive relief, the plaintiffs requested that Google be forced to hand over its profits and pay statutory and/or actual damages.[119]

2. THE PUBLISHERS' JOINT ACTION

In October 2005, several publishers filed suit against Google in the United States District Court for the Southern District of New York. The publishers sought only injunctive and declaratory relief, rather than an injunction plus damages like the Authors Guild.[120] The publisher plaintiffs included Simon & Schuster (Scribner), Penguin (Viking), McGraw-Hill, Pearson Education (Prentice-Hall), and Wiley.[121] They are represented by Debevoise & Plimpton, LLP, which was also counsel for New York Times Co. in the *Tasini* litigation over LexisNexis rights.[122] These publishers claimed to be the "owner or exclusive licensee" of copyrights in a number of works by authors including F. Scott Fitzgerald, Ernest Hemingway, Terry McMillan, Amy Tan, and Bob Woodward.[123] At least one commentator has questioned, however, whether these publishers could possibly have secured electronic rights in contracts covering books written long before e-books and electronic rights became relevant to major publishers.[124] The Association of American Publishers "is

116. *Id.* at ¶¶ 10-12 (reciting that plaintiff Herbert Mitgang has written "numerous nonfiction books, novels and plays," plaintiff Betty Miles has written "several works of children's and young adult fiction," and plaintiff Daniel Hoffman has written "many volumes of poetry, translation, and literary criticism, and . . . a memoir").

117. *Id.* A successful copyright infringement action requires proof not only of unlawful copying, but also "ownership of a valid copyright." Bill Graham Archives, LLC v. Dorling Kindersley Ltd., 386 F. Supp. 2d 324, 327 (S.D.N.Y. 2005), *aff'd*, 448 F.3d 605 (2d Cir. 2006).

118. Complaint at ¶ 20, *The Authors Guild*, No. 05-CV-8136.

119. *Id.* at Prayer for Relief.

120. *See* Complaint at ¶ 1, McGraw-Hill et al. v. Google, Inc., No. 05-CV-8881 (S.D.N.Y. Oct. 19, 2005).

121. *See id.* at ¶¶ 13-17.

122. *See id.* at 1; N.Y. Times Co., Inc. v. Tasini 533 U.S. 483 (2001). I became an associate at Debevoise & Plimpton after the *Tasini* decision was handed down, but during proceedings on remand, in which I did not participate other than by conducting legal research.

123. Complaint at ¶¶ 13-17, Exhibit A, *McGraw-Hill*, No. 05-CV-8881.

124. *See* Eriq Gardner, *Online Disputes Expose Publishers' Copyright Vulnerability*, IP LAW & BUS., Mar. 6, 2006, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1140689116012 (questioning whether Simon & Schuster's contracts with F. Scott Fitzgerald and

coordinating and providing funding for the case, but it is not technically a plaintiff, since it does not hold the rights to the content."[125]

B. *The Web Precedents*

The authors and publishers are likely to oppose any fair use defense by Google by citing prior authorities involving the unauthorized reproduction and distribution of copyrighted works over the Internet. Web sites like Free Republic and MP3Board claimed to be facilitating user sampling of experience goods, such as articles and songs, by posting links to them or making them searchable by title, artist or author, and other criteria.[126] Courts deciding lawsuits brought against these sites by the record labels and major newspapers, respectively, found that despite significant levels of "sampling," distribution of complete digital copies of articles or songs by these commercial Web sites was not a fair use.[127] In the *Free Republic* case, the court relied in particular on the fact that the site distributed, without transformative commentary, "excerpts" or "substantial portions" of articles instead of on the fact that it had many characteristics of a non-profit venture.[128] Even without evidence of lost revenue, digital excerpts of print articles had "the potential of . . . diminishing the market for the sale of archived articles, and decreasing the interest in licensing the articles."[129] Regarding Free Republic's referral to a newspaper Web site of tens of thousands of Web surfers, and thousands of dollars of advertising revenue every year, the court stated that a use's tendency to "increase[ ] demand for the plaintiff's copyrighted work" was not dispositive.[130]

Ernest Hemingway, "authors who signed contracts before the digital age," included "'electronic rights,'" and noting that "Simon & Schuster put electronic rights clauses into its contracts in the mid-1980s," while "Time Warner Inc. (owner of Little, Brown and Warner Books)" did not "until the mid-1990s").

125. M. Cohn, *Google Gets Subpoena Power*, RED HERRING, Oct. 6, 2006, *available at* http://www.redherring.com/Article.aspx?a=19024&hed=Google+Gets+Subpoena+Power.

126. *See, e.g.*, L.A. Times v. Free Republic, No. CV 98-7840 MMM (AJWx), 2000 WL 565200, at 1471 (C.D. Cal. 2000) (defendant argued that "plaintiffs' sites receive 'literally tens of thousands, if not hundreds of thousands of hits per month' as a result of referrals from the Free Republic site, . . . [which] demonstrates that Free Republic is creating a demand for plaintiffs' works"); Memorandum of Points and Authorities in Support of Defendant MP3Board, Inc.'s Motion for Summary Judgment, or, Alternatively, Partial Summary Judgment as to Plaintiffs' Complaint at 16, Arista Records, Inc. v. MP3Board, Inc., 2002 WL 1997918 (S.D.N.Y. 2002) (No. 00 CIV. 4660 (SHS)), *available at* http://www.techfirm.com/mp3msj.pdf ("Musical artists who take advantage of modern technology to promote their music independently of Record Companies need systems such as are provided by MP3Board. Even Record Companies need search engines to market their products online.").

127. *See Arista Records*, 2002 WL 1997918, at *12-13; *Free Republic*, 2000 WL, at 1466-72.

128. *Free Republic*, 2000 WL, at 1469-71.

129. *Id.* at 1470-71 (citation omitted).

130. *Id.* at 1471 (citation omitted).

C. *The Contributory Infringement Precedents*

1. THE *SONY* case

Some commentators have suggested that even though Google is being sued as a copyright infringer in its own right, courts may draw analogies to precedents governing technology companies such as Sony or Grokster that were charged with contributing to copyright infringement by their users. As two copyright practitioners have written, the Supreme Court's precedents on contributory copyright infringement may enable Google to argue that the cost of limiting the development of digital technology by overinclusive copyright laws must be weighed against the cost to copyright owners of underinclusive copyright laws that allow infringement using new technologies.[131] On one reading of these precedents, because searching via the Internet is a "staple" of twenty-first century commerce, courts will hesitate to "disrupt the Google Book Search [feature] unless the publishers demonstrate a very substantial loss in the marketplace."[132] Is there any support for this argument in the legal principles articulated in *Sony* or *Grokster*, and if so, in which principles?

Nothing in the Copyright Act makes encouraging, inducing, contributing to, or benefiting from copyright infringement an independent basis for copyright liability.[133] Nevertheless, the Supreme Court has grafted such secondary liability onto the Copyright Act based on its view of what is "just."[134] In its most important case in this area, in which two movie studios sued Sony, among other defendants, in its capacity as the manufacturer of the Betamax videocassette recorder, the Court refused to find Sony liable for the allegedly infringing conduct of Betamax users, noting that a "finding of contributory infringement is normally the functional equivalent" of including an article of commerce within the plaintiff's copyright monopoly.[135] The Court held that the sale of the Betamax or any other articles of commerce capable of copying protected works is not a form of contributory copyright infringement "if the product is widely used for legitimate, unobjectionable purposes"

131. *See* Ed Dailey & Keith Toms, *Technology and Copyright Tend to Find Equilibrium*, NAT'L L.J., Dec. 5, 2005, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1133431506889.

132. *Id.*

133. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434-35 (1984) ("The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the Patent Act expressly brands anyone who actively induces infringement of a patent as an infringer, and further imposes liability on certain individuals labeled contributory infringers.") (internal quotations and citations omitted).

134. *Id.* at 435-37.

135. *Id.* at 441.

or is "capable of substantial noninfringing uses."[136]

In Sony's case, a principal noninfringing use of the Betamax was taping television programs to watch later, or "time-shifting," which was fair because there was little evidence that television ratings or advertising revenues would decrease, or that motion picture attendance or videotape rentals would decrease as television taping of motion pictures became an alternative.[137] On the contrary, the Court noted, there *was* evidence that time-shifting would "aid plaintiffs rather than harm them" by expanding their audiences to include people away from home during the time of initial broadcast of a program.[138] Therefore, the Court concluded that the movie studios had not come forward with evidence of "any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works" that would throw the fair use status of time-shifting into doubt.[139]

Since *Sony* was decided, owners of large copyright holdings have quarreled with technology companies and individuals making fair use of their works over the scope of the case's holding. A broad reading of *Sony* is that creators of new technologies capable of infringing uses should not be held liable for infringements by users unless the technology is not capable of substantial noninfringing uses in the future, regardless of whether the technology's "principal" use is infringement, or whether its maker "encourages" infringement.[140] On this reading, "Congress has the constitutional authority and the institutional ability" to deal with "major technological innovations [which] alter the market for copyrighted materials."[141] The more narrow reading, favored by large copyright holders, is that *Sony* represents a "staple article of commerce doctrine" that does not apply where a new technology involves commercial copying, where its principal use is to reproduce, distribute or display copyrighted works to unauthorized persons, where it facilitates copying of works which the public has not been invited to view free of charge, or where it involves a service requiring ongoing and direct contact with consumers, as opposed to a release of a product into the stream of com-

136. *Id.* at 442.

137. *Id.* at 452-56.

138. *Id.* at 453 (quotation marks omitted); *see id.* at 454 ("'Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that the Betamax will change the studios' financial picture.'") (quoting Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 468-469 (C.D. Cal. 1979)).

139. *Sony*, 464 U.S. at 456.

140. Brief of Internet *Amici*: Cellular Telecomms. & Internet Ass'n, et al. in Support of Affirmance at 7-8, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005) (No. 04-480).

141. *Sony*, 464 U.S. at 431.

merce.[142] Google would most assuredly advance the broader view of *Sony*, as its public policy voice, NetCoalition, attempted to do in the more recent *Grokster* case.[143]

2. THE *NAPSTER* CASE

Publishers accusingly compare Google Book Search to Napster's permission-insensitive music index.[144] To a certain extent, Napster was conceived as a search engine like Google. Shawn Fanning invented Napster as a search engine for music files that would avoid the public Web, which saw frequent takedowns of unauthorized MP3s, by using a real-time centralized index of MP3 files contained on users' computers.[145] Fanning also designed Napster to economize on server space, like Google did, by indexing content and linking to it without actually serving it up to Internet surfers.[146] "According to Hank Barry, CEO of the infamous peer-to-peer service during the height of its controversial success, 'Napster was, at its core, simply a search engine for music.'"[147] Barry testified before Congress that Napster made lists of MP3s, but it did not create, copy, transfer, or provide the technology for copying MP3s.[148]

When Napster was sued by several major record labels and owners of music publishing rights, it sought shelter under *Sony*'s substantial noninfringing use defense.[149] The Ninth Circuit, however, held that

---

142. *See, e.g.*, Brief of *Amici Curiae* Office of the Commissioner of Baseball, et al. in Support of Petitioners, *Grokster*, 125 S. Ct. 2764 (No. 04-480); Brief of the Nat'l Ass'n of Broadcasters as *Amicus Curiae* in Support of Petitioners, *Grokster*, 125 S. Ct. 2764 (No. 04-480); Brief of Plaintiffs/Appellees at 40-57, A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401, 00-16403), *available at* http://www.riaa.com/News/filings/pdf/napster/Napster 09082000.pdf

143. *See* Brief of the Digital Media Ass'n, NetCoalition, et al. as *Amici Curiae* in Support of Neither Party, *Grokster*, 125 S. Ct. 2764 (No. 04-480).

144. *See, e.g.*, Lewis Smith, *Publishers Wrestle with Digital Era*, THE TIMES (London), Nov. 5, 2005, at 33 ("Nigel Newton, chief executive of Bloomsbury, which publishes the Harry Potter books, recently expressed fear that the Google Print launch was publishing's equivalent of music's 'Napster effect' – when millions of internet users swapped music free – and could sound the death knell for books."); Sarah Lai Stirland, *Google's Book Project Panned By Publishing Official*, 9 TECH. DAILY No. 8 (2006) (Vice President of government affairs at News Corp., which owns HarperCollins, stated: "'This is the Napster case all over again . . . .'").

145. *See* JOSEPH MENN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING'S NAPSTER 34 (2003).

146. *See id.* at 35.

147. JOHN BATTELLE, THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE 172 (2005).

148. *Music on the Internet: Is There an Upside to Downloading? Before the S. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Hank Barry, CEO of Napster, Inc.), *available at* http://judiciary.senate.gov/testimony.cfm?id=195&wit_id=254.

149. Napster argued that just as in *Sony*, where "82% of Betamax users watched the same amount of television, and 83% maintained their movie-going frequency, despite the new

Napster was not entitled to the defense because it had actual knowledge that its software was used to infringe music copyrights.[150] The court rejected Napster's fair use defense based on expert reports showing a decline in sales of music in college markets, as well as a threat to other existing and planned markets.[151] In response to Napster's unequivocal evidence that compact disc sales were up strongly nationwide, the court found that harm to the market for copyrighted works may include not only "harm to an established market," but also harm to the "right to develop alternative markets" such as legal digital downloads.[152] The court declared that "[h]aving digital downloads available for free on the Napster system *necessarily* harms the copyright holders' attempts to charge for the same downloads,"[153] and "'[a]ny allegedly positive impact . . . on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works.'"[154]

Unlike Napster, of course, Google Book Search is not a system that facilitates the free downloading of full copyrighted books. While Napster enabled users to find potentially millions of copyrighted full-length songs at no charge, Google is not even distributing a single intact page of a book still under copyright. Absent full permission, a preview of a copyrighted book will only include bibliographic information "with a

---

technology," so too in its case "over 91% of Napster users buy at least as much music, and some 28% buy *more* music than they did before using Napster," and the "impact of Napster has proven positive, not negative, on Plaintiffs' CD sales, which are up 8% this year over last year." Opposition of Defendant Napster, Inc. to Plaintiffs' Motion for Preliminary Injunction at 14, A&M Records v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000) (Nos. C 99-5183 MHP, C 00-0074 MHP) (citing Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp 429, 438 (C.D. Cal. 1979); Expert Report of Peter S. Fader, Ph.D. at ¶¶ 20, 43, *Napster*, 114 F. Supp. 2d 896 (Nos. C 99-5183 MHP, C 00-0074 MHP)), *available at* http://www.eff.org/IP/P2P/Napster/opposition.pdf). Although plaintiffs' "expert reports suggest[ed] that the use of Napster displaces music purchases," Napster cited "recent public press, studies and surveys suggest[ing] that the use of Napster more likely increases users' purchases of music. For example, Walter Mossberg, the Wall Street Journal's highly respected personal technology columnist, commented that, upon trying Napster, he 'rediscovered artists and songs that spurred old memories and prompted [him] to buy five CDs and a DVD.'" Expert Report of Peter S. Fader, Ph.D. at ¶ 17, *Napster*, 114 F. Supp. 2d 896 (Nos. C 99-5183 MHP, C 00-0074 MHP) (citing Walter S. Mossberg, *Despite Lawsuit, Napster Offers a Model for Music Distribution*, WALL ST. J., May 11, 2000, at B1).

150. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020-22 (9th Cir. 2001).

151. *Id.* at 1016-17.

152. *Id.* at 1017 (citing L.A. Times v. Free Republic, No. CV 98-7840 MMM (AJWx), 2000 WL 565200, at 1469-71 (C.D. Cal. 2000), for proposition "that [the] online market for plaintiff newspapers' articles was harmed because plaintiffs demonstrated that '[defendants] are attempting to exploit the market for viewing their articles online'").

153. *Id.* (emphasis added).

154. *Id.* (quoting UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000)).

few sentences of [a] search term in context."[155] Thus, Google will not impede publishers' efforts to develop online markets for e-books.[156] Indeed, Google is actively facilitating publishers' efforts to sell online access to their books or e-books.[157]

3. THE *GROKSTER* CASE

Publishers and the Authors Guild have proclaimed to the media that Google Book Search will generate millions of digital copies of their books that hackers may be expected to purloin and upload to file-sharing networks.[158] Doug Lichtman has suggested that Google could be liable for the unauthorized access and subsequent distribution by hackers of copies of books it had scanned under principles announced in the recent *Grokster* decision.[159] The head of the British publisher that releases the Harry Potter books has warned that "[b]y digitizing libraries on servers, Google could 'Napsterize' the written word," because if Google's "servers full of books were hacked, copyrighted material would be freely available all over the Web."[160] Another publisher asked, " '[c]redit card information was supposed to be safe, and look what's happened with

155. Google, Google Book Search Common Questions, http://books.google.com/googlebooks/common.html (last visited Sept. 11, 2006).

156. Even the hacking of e-book encryption and the release of thousands of books onto the Web and p2p file-sharing services, representing much more serious threats to e-book markets than Google's snippets, have not resulted in fewer book sales. *See, e.g.*, David A. Bell, *The Bookless Future*, THE NEW REPUBLIC, May 2, 2005, at 27, *available at* http://www.tnr.com/doc.mhtml?i=20050502&s=bell050205; M.J. Rose, *How to Crack Open an E-Book*, WIRED NEWS, Apr, 27, 2001, http://www.wired.com/news/business/0,1367,43401,00.html. Sales of books more than doubled between 1993 and 2006, and e-book sales increased by 40% from 2002-2003 and 25% from 2003-2004. *See The Dead CD-Roms: Did You Hear?*, EDSF REP., Sept.-Oct. 2004, *available at* http://www.edsf.org/Images/Report09-10.PDF; Calvin Reid, *Survey Claims E-Book Sales Up 30% in '03*, PUBLISHER'S WEEKLY NEWSLINE, Sept. 17, 2003, *available at* http://www.publishersweekly.com/index.asp?layout=article&articleid=CA323607&display=breakingNews; *A Library at Your Fingertips; Online Books*, ECONOMIST.COM, Nov. 4, 2005, http://www.economist.com/agenda/displaystory.cfm?story_id=5130451.

157. Google, What Does It Mean to Sell Online Access to My Book?, http://books.google.com/support/partner/bin/answer.py?answer=34596 (last visited Nov. 4, 2006) ("At this time, we're inviting publishers to tell us which books they want to include and the prices they'd like to set for those books."); *Google Pay Plan*, PUBLISHERS WEEKLY, Mar. 13, 2006, at 4 ("Google has introduced a new tool that will allow publishers to expand the amount of content available for viewing by consumers of books that are part of Google Book Search. Publishers also set the price for the greater access and determine how much of the book can be seen. . . . ").

158. *See, e.g.*, Burt Helm, *A Google Project Pains Publishers*, BUS. WK., May 23, 2005, *available at* http://www.businessweek.com/technology/content/may2005/tc20050523_9472_tc024.htm (" 'Nobody has convinced us that this can't be hacked,' says Kay Murray, general counsel for the Authors' Guild.").

159. *'Rights Clearinghouse' Is Goal for Book Search Online, but Path Murky*, WASH. INTERNET DAILY, Feb. 27, 2006.

160. Burt Helm & Hardy Green, *Google This: "Copyright Law"*, BUS. WK., June 6, 2005, *available at* http://www.businessweek.com/magazine/content/05_23/b3936043_mz011.htm?chan=search.

that. . . . What happens if a disgruntled Google employee walks out the door with 200,000 book files?' "[161]

When most of the major movie studios, record labels, and others sued Grokster and other distributors of "decentralized" peer-to-peer (p2p) file sharing software, the Ninth Circuit found that the software was capable of substantial noninfringing uses, including works in the public domain or works whose owners authorized p2p use.[162] The opinion of the Supreme Court did not address fair use, but in a concurring opinion several justices dismissed the evidence of fair use as resting on "mostly anecdotal evidence . . . of authorized copyrighted works or public domain works available online and shared through peer-to-peer networks, and general statements about the benefits of peer-to-peer technology."[163] Ultimately, the Supreme Court did not resolve the simmering conflict between technologists' broad and content owners' narrow readings of *Sony*.[164]

Google recently asserted a *Sony/Grokster* defense to a claim that it should be held contributorily and vicariously liable for the reproducing, distributing, and displaying of photographs by third parties that participated in Google's Adsense program and to which Google's search engine contained links.[165] Google cited *Sony* and *Grokster* for the proposition that it could not be held liable " 'based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement.' "[166] The court held that Google's "search engine clearly is capable of commercially significant noninfringing uses," and that Google did not know about or encourage copyright infringement by third parties within the meaning of *Grokster*.[167]

This holding intimates, contrary to what has been suggested, that

161. Jim Milliot, *Authors, Google Square Off*, PUBLISHERS WKLY., Sept. 26, 2005, *available at* http://www.singlearticles.com/2006/07/27/authors-google-square-off-2/.

162. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154, 1161-62 (9th Cir. 2004), *vacated* 125 S. Ct. 2764 (2005).

163. *Grokster*, 125 S. Ct. at 2785 (Ginsburg, J., joined by Rehnquist, C.J., and Kennedy, J., concurring) (citations omitted).

164. *See id.* at 2778 (declining to "revisit *Sony*" to establish a "balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur.").

165. Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 836 (C.D. Cal. 2006); *id.* at 834 ("Google's AdSense program allows pages on *third party sites* 'to carry Google-sponsored advertising and share [with Google the] revenue that flows from the advertising displays and click-throughs.' 'To participate [in AdSense], a website publisher places code on its site that asks Google's server to algorithmically select relevant advertisements' based on the content of that site.") (citations omitted)).

166. *Id.* at 853 (quoting *Grokster*, 125 S. Ct. at 2778).

167. *Id.* at 853-55.

Google could not be held liable for its user's conduct in hacking into Google Book Search or exceeding Google's browsing limits, whether they be the limits of library scans to "snippets" or of publisher-authorized books to specific page ranges.[168] Only if authors or publishers described the infringing hack with sufficient detail to enable Google to take remedial action and Google failed to take such action could the company conceivably be held liable for its user's conduct under *Sony* and *Grokster*.[169]

There are several reasons why the threat of hacking should not materially alter a court's analysis of the legality of Google Book Search. First, the risk of massive hacking into Google's book databases seems to be minimal given the security procedures Google has instituted.[170] Various bloggers have claimed to have discovered ways to hack Google's system to permit more book browsing and saving than Google allows, but more than a year into the operation of Google Book Search, no major vulnerabilities resulting in leaks have been reported.[171] Second, physical books, e-books authorized by the publishing industry, and services like iTunes or Amazon are also subject to methods of unauthorized copying and/or hacking that might be even easier than getting into

168. *See 'Rights Clearinghouse' Is Goal for Book Search Online, but Path Murky*, *supra* note 159 (citing Doug Lichtman for argument that Google could be liable under *Grokster* for user hacking into database of scanned books).

169. *Perfect 10*, 416 F. Supp. 2d at 853-54; *see also* Newborn v. Yahoo!, Inc., 391 F. Supp. 2d 181, 189 (D.D.C. 2005) (citations omitted) (requiring that, in order to hold Google or Yahoo! responsible for their users' conduct, complaint must allege that they "substantially participated in the infringing activities," which requires more than the mere operation of their web sites and search engines, or a conclusory allegation that they knowingly permitted the infringement); Hecke v. Clear Channel Commc'ns., Inc., 2005 U.S. Dist. LEXIS 7317, at *7-8 (S.D.N.Y. Apr. 27, 2005) (citations omitted) (declining to hold radio giant Clear Channel liable for its stations' broadcast of infringing material where the "stations make their own programming decisions, including deciding whether to contract for and use services such as plaintiff's," and "the evidence in the record points to an utter lack of any 'continuing connection' between Clear Channel and its stations in regard to programming decisions").

170. *See Coming to a Computer Near You*, WASH. TIMES, Aug. 19, 2005, at A20, *available at* http://washingtontimes.com/op-ed/20050818-083859-9476r.htm ("Google says that its databases are very secure . . . ."); Markoff & Wyatt, *supra* note 32 ("David Steinberger, the president and chief executive of the Perseus Books Group, which publishes mostly nonfiction books under the Basic Books, PublicAffairs, Da Capo and other imprints," said that "[b]ased on his experiences with Amazon's and Google's commercial search services so far, . . . 'I think there is minimal risk, or virtually no risk, of copyrighted material being misused.'"); *see also* Mary Sue Coleman, President, University of Michigan, Address to the Professional/Scholarly Publishing Division of the Association of American Publishers 5 (Feb. 6, 2005), http://www.law.pitt.edu/madison/downloads/coleman.pdf ("We will safeguard the entirety of this [scanned book] archive with the same diligence we accord our most sensitive materials at the University: medical records, Defense Department data, and highly infectious disease agents used in research.") .

171. *See* Posting of Greg Duffy (isometrick) to http://www.kuro5hin.org/story/2005/3/7/95844/59875 (Mar. 8, 2005, 05:13:53 EST); Posting of Ben Smyth to HCI BLOG, http://bensmyth.blogspot.com/2005/05/google-print-hack-it.html (May 17, 2005).

Google's databases or circumventing its page limits.[172] Third, if the development of new technologies is going to be restrained because they might potentially subject the information of third parties to misuse and/or hacking, we would have to get rid of banks, credit cards, university databases, photocopiers, vinyl records, cassette tapes, VHS tapes, compact discs, DVDs, iTunes, streaming audio and video, and most Microsoft software.[173] A more appropriate solution would be to give the victims of egregious hacking, when it actually occurs, some form of monetary relief or class action remedy.[174]

---

172. *See* Rachel Deahl, *The Looming Threat of Book Piracy: How Publishers are Losing More than Half a Million Bucks Overseas While Keeping Quiet at Home*, THE BOOK STANDARD, June 16, 2005, *available at* http://www.thebookstandard.com/bookstandard/news/publisher/article_display.jsp?vnu_content_id=1000963039 (expert on hacking opined that "it would be easier for a potential pirate to scan a print edition of a book than to hack into one of Google's protected digital files").

173. Large copyright holders' "zero tolerance" policy for copyright infringement by firms scanning books or facilitating peer-to-peer file-sharing, if extended to other technologies, would appear to justify shutting them down or substantially inhibiting their growth. *See, e.g.*, Travis, *supra* note 1, at 789-90, 825; JOSHUA PAUL, DIGITAL VIDEO HACKS: TIPS & TOOLS FOR SHOOTING, EDITING, AND SHARING 355-57 (2005), *available at* http://www.oreilly.com/catalog/digitalvideohks/chapter/hack90.pdf (describing how to record streaming video); HADLEY STERN, IPOD AND ITUNES HACKS: TIPS & TOOLS FOR RIPPING, MIXING, AND BURNING 168-79, 411-14 (2005) (discussing how to "rip" vinyl records and streaming audio onto iPods); Bryan Bergeron, *Technology in Your Practice: Creating a Digital Library*, 6(1) MEDGENMED. 52 (2004), *available at* http://www.pubmedcentral.nih.gov/article render.fcgi?artid=1140729 (describing how firewire, USB, and "analog to digital video cards and software" can be used to convert VHS tapes and camcorder video into digital files, and stating that "'ripping' software is readily available" to convert CD music to MP3 files); Universal City Studios, Inc. v. Remeirdes, 111 F.Supp.2d 294, 308-20 (S.D.N.Y. 2000) (stating that a hacker obtained unauthorized access to DVDs, "Internet domain name[s], . . . other people's e-mail, . . . cellular phone calls, and . . . computer systems at Costco stores and Federal Express"); *Symposium: IV: Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 66 (2002 / 2003) (statement of Peter S. Menell, Boalt Hall School of Law, University of California, Berkeley) (describing the "success of hackers in cracking and disseminating means of decrypting the DVD Content Scrambling System (and other technological protection measures)"); John Borland, *iTunes hack disabled by Apple*, ZDNET TECH. NEWS, Mar. 21, 2005, http://news.zdnet.com/2100-9588_22-5628616.html (describing successful hack of iTunes copyright protection); *High Cost of Data Loss*, INFO.WK., Mar. 20, 2006, at 34 ("In the past few weeks, some of the largest U.S. banks – including Bank of America, Washington Mutual, and Wells Fargo – have had to reissue debit cards, all because of data theft."); Jonathan Krim, *Hackers Targeting Security Programs*, WASH. POST, Nov. 22, 2005, at D05 (noting that Microsoft's "Office, Outlook Express, Internet Explorer and the basic Windows system" are often hacked); *'Rights Clearinghouse' Is Goal for Book Search Online, but Path Murky*, *supra* note 159 ("[Professor] Lichtman said . . . [d]ata breaches at credit card firms, universities and financial institutions could extend to digitized books . . . ."); Admire Soft: Super Mp3 Recorder, http://www.supermp3recorder.com (last visited Sept. 12, 2006) (advertising software that allows users to save streaming audio as an MP3 file); Videora, Videora Converter: Conversion Guides, http://www.videora.com/en-us/Converter/guides.html#1000 (last visited Sept. 12, 2006) (describing how to "rip" DVDs into digital files).

174. *See* Michael Bradford, *Cyber Privacy Rules Challenge Employers; Regulations Prompt More Lawsuits*, BUS. INS., Nov. 28, 2005, at 11 (describing 20 class action suits filed against firm

V. GOOGLE BOOK SEARCH AS A FAIR USE

A. *An Interlude on Library Exemption Doctrine*

No copyright infringement case was brought against a library until 1968, nearly two hundred years after the ratification of the Copyright Clause and the passage of the Copyright Act of 1790.[175] The U.S. Copyright Office viewed the filing of this case as a "'bombshell'" that influenced the growing congressional debate over adding a library exemption to the Copyright Act.[176] The American Library Association proposed that it be declared legal "for an academic institution or library to reproduce a work or a portion thereof" for a noncommercial purpose.[177] Congress agreed that a library exemption was necessary, but limited it to only one copy per book or phonorecord made without the purpose of either direct or indirect commercial advantage by a library or archive either open to the public or to all researchers in a given specialized field.[178]

Given Google's contracts with university libraries, the opening of its service to the public, and its limitation of reproductions to isolated user-initiated requests, the question of its entitlement to plead the library exemption defense was bound to arise. The publishers' complaint alleged that "the narrow provisions of 17 U.S.C. § 108, which in very different circumstances would allow a library, but, in no event, Google, to make digital copies of these works in a library's collection, [does not] excuse Google's wholesale . . . copying."[179] Mary Rasenberger, Policy Advisor for Special Programs in the Copyright Office, has opined that "Google is not a library or archive for purposes of Section 108, nor is it acting as an outsourcing agent."[180] Rebecca Tushnet has similarly

---

whose data on 145,000 people was stolen by an "identity theft ring," and another class action filed against "credit card payment processor" whose data on 34 million credit card holders was "exposed to a security breach"); *High Cost of Data Loss, supra* note 173 (describing class action valued at seven to nine million dollars filed against health care firm whose lax security procedures allowed sensitive patient data to be stolen);

175. *See* Mary Rasenberger & Chris Weston, *Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning* 2 (Apr. 14, 2005), *available at* http://www.loc.gov/section108/papers.html.

176. *Id.* at 16 (quoting THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 27-28 (1983)).

177. Rasenberger & Weston, *supra* note 175, at 17 (internal quotation and citation omitted).

178. 17 U.S.C. § 108(a)(1)-(2) (2006). The exemption contains other limitations as well, including the "concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time," as opposed to "isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions." *Id.* at § 108(g)(1).

179. Complaint at ¶ 7, McGraw-Hill et al. v. Google, Inc., No. 05-CV-8881 (S.D.N.Y. Oct. 19, 2005).

180. Tech Law Journal Daily E-Mail Alert No. 1,321, Library of Congress Comments [on]

argued that the Copyright Act's library exemption, section 108, "does not authorize systematic, deliberate reproduction of multiple copies."[181]

There would seem to be some limited support for these contentions in at least one case that cursorily rejected a section 108 argument by a television news "clipping" service that analogized itself to an archive.[182] The court concluded without discussion that section 108 "defines an archive with some precision, and [the service] does not [qualify]."[183] It is not clear, however, whether the court decided this issue on the basis that the service reproduced copyrighted works for purpose of "commercial advantage," or on the basis that it was not "open to the public."[184] The latter rationale might not apply to Google Book Search, which is open to the public and engages in the core functions of a library by preserving books for posterity and "serving effectively as a museum of information."[185] The former rationale is also debatable as applied to Google Book Search, given that the legislative history of section 108 states that "spontaneous making of single photocopies by a library in a for-profit organization" may qualify in certain circumstances.[186] Moreover, the dissemination of information is often viewed as noncommercial

---

Section 108 Exemptions and Book Scanning, Mar. 2, 2006, http://www.techlawjournal.com/alert/2006/03/02.asp.

181. Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 1007 n.110 (2006) (citing 17 U.S.C. § 108(g) (2000)).

182. Pac. & S. Co., Inc. v. Duncan, 744 F.2d 1490, 1495 n.6 (11th Cir. 1984).

183. *Id.* (citing 17 U.S.C.A. § 108 (1977)).

184. *See Duncan*, 744 F.2d at 1495 n.6; 17 U.S.C. § 108(a)(1)-(2) (2006).

185. Posting of Laura Quilter to Derivative Work, http://lquilter.net/blog/archives/2005/08/17/essence-of-library (Aug. 17, 2005). As the *Tech Law Journal* has pointed out, neither section 108 nor the Copyright Act's definitional provisions limit the library exemption to physical or university libraries or archives. Tech Law Journal Daily E-Mail Alert No. 1,318, LOC Seeks Comments on Google Type Programs, Feb. 27, 2006, http://www.techlawjournal.com /alert/2006/02/27.asp (reporting that the Library of Congress has recently published a notice and request for comment asking whether "non-physical or 'virtual' libraries or archives [should] be included within the ambit of section 108," and whether "further definition of the terms 'libraries' and 'archives' (or other types of institutions) [should] be included in section 108, or additional criteria for eligibility be added to subsection 108(a)"); *see* Section 108 Study Group: Copyright Exceptions for Libraries and Archives, 71 Fed. Reg. 7999, 8000 (proposed Feb. 15, 2006), *available at* http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-2127.htm (notice acknowledging that an amendment to the exemption would be needed if Congress wanted "eligible institutions [to] be limited to nonprofit and government entities for some or all of the provisions of section 108," or other provisions "limiting eligibility to institutions that have a nonprofit or public mission, in lieu of or in addition to requiring that there be no purpose of commercial advantage").

186. H.R. REP. No. 94-1476, at 75 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5689. Congress explained:

> Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108, . . . [and] would ordinarily not be considered "for direct or indirect commercial advantage," since the "advantage" referred to in this clause must attach to the immediate commercial

speech even if undertaken by an ultimately commercial enterprise.[187]

Ironically, the publishers' strongest basis for arguing that Google and its library partners should be denied the protection of the section 108 library exemption may be found in a case that reaches conclusions generally unfavorable to publishers, the *Tasini* case.[188] There, the Supreme Court briefly considered the question of whether Lexis/Nexis "libraries" of freelance *New York Times* articles fit under the section 108 exemption from copyright infringement actions.[189] In dicta, the Court suggested that these "libraries" did not qualify without actually deciding the issue one way or the other.[190] The Court stated that even if Lexis/Nexis was a "library," "the Copyright Act's special authorizations for libraries do not cover [its] reproductions" of *New York Times* articles,[191] because the Act only authorizes reproduction of copyrighted works "'without any purpose of direct or indirect commercial advantage.'"[192] Publishers may not want to avail themselves of *Tasini* as a precedent against Google,

---

motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located.

Id. Although authors and publishers will no doubt argue that Google has an "immediate commercial motivation behind the reproduction or distribution itself," it would seem that this term does not extend to obtaining an indirect commercial advantage, as Google is, by reaping advertising revenue from user searches of the books, because if "commercial motivation" extended to such indirect ways of earning revenue other than by selling access to a work, then no "library in a for-profit organization" could qualify for the library exemption, which is not what Congress intended.

187. *See, e.g.*, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006) ("Here, [defendant] does not exploit the use of [plaintiff's] images as such for commercial gain. Significantly, [defendant] has not used any of [plaintiff']s images in its commercial advertising or in any other way to promote the sale of the book. . . . By design, the use of [plaintiff]'s images is incidental to the commercial biographical value of the book."); *see also* Florida Bar v. Went For It, Inc., 515 U.S. 618, 634-35 (1995) (contrasting "pure commercial advertising," from speech by paid professionals "on public issues and matters of legal representation," which is entitled to "the strongest protection our Constitution has to offer") (citations omitted)); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983) (for-profit company's "informational pamphlets" were not necessarily "commercial speech" in the context of "proposals to engage in commercial transactions," because neither "an economic motivation for mailing the pamphlets" nor "the reference to a specific product" are sufficient standing alone to render the pamphlets "commercial speech") (citations omitted); Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1017 (9th Cir. 2004) ("'[T]he core notion of commercial speech is that it does no more than propose a commercial transaction. If speech is not 'purely commercial' – that is, if it does more than propose a commercial transaction – then it is entitled to full First Amendment protection.'") (quoting Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 906 (9th Cir. 2002)).

188. N.Y. Times Co., Inc. v. Tasini, 533 U.S. 483 (2001).

189. *Id.* at 503 n.12.

190. *Id.*

191. *Id.*

192. *Id.* (quoting 17 U.S.C. § 108(a)(1) (2000)). The Court also noted that to be exempt from copyright, library copying must be "'solely for purposes of preservation and security or for deposit for research use'" in the case of unpublished works, and "'solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the

however, because if its holding is extended to the e-book context on the rationale that searchable digital versions of e-books break up any collectively authored books such as anthologies or encyclopedias into separately accessible pages or excerpts, the publishers themselves would frequently lack the rights to exploit these works digitally.[193]

B. *A Fair Use Analysis of Google Book Search*

1. PURPOSE AND CHARACTER OF THE USE

In any event, whether or not Google is a "library" when it scans books in partnership with physical libraries does not affect its ability to assert the "right of fair use."[194] Anticipating a fair use defense, authors and publishers emphasize that Google's use of their books is a commercial one, in that Google may earn millions of dollars by infringing upon the copyrights of authors and publishers.[195] As the Association of American Publishers points out, Google is a for-profit corporation whose shares have been valued as highly as $90 billion.[196] "'Our position is plain and simple,'" counsel for the authors told a legal magazine, "'[i]f Google is doing it for commercial purposes, [it should] cut the copyright holder in to whatever revenues are generated by this library project.'"[197]

The fact that Google is a business, even one that is very successful, is not controlling, however. What is critical is that Google Book Search is not engaging in the mere commercial reproduction or distribution of works in a new medium, or in other words, an exploitative or consumptive use.[198] Rather, it is utilizing information about the books in a genuinely new fact-disseminating and transformative way by making entire libraries of books searchable in an online index, and facilitating book previews and purchases with an online, enhanced, hyperlinked cata-

---

existing format in which the work is stored has become obsolete.'" *Tasini*, 533 U.S. at 503 n.12 (quoting § 108(b)-(c)).

193. *See* Kerry-Tyerman, *supra* note 44, at ¶¶ 35-41, 50 (arguing that under *Tasini*, many publishing contracts that would otherwise authorize the online display of e-books "do not grant the publishers the requisite electronic rights to the underlying works," so that contributors to collective works such as anthologies could claim that digital exploitation of such works under license from publishers, as Lexis/Nexis had a license from the *Times*, violates their copyrights); Lateef Mtima, *Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Elctronic Publishing Frontier?*, 14 FORDHAM INTELL. PROP., MEDIA & ENTM'T L.J. 369, 419-28, 430-31, 434-35, 459 (2004) (similar).

194. § 108(f)(4).

195. *See* Kopytoff, *supra* note 48.

196. *See* Ass'n of Am. Publishers, *To Have and to Hold*, 23 INFO. TODAY, Jan. 2006, *available at* http://www.infotoday.com/IT/jan06/viewpoint.shtml.

197. Tresa Baldas, *Copyright Law Put to Test in Google Case*, NAT'L L.J., Oct. 5, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1128416712706.

198. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001).

log.[199] Although some cases find that search engines make fair use of their searchable content by relying on the copyright owner's voluntarily publishing their works on the Internet or World Wide Web, prior publication in the same or similar form is not necessarily a requirement for an index to be a fair use.[200] Google Book Search is not simply a retransmission of copyrighted material in a new medium, but rather a contribution to our understanding of the universe of published books.[201] In that respect, it facilitates "'comparative advertising [of books which] redounds greatly to the purchasing public's benefit with very little corresponding loss to the integrity of [the] copyrighted material.'"[202] In fact, "Google has suggested it may consider setting up an online book store . . . [with] permission from copyright holders."[203]

---

199. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003) (reproducing copyrighted works for purpose of "improving access to images on the internet" is different and more "transformative" use than selling access to copyrighted works for their intrinsic value); Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 848-49 (C.D. Cal. 2006) ("It is by now a truism that search engines . . . provide great value to the public. Indeed, given the exponentially increasing amounts of data on the web, search engines have become essential sources of vital information for individuals, governments, non-profits, and businesses who seek to locate information. As such, Google's use of thumbnails to simplify and expedite access to information is transformative of [plaintiff's] use of reduced-size images to entertain."); Elisabeth Hanratty, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 10, ¶ 20 (2005), *available at* http://www.law.duke.edu/journals/dltr/articles/2005dltr0010.html ("Being able to search the text allows for much more specific inquiries by a user than can be accomplished using a card catalog or even an index of a particular work. This extra functionality . . . [gives] researchers easier, more valuable access to large numbers of works."); *see also* CONG. RES. SERVICE, THE GOOGLE BOOK SEARCH PROJECT: IS ONLINE INDEXING A FAIR USE UNDER COPYRIGHT LAW? (2005), *available at* http://www.opencrs.com/rpts/RS22356_20051228.pdf; Jonathan Band, *The Google Print Library Project: A Copyright Analysis*, E-COMMERCE. L. & POL'Y., Aug. 2005, *available at* http://www.policybandwidth.com/doc/googleprint.pdf.

200. *See, e.g.*, Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 521 (7th Cir. 2002) (finding a complete copy of works necessary to create an index of them, i.e., a collector's guide, to be a fair use in order to prevent copyright owner from gaining a "monopoly" over an area of commerce) (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447-50 (1984)); N.Y. Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 21 (D. N.J. 1977) (fair use argument supported by fact that defendants' index of *New York Times* articles "appears to have the potential to save researchers a considerable amount of time and, thus, facilitate the public interest in the dissemination of information").

201. *Cf.* UMG Recordings v. MP3.com, Inc., 92 F. Supp. 2d 349, 350-51 (S.D.N.Y. 2000) (where defendant set up service allowing subscribers to replay full contents of "tens of thousands of popular CDs in which plaintiffs held the copyrights," court rejected fair use argument because service did not "infus[e]" the CDs "with new meaning, new understanding, or the like," but simply "retransmitted [them] in another medium – an insufficient basis for any legitimate claim of transformation") (citations omitted); Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108-09 (2d Cir. 1998) (retransmission of radio broadcasts over telephone wires was neither transformative nor a fair use); L.A. News Serv. v. Reuters Television Int'l Ltd., 149 F.3d 987, 993-94 (9th Cir. 1998) (retransmission of news video was neither transformative nor a fair use).

202. *Kelly*, 336 F.3d at 820 (quoting Sony Computer Entm't Am., Inc. v. Bleem, 214 F.3d 1022, 1027 (9th Cir. 2000)).

203. Alfred Hermida, *Google Mulls Online Book Future*, BBC NEWS, Jan. 10, 2006, http://news.bbc.co.uk/1/hi/technology/4598478.stm.

These transformative characteristics of Google's search index and book marketing platform outweigh the commercial nature of Google as an enterprise which would otherwise count against its fair use argument.[204] Any use that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . lie[s] at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright"[205] Thus, Google's nature as a commercial enterprise should not preclude it from asserting fair use rights.[206]

2. NATURE OF THE COPYRIGHTED WORK

The fact that all of the works scanned into Google Book Search from library collections have already been published further supports Google's fair use argument.[207] In addition, the "vast majority" of scanned books will likely be nonfiction and fact-based books,[208] including those which address controversial public and political debates; this too should weigh strongly in favor of finding a fair use in Google's

---

204. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."); *Kelly*, 336 F.3d at 818 (same); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 921 (2d Cir. 1994) ("Since many, if not most, secondary users seek at least some measure of commercial gain from their use, unduly emphasizing the commercial motivation of a copier will lead to an overly restrictive view of fair use. . . . [A] categorical rule against commercial uses [is] unwarranted since this 'would cause the fair use analysis to collapse in all but the exceptional case of nonprofit exploitation.'") (citation omitted)); Field v. Google Inc., 412 F. Supp. 2d 1106, 1120 (D. Nev. 2006) ("The fact that Google is a commercial operation is of only minor relevance in the fair use analysis. The transformative purpose of Google's use is considerably more important, and, as in *Kelly*, means the first factor of the analysis weighs heavily in favor of a fair use finding."); Fin. Info. v. Moody's Investors Serv., Inc., 1984 U.S. Dist. LEXIS 20579, at *11-12 (S.D.N.Y. Jan. 10, 1984) ("That Moody's used the information on plaintiff's index card for its commercial interest does not alone defeat a fair use defense. . . . Moody's, . . . in making available [much] needed financial information, is performing a public function which clearly brings it within the ambit of the first requirement for fair use protection.") (citations omitted)).

205. *Campbell*, 510 U.S. at 579 (citations omitted).

206. Notwithstanding its decision not to charge web surfers for book searches or snippets, or the transformative character of its use, whether Google's use is "commercial" would, at a very minimum, be an issue of fact triable by a jury. *See* Int'l Linguistics, Inc. v. Language Link, Inc., No. 04-1109-CV-W-GAF, 2006 WL 859297, at *9 (W.D. Mo. Mar. 28, 2006) ("In the present case, genuine issues of material fact exist which preclude summary judgment on the Defendants' fair use defense. There is a question as to whether the tapes were being used for a commercial purpose. The Defendants assert that their students did not pay for the tapes and they were provided free of charge. The Plaintiff asserts that the Defendants received payment for the tapes . . . . Accordingly, there is a factual question regarding whether the Defendants accepted monetary compensation in exchange for the tapes.").

207. *See*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985); *Kelly*, 336 F.3d at 820.

208. Band, *supra* note 199, at 3; *but see* Hanratty, *supra* note 199, at ¶¶ 22-23.

case.[209] If Web search results are any indication, nearly two-thirds of Web searchers are looking for informational, as opposed to entertaining or commercial (i.e., shopping), content.[210] Concededly, some of the copyrighted works Google will scan will be highly creative fictional and poetic works, a fact which may count against a fair use argument as to these works.[211] Even as to these artistically creative works whose nature sometimes weighs against an alleged infringer, this weight should be quite "limited," because the works are being transformed into a searchable online index.[212] The fictional nature of some books included in Google Book Search therefore "has limited weight" because Google's principal purpose is to emphasize the books' informational content rather than their creative or literary flourishes.[213]

3. AMOUNT AND SUBSTANTIALITY OF PORTIONS TAKEN

Google is copying all of the books from participating library collections into Google Book Search in their entirety. This factor may not significantly detract from its fair use argument, however, because the scanning is necessary to provide the indexing and search functionality. Where copying the full contents of a work is necessary to make a fair use of it, such as by making it searchable or viewable in a different format or at a different time, criticizing or parodying the work or its author, or competing fairly with the work, its author, or publisher on the merits, this factor may weigh in favor of the alleged infringer or only minimally in favor of the copyright owner.[214] Google needed to scan

---

209. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984) ("Copying a news broadcast may have a stronger claim to fair use than copying a [fictional] motion picture."); *Campbell*, 510 U.S. at 586; *Kelly*, 336 F.3d at 820; *see also* L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122 (9th Cir. 1997) (where copied material is "informational and factual and news," this "strongly favors" alleged infringer); *Moody's*, 1984 U.S. Dist. LEXIS 20579, at *12 ("Since copyright protection for compilations of factual material is at odds with the basic thrust of the copyright laws, the scope of permissible fair use is greater," and "'[t]he scope of the doctrine is undoubtedly wider when the interest conveyed relates to matters of high public concern . . . .'") (quoting Consumers Union of the U.S., Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983)); N.Y. Times Co., Inc. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D. N.J. 1977) (where the work is "more of diligence than of originality or inventiveness, defendants have greater license to use portions of [it] under the fair use doctrine than they would if a creative work had been involved").

210. *See* BATTELLE, *supra* note 147, at 28.

211. *See, e.g.*, *Campbell*, 510 U.S. at 586.

212. *Bill Graham Archives*, 448 F.3d at 612.

213. *Id.* at *19.

214. *See Sony*, 464 U.S. at 449-50 & n.33 ("[W]hen one considers . . . that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced, see § 107(3), does not have its ordinary effect of militating against a finding of fair use. . . . Moreover, the time-shifter no more steals the program by watching it once than does the live viewer . . . ."); *Kelly*, 336 F.3d at 820-21 ("If the secondary user only copies as much as is necessary for his or her intended use, then this factor will

the entire books in order to inform users which books contain which words, how many other words the books contain, and in which order the words appear in the books – all critical facts concerning the quality and characteristics of the books as products.[215]

In a brilliant formulation on her blog, Laura Quilter of the Brennan Center for Justice and former Electronic Services Librarian at the University of Illinois, captures how Google is generating knowledge *about*

---

not weigh against him or her"); Ty, Inc. v. Publ'ns Int'l Ltd. 292 F.3d 512, 521 (7th Cir. 2002) (rejecting assertion that defendant necessarily "copied more than it had to in order to produce a marketable collectors' guide" by making "photographic copies of[ ] the entire line of Beanie Babies," because "the cases are clear that a complete copy is not per se an unfair use," and plaintiff "overlook[ed] the fact that a collectors' guide, to compete in the marketplace, has to be comprehensive" to "compete" and prevent copyright owner from gaining a "monopoly" over an area of commerce) (citations omitted)); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1079 (9th Cir. 1999) ("The Rio [MP3 player] merely makes copies in order to render portable, or 'space-shift,' those [music] files that already reside on a user's hard drive. Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the [Copyright] Act.") (citing *Sony*, 464 U.S. at 455); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 921-22 (2d Cir. 1994) (although Texaco photocopied entire journal articles, this was an "'intermediate use'" of the articles which could not be characterized as mere "'commercial exploitation,'" especially because its "nature and objectives" was to improve the quality of Texaco's scientific research and development, which "might well serve a broader public purpose") (citations omitted); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1526-27 (9th Cir. 1992) ("The fact that an entire work was copied does not, however, preclude finding a fair use. . . . In fact, where the ultimate (as opposed to direct) use is as limited as it was here [to "wholesale copying of Sega's copyrighted code as a preliminary step in the development of a competing product"], the factor is of very little weight.") (citations omitted); *Bill Graham Archives*, 448 F.3d at 613 ("Neither our court nor any of our sister circuits has ever ruled that the copying of an entire work favors fair use. At the same time, however, courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the [work].") (citations omitted); Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 850 (C.D. Cal. 2006) (copying of entire works was necessary for Google's intended use of creating image search engine); Online Policy Group v. Diebold, 337 F. Supp. 2d 1195, 1203 & n.14 (N.D. Cal. 2004) (although copyright holder's "entire email archive" was posted or linked to over Web by its critics, these critics engaged in fair use because their copying was engaged in "for the purpose of informing the public about the problems associated with Diebold's electronic voting machines," a discussion very much "in the public interest"); Ticketmaster Corp. v. Tickets.com, Inc., 2003 U.S. Dist. LEXIS 6483, *17-18 (C.D. Cal. Mar. 7, 2003) (where defendant downloaded plaintiff's entire Web pages containing publicly available information about the time, place, description, and ticket prices for musical, sporting, and theatrical performances, the fact that such downloads were necessary "for the limited purpose of extracting unprotected public facts leads to the conclusion that the temporary use of the electronic signals was 'fair use' and not actionable," because "no public policy . . . would be served by restricting" defendant from downloading plaintiff's pages "in order to acquire the unprotected, publicly available factual event information"); Religious Tech. Ctr. v. F.A.C.T.NET, 901 F.Supp. 1519, 1524-25 (D. Col. 1995) (to the extent that defendants scanned entire copyrighted works "onto their computer and plac[ed] them in the private section of their library without making them available to the public over the Internet or otherwise," their conduct constituted fair use).

215. *See* Derivative Work, http://lquilter.net/blog/archives/2005/10/27/lost-licensing-revenue-google-print (Oct. 27, 2005, 11:13 EST) ("The total number of words, the presence of particular words, and the arrangement of those words in a work are, among other things, facts about the work.").

the books it scans from libraries: "An index [like Google Book Search] *performs* the work, interpreting it by recourse to information beyond the text itself (for instance, bibliographic data; retail or location data; or the meta-structures of the work's organization, in paragraphs, sections, chapters, parts, pages) and opening it to dialog[ue] with the audience."[216] This kind of interactive performance – which "reads" a work and links it to others that share authors, publishers, dates and locations of publication, words, passages, quotations, or sources – enables readers to form their own judgments about the quality, resemblances, or monetary value of a book, and cannot be dismissed as an unproductive reproduction of the entire text of the book.

4. EFFECT ON THE MARKET FOR THE WORKS

Authors and publishers fear that with Google Book Search they "would lose the whole academic market."[217] Publishers earn modest profits in some markets and allege that revenue for licensing excerpts may make the difference between the profitability and unprofitability of many, and possibly most, authors' creations.[218] Hardcover books with cover prices of $25 sold for as little as $12 to retailers during the 1990s; because a hardcover book costs up to $10 to manufacture and market after licensing from the author, this left a profit margin of only 6% for the publisher.[219] By 2000, however, the profitability of hardcover book publishing may have increased, with up to 20% of revenue going to profit.[220] Advances on royalties to first-time novelists have surpassed $1 million in a surprisingly large number of publicized cases, indicating the profit potential of a bestseller.[221]

Of course, discovery has yet to be completed in the authors' and publishers' cases against Google, so it is not yet possible to categorically rule out the possibility that harm to printed book sales will be shown. But thus far there is little evidence that any printed books have suffered lost sales because Google has made them searchable. Book sales were

---

216. *Id.*

217. Milliot, *supra* note 161.

218. *See* Complaint at ¶ 19, McGraw-Hill et al. v. Google, Inc., No. 05-CV-8881 (S.D.N.Y. Oct. 19, 2005) ("In order to profitably publish their books and continue in business, Publishers depend on initial and backlist sales of books and the licensing revenue from those works.").

219. *See* VOGEL, *supra* note 69, at 325.

220. *See* KIRKPATRICK, *supra* note 77, at 16.

221. Alex Williams, *The New Literary Lottery*, N.Y. MAG., July 21, 2003, *available at* http://www.printthis.clickability.com/pt/cpt?action=cpt&title=The+New+Literary+Lottery&expire=&urlID=18190120&fb=Y&url=http%3A%2F%2Fwww.nymag.com%2Fnymetro%2Fnews%2Fmedia%2Ffeatures%2Fn_8972%2Findex.html&partnerID=73272 ("half a million dollars is de rigueur for a first novelist who's perceived to have hot prospects," with first-time novelists such as Stephen Carter, Khaled Hosseini, and Jonathan Safran Foer earning anywhere from several hundred thousand dollars to $2 million in advances on their first novels).

up markedly in the period after Google placed excerpts online with publishers' permission and began scanning and making library books searchable, compared to the period before it did so.[222] This absence of harm posed by Google to established markets indicates a fair use.[223]

In the past, fair use and the first sale doctrine have shielded libraries, not only against copyright lawsuits based on their services facilitating the sampling of experience goods, such as browsing, borrowing, and cataloguing, but also against cases based on the use of library photocopiers to copy millions of pages of copyrighted material.[224] In 1975, for example, the Supreme Court did not disturb a finding that the National Library of Medicine had not violated medical publishers' copyrights by allowing visitors to photocopy up to about half of a single journal issue at a time.[225] As the lower court pointed out in that case, the law allows copying without permission where it promotes the public's access to information as opposed to simply ripping off creative

222. In February 2006, total publishing sales were up by 6.6 percent compared to the year earlier, and some categories, such as Adult Paperback, Adult Mass-Market, University Press Paperback, and E-book, saw increases of over 20 percent compared to the year previously. *See* Ass'n of Am. Publishers, *Books [sic] Sales Continue to Rise in February* (April 13, 2006), http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=323. The net sales of the book industry increased nearly 10 percent between 2004 and 2005, to surpass $25 billion in 2005. *See* Diane Cole, *Publish or Panic*, U.S. NEWS & WORLD REP., Mar. 13, 2006, at 46-53, *available at* http://www.usnews.com/usnews/biztech/articles/060313/13publish_3.htm ("Nielsen BookScan recorded 709.8 million sales – a healthy 9.3 percent uptick from 2004."); Ass'n of Am. Publishers, *Book Publishing Industry Net Sales Totalled $25.1 Billion in 2005* (Mar. 6, 2006), http://www.publishers.org/industry/2005_book_sales_overview.doc ("Net sales for the United States publishing industry are estimated to have increased by 9.9 percent from 2004 to 2005 to a grand total of $25.1 billion . . . ."). Google debuted its Google Print service in 2004, and resumed scanning books in November 2005 after suspending it for a time due to publishers' and authors' concerns over alleged copyright infringement. *See* Kevin J. Delaney & Jeffrey A. Trachtenberg, *Google Will Return to Scanning Copyrighted Library Books*, WALL ST. J., Nov. 1, 2005, at B1; *Google's [sic] Turns a New Page with Book Search Feature*, WASH. POST, Dec. 21, 2003, at F07; John Markoff, *Google Experiment Provides Internet with Book Excerpts*, N.Y. TIMES, Dec. 18, 2003, at C6; Markoff & Wyatt, *supra note* 32; Jeffrey R. Young, *Google Adds First Scanned Library Books to Search Index, and Says Copyrighted Works Will Follow*, CHRON. OF HIGHER ED., Nov. 18, 2005, at 34; Harvard University Library, Harvard's Digitization Project with Google (Dec. 14, 2004), http://hul.harvard.edu/news/2004_1214_news.html.

223. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 821-22 (9th Cir. 2003) (absence of harm posed by image search engine's thumbnail copies of copyrighted photographs to existing markets for photographs was an important factor in favor of fair use finding); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1358 (Ct. Cl. 1973) (photocopying of medical journals by practitioners and others availing themselves of libraries was fair use due to absence of "solid evidence that photocopying has caused economic harm to any other publisher of medical journals"), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam).

224. *See, e.g.*, R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577 (2003).

225. *Williams & Wilkins*, 487 F.2d at 1346, 1348, 1354-58, *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam).

work.[226] Google Book Search is an even stronger case for fair use than library photocopying because Google never displays whole pages or longer excerpts from library books, and its database is not simply reproducing works, but adding enormous value to library holdings by making them searchable by author, title, date of publication, and keyword.[227]

The prospect of future harm being wrought by Google Book Search seems very unlikely, moreover, because the service appears to have had a very positive effect on the sales of books it has included to date. Penn State Press, for example, saw sales of print-on-demand books triple after availability on Google Book Search.[228] Amazon reported more modest results in a study of the first five days of sales of titles included in its "Search Inside the Book" program, with sales of the 120,000 titles in the program ("a large, statistically significant sample") about nine percent higher than sales of other books.[229] The CEO of HarperCollins reported that Amazon's search function "helped boost her backlist sales by 6% to 8% annually."[230] The experiences of Google and Amazon are consistent with the results of other experiments that have similarly provided online samples of books:

> The National Academy of Sciences Press found that when they posted the full text of book [sic] on the Web, the sales of those books went up by a factor of three. Posting the material on the Web allowed potential customers to preview the material, but anyone who really wanted to *read* the book would download it. MIT Press had a

---

226. *See Williams & Wilkins*, 487 F.2d at 1352-53 ("To serve the constitutional purpose, 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.' Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter.") (citation omitted) (quoting Berlin v. E.C. Publ'ns, Inc., 329 F. 2d 541, 544 (2d Cir. 1964)); *id.* at 1354 ("There has been no attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research. This is important because it is settled that, in general, the law gives copying for scientific purposes a wide scope.") (citations omitted).

227. Photocopying also adds value to library books by making their content easier to move around and annotate, but not, I would submit, as much value as Google Book Search's full-text indexing. *Cf. id.* at 1353 n.13.

228. Google, Google Book Search: Partner Program: Google Book Search Case Study, https://books.google.com/partner/pennstate (last visited Sept. 13, 2006).

229. Press Release, Amazon, Amazon.com Announces Sales Impact from New Search Inside the Book Feature (Oct. 30, 2003), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-newsArticle&ID=465155 &highlight=.

230. Jeffrey A. Trachtenberg & Kevin J. Delaney, *HarperCollins Plans to Control its Digital Books*, WALL ST. J., Dec. 12, 2005, *available at* http://online.wsj.com/public/article/SB113435527609919890-w6DEaw_pnhG1E1xxXIDcT2S9ptM_20061212.html?mod=tf_main_tff_top.

similar experience with monographs and online journals.[231]

Even the proliferation of "pirate" editions of books on Web sites and p2p services, and advances in technologies for scanning books or hacking e-book encryption, have not been shown to reduce sales of printed books.[232] To the contrary, unit sales of books doubled between 1993 and 2003.[233] Although fewer Americans report reading books regularly, avid readers may be compensating for this.[234]

Although actual harm to book sales is therefore unlikely, publishers argue that Google Book Search may have an adverse effect on their ability to collect potential royalties on book previews or snippets.[235] The Second Circuit, which will hear the initial appeal of any decision in the cases against Google, deems it "indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work, and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth [fair use] factor."[236] It held that the existence of "a workable market" for corporate libraries to purchase licenses entitling them to photocopy individual articles outweighed the claim that a corporate library engaged in a fair use by regularly circulating photocopies of scientific articles in their entirety to employees who signed up on routing lists.[237] The potential licensing revenues that the corporate library could

231. Varian, *supra* note 64.

232. *See* Linton Weeks, *Don't Steal This Book*, WASH. POST, Aug. 9, 2000, at C01 (acknowledging threat of book trading on p2p sites like Gnutella); M.J. Rose, *How to Crack Open an E-Book*, WIRED NEWS, Apr, 27, 2001, http://www.wired.com/news/business/0,1367,43401,00.html (reporting a hacker's online release of instructions for cracking e-book encryption format).

233. *See The Dead CD-Roms: Did You Hear?*, EDSF REP., Sept.-Oct. 2004, *available at* http://www.edsf.org/Images/Report09-10.PDF ("Unit sales of books will reach 2.3 billion in 2007, up 3.6 percent from 2.22 billion in 2003. The 1993 number was 1.01 billion.").

234. *See* Myron Magnet, *Is Reading Really at Risk?: It Depends on What the Meaning of Reading Is*, THE WKLY. STANDARD, Aug. 16, 2004, http://www.manhattan-institute.org/html/_wsis_reading.htm ("According to R.R. Bowker, the firm that compiles the database for Books in Print, the number of books published last year was a shelf-groaning 175,000, an increase of 19 percent over the previous year, despite the decline in reading generally and the reported flatness of book sales."); *This Is America - Reading in America*, VOA NEWS.COM, Aug. 2, 2004, http://www.voanews.com/specialenglish/archive/2004-08/a-2004-08-02-4-1.cfm (report by National Endowment for the Arts showed that "the book industry in the United States now sells three times as many books as it did twenty-five years ago. In two-thousand the industry sold more than two thousand million books. Book sales are up. But the report shows that people are reading less for pleasure").

235. *See* Complaint at ¶ 19, McGraw-Hill et al. v. Google Inc., No. 05-CV-8881 (S.D.N.Y. Oct. 19, 2005) ("[T]he sale of every additional copy – in whatever medium – is significant, as is each source of ancillary revenue, such as licensing fees received for granting permission to make copies of and prepare and use excerpts of such works in hard copy and in electronic form.").

236. Am. Geophysical Union v. Texaco, Inc, 60 F.3d 913, 929 (2d Cir. 1994) (citations omitted).

237. *Id.* at 930-31.

have paid would have gone to the Copyright Clearance Center (CCC), which publishers developed in 1977 to assess and distribute photocopying royalties based on the model of the ASCAP group of composers, authors, and publishers formed in the 1910s.[238]

Courts, however, are unlikely to find the CCC – developed to prevent commercial photocopy outlets from supplanting the demand for printed books – a "workable" model for a book search function on a search engine. For example, it would hardly seem appropriate to require that Google pay the same fee for providing a free snippet of two or three lines of an out-of-print library book that a copyshop would pay for reproducing, for sale at a profit to a consumer, a whole page of a book still in print.[239] Other severe limitations of the CCC model are that it

238. *See id.* at 929 n.16 ("The CCC is a central clearing-house established in 1977 primarily by publishers to license photocopying. The CCC offers a variety of licensing schemes; fees can be paid on a per copy basis or through blanket license arrangements. Most publishers are registered with the CCC, but the participation of for-profit institutions that engage in photocopying has been limited, largely because of uncertainty concerning the legal questions at issue in this lawsuit."); *see also* COPYRIGHT CLEARANCE CENTER, 2005 ANNUAL REPORT, *available at* http://www.copyright.com/media/pdfs/AR_CCC_05_Single.pdf; PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 204 (Stanford Law School 2003) (1994). At the time the CCC was formed, "many nonlibrary users-including educators and businesses-read the *Williams & Wilkins* decision to hold that their activities constituted fair use, so that they did not have to take a copyright license." GOLDSTEIN, *supra*, at 205. So the CCC began negotiating settlements and licenses with entities such as General Electric and New York University under the threat of litigation, which publishers successfully pursued in a few federal district and federal appellate courts in the early- to mid-1990s. *See id.* at 204-7; Steven J. Melamut, *Pursuing Fair Use, Law Libraries, and Electronic Reserves*, 92 LAW LIBR. J. 157, 182 (2000) (describing prosecution and settlement of case against New York University). ASCAP and its companion entity Broadcast Music, Inc. license musical performance rights worth billions of dollars to broadcasters, cable networks, bars and restaurants, and dance clubs on behalf of tens of thousands of composers, lyricists, and music publishers. *See* Stanley M. Besen, Sheila N. Kirby, & Steven C. Salop, *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 386-888 (1992); Am. Soc'y of Composers, Authors and Publishers (ASCAP), Music & Money: Performing Right Payments, http://www.ascap.com/musicbiz/money-payments.html (three U.S. performing rights organizations collect $1 billion each year) (last visited Sept. 13, 2006); Broadcast Music Inc., BMI and Radio Industry Reach $1 Billion Agreement, July 31, 2003, http://www.bmi.com/news/200307/20030731a.asp.

239. A somewhat more analogous model might be the "[s]ampling clearinghouses" reportedly developed by music copyright owners to license samples of music for inclusion in new pieces of music, "according to an agreed upon fee structure" and "with the hope of avoiding litigation." Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 804 n.19 (6th Cir. 2005) (quoting A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 163 (1993) (footnote omitted)) (internal quotation marks omitted). But even a sample of a song is more like a full page out of a book, i.e., a substantial chunk of the whole, unlike a snippet of three or fewer lines, which will be less than a tenth of one percent of a book having as few as 200 pages and 20 lines per page. Moreover, the situation with digital sampling of music is different from the digital scanning of books because the Copyright Act has distinctive language governing digital sampling of sound recordings, but leaves digital scanning of books subject to the same principles governing sampling of musical compositions which are treated much more leniently. *See id.* at 804 n.18 ("[T]he copyright act

may only cover a minority of all printed works, and that "not all the articles in publications covered by the [CCC] are copyrighted."[240] Furthermore, it remains to be seen how the CCC will hold up against a challenge from authors to the digital exploitation of their work, as in *Tasini*.[241] As a result, even such a license could not necessarily reassure Google that its conduct was legal, or that it was not overpaying to license content that was not copyrighted.[242] At the very least, the complex economic and technological question of whether licenses from an entity like the CCC would be feasible and proportionate to the very limited extent of Google's use would seem to be a debatable issue of fact that should be tried to a jury, absent a waiver by Google.[243]

Given the poor fit between Google's use and the CCC model, authors and publishers may claim that Google Book Search circumvents even more directly applicable licensing frameworks. They may compare Google Book Search unfavorably to Amazon's and iTunes' purportedly permission-based marketing platforms and argue that Google's size and popularity should not exempt it from seeking prior permission for offering previews of their works. In the online book context, Amazon created a market for licensing book previews with its "look inside"/"search inside" functionality. Depending on whether these previews would be independently copyrightable due to their condensation and indexing of

---

states that, 'The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording' [17 U.S.C. § 114(b)] (emphasis added). By using the words '*entirely* of an independent fixation' in referring to sound recordings which may imitate or simulate the sounds of another, Congress may have intended that a recording containing *any* sounds of another recording would constitute infringement. Thus, it would appear that any unauthorized use of a digital sample taken from another's copyrighted recording would be an infringement of the copyrighted recording.").

240. *Am. Geophysical Union*, 60 F.3d at 937 (Jacobs, J., dissenting). *See also* Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1034, 1065 n.169 (2006) ("Many of the licenses for sale through the Copyright Clearance Center are to public domain works. A recent search turned up more than two-dozen editions of The Federalist, priced at between nine cents and twenty cents per page for each copy . . . . Other public domain works being sold at the Copyright Clearance Center are . . . numerous plays by Shakespeare at various prices; and Thomas Paine's Common Sense, at eleven cents per page per copy. . . . There is also a $ 3 processing fee collected by the Copyright Clearance Center.") (footnotes omitted).

241. N.Y. Times Co., Inc. v. Tasini, 533 U.S. 483 (2001).

242. *See Am. Geophysical Union*, 60 F.3d at 937 (Jacobs, J., dissenting).

243. *See* Meeropol v. Nizer, 560 F.2d 1061, 1069-71 (2d Cir. 1977) (defendants' use of quotations from plaintiff's work presented genuine issue of material fact regarding effect of the use on the existing or potential market for the work: "The availability of the fair use defense depends on all the circumstances surrounding the use of copyrighted material. . . . Whether or not there has been substantial use which would deprive appellees of the fair use defense is a decision which must be made by the trier of fact after all the evidence has been introduced.") (internal citations omitted).

the entire book, they might be considered derivative works, subject to an authorial exclusive right to the extent consistent with fair use.[244] Google's voluntary deals with publishers for permission-based searches and previews could also be a model for a licensing market harmed by Google's deal with libraries that do not have publishers' permission.

Google Book Search is unlikely to cause much harm to these potential licensing markets for book photocopies or e-book excerpts, however, for the same reason that it is unlikely to supplant demand for the books themselves. A short "snippet" of a line or two from a book is hardly comparable to an entire book chapter or a fourth of a song, which a license covering an Amazon "Search Inside the Book" or an Apple iTunes 30-second preview might convey the right to reproduce. Just as a parody may call to mind an original copyrighted work without acting as a substitute for it in the marketplace, so too will Google's snippet-length previews open a window into the contents of books without making purchases or photocopies unnecessary or undesirable.[245]

Like the samples on iTunes and similar digital music services, the primary utility of Google Book Search will be to enable Internet users to preview works about which they lack adequate information to make a purchasing decision. The Association of American Publishers has conceded that Google Book Search "could help many authors get more

244. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) (holding that fair use inquiry "must take account not only of harm to the original but also of harm to the market for derivative works," including the market for abbreviated version of a book for publication in periodical); Woods v. Bourne Co., 60 F.3d 978, 990 (2d Cir. 1995) ("In order for a work to qualify as a derivative work it must be independently copyrightable. . . . '[T]here must be at least some substantial variation [from the underlying work], not merely a trivial variation.'") (quoting L. Batlin & Son, Inc. v Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (en banc)); *cf.* Matthew Bender & Co. v. West Publ'g Co., 1997 U.S. Dist. LEXIS 6915, at *5-13 (S.D.N.Y. May 19, 1997) (holding that index of judicial opinions, to which West appended new case title, docket number, date argued and decided, subsequent history, names of the attorneys, parallel citations, and other edits were not "'a distinguishable variation' of the opinion written by the court," so West "has no copyright interest in those elements of the reported opinions which [defendant] is copying and intends to copy"), *aff'd*, 158 F.3d 693, 699 (2d Cir. 1998) (holding that West's "volume and page numbers distributed through the text of . . . judicial opinions," as "determined by an automatic computer program," did "not entail even a modicum of creativity" and were "unprotected features of West's compilation process [that] they may be copied without infringing West's copyright.") (citing Feist Publ'ns Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 363 (1991)).

245. *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 591 (1994) ("[I]t is more likely that the new work will not affect the market for the original in any way cognizable under this factor, that is, by acting as a substitute for it (superseding its objects). This is so because the parody and the original usually serve different market functions.") (internal quotation marks and citations omitted); Leibovitz v. Paramount Pictures Corp., 948 F. Supp. 1214, 1226 (S.D.N.Y. 1996) (recognizing that a parody "is unlikely to serve as a market substitute for the original") (citing *Campbell*, 510 U.S. at 591).

exposure and maybe even sell more books . . . ."[246] As the Vice-President of Simon & Schuster's online division noted: "'We're very careful about protecting our content,' . . . '[b]ut we do think this could be a great additional marketing and sales tool.'"[247] Google's CEO Eric Schmidt has indicated that "every book ever written" may soon be "just one search away from being found and purchased," either from its current publisher or a used book store.[248] In this way, Google is salvaging entire libraries full of dusty, crumbling books while creating a highly efficient marketing platform for authors. The benefits of its book search technology will be most dramatic in the case of obscure and out-of-print works, whose reviews were published long ago and which bookstores lack the space to display prominently, if at all. Google cites the example of an author of a book on the Persian Gulf War, who saw his sales soar when it became searchable on Google.[249] In sum, Google Book Search "will be the best shop window ever for obscure texts."[250]

All of this assumes that Google Book Search is being gauged for its effect on the market for books that are still in print, which will be minimal for the reasons already stated. A substantial majority of the books covered by the program are not even in print, however, so there is very little in the way of a market to protect, and, correspondingly, there is a weaker interest on the part of publishers and authors in controlling the exploitation of these books.[251] Especially "in the early stages, [Google] will scan mostly older and out-of-circulation books."[252] According to an initial calculation, seventy percent of the books Google will scan are no longer actively sold to the public.[253] In other words, the vast majority of these books are "orphan works," or out-of-print books that may take years or decades to fall into the public domain.[254] Moreover, about sev-

246. *Intellectual Property: Closing the Book*, CORP. LEGAL TIMES, Dec. 2005, at 10.

247. Helm & Green, *supra* note 160.

248. Eric Schmidt, *Books of Revelation*, WALL ST. J., Oct. 18, 2005, *available at* http://googleblog.blogspot.com/2005/10/point-of-google-print.html.

249. *See* Google, Google Book Search Case Study: Author Richard Lowry Found More Readers, and Sales, with Google Book Search, http://books.google.com/googlebooks/author_lowry.html.

250. John Lanchester, *The Global Id*, LONDON REV. OF BOOKS, Jan. 26 2006, *available at* http://www.lrb.co.uk/v28/n02/lanc01_.html.

251. *See* Joseph Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 456 (2002) ("The younger the work, the greater potential there is for a market to be affected by a particular use. Conversely, the older the work, the less likely a market might be affected, particularly if the work is no longer being fully exploited or a license is difficult to secure. For example, copying an excerpt of an old, out-of-print book is unlikely to result in any appreciable harm to the market for that book.") (footnotes omitted).

252. Kopytoff, *supra* note 48.

253. Farhad Manjoo, *Throwing Google at the Book*, SALON.COM, Nov. 9, 2005, http://dir.salon.com/story/tech/feature/2005/11/09/google/index_np.html?pn=2.

254. *See id.* This is true under a definition of "orphan works" that considers any book no

enty percent of the books Google is scanning are only held by one out of the five research libraries participating in the project, meaning that without Google, most people will have virtually no chance of ever finding or learning about these books.[255] This should provide a key source of support for Google's fair use argument.[256]

C. *Reforming Fair Use Law for the Internet Age*

The Google Book Search litigation should be seen for what it is: a defining moment in the history of the Internet. The courts that hear it will guide thousands of technologists and perhaps millions of Americans as they grapple with the question of when using the Internet to spread knowledge and create new and more efficient markets is legal. The case represents an ideal opportunity for these courts to remedy a number of distortions and lamentable doctrines that have been introduced into copyright and fair use law over the past few decades.

---

longer in print to be an "orphan," a definition with which some publishers would probably disagree. *Compare* Orphan Works, 70 FED. REG. 3739 (notice issued Jan. 26, 2005) (defining orphan works as "copyrighted works whose owners are difficult or even impossible to locate"), *and* Letter from Michael A. Keller, Ida M. Green University Librarian and Director of Academic Information Resources, to Jule L. Sigall, Associate Register for Pol'y & Int'l Affairs, U.S. Copyright Office (May 9, 2005), *available at* http://www.copyright.gov/orphan/comments/reply/OWR0111-StanfordLibraries.pdf (characterizing "orphan works" as those that "have only theoretical commercial value," but which "copyright law limits digitization" of their "content useful in the promotion of sciences and the arts"), *with* Letter from Allan Adler, Vice President for Legal & Governmental Affairs, Ass'n of Am. Publishers et al., to Jule L. Sigall, Associate Register for Pol'y & Int'l Affairs, U.S. Copyright Office 8-9 (May 6, 2005), *available at* http://www.copyright.gov/orphan/comments/reply/OWR0085-AAP-AAUP-SIIA.pdf (noting the "different views regarding the nature of 'orphan works' and how this should be reflected in a statutory definition of the term," and criticizing various proposals for "special treatment for use of works that are 'out-of-print'" because the "'out-of-print' status of a work does not make it any less subject to copyright protection," and even where the copyright owner is unable, unwilling, or unlikely to market the work commercially this is not "a justifiable basis for subjecting a work to 'orphan works' treatment").

255. *See* Lavoie, *supra* note 42 ("Of the 10.5 million unique books held in the combined [Google Print for Libraries] collection, 6.3 million (61 percent) are held by only one Google [participating] library; 2.1 million (20 percent) are held by two libraries; 1.1 million (10 percent) are held by three libraries; 0.6 million (6 percent) by four libraries; and 0.4 million (3 percent) by all five libraries.").

256. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 553 (1985) ("A key, though not necessarily determinative factor in fair use is whether or not the work is available to the potential consumer. If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it . . . .") (quoting S. REP. No. 94-473, at 64 (1975)); *see also* Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1122-23 (9th Cir. 2000) (Brunetti, J., dissenting) (arguing that "out-of-print status of copyrighted book supports fair use determination") (citing Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1264 n.8 (2d Cir. 1986) (while "not essential" to "finding of fair use," fact that work was out of print "certainly support[ed]" that conclusion)).

1. THE GOOGLE BOOK SEARCH COPYRIGHT LITIGATION IS ULTIMATELY NOT ABOUT GOOGLE

Google represents the nation's and much of the world's aspirations for the Internet as a whole.[257] Google simply owns the most advanced (non-classified) technology for the searching and indexing of information, technology which most Internet users employ regularly.[258] The U.S. government subsidized a great deal of the research and development that led to the Internet on the understanding that it would be used to provide digital libraries to the public and ensure wider access to knowledge.[259] The principal of universal access to information also motivated the creation of the World Wide Web on which Google is based.[260] Google would have had no purpose, and precious few search results to rank for relevancy, had Tim Berners-Lee not developed and released the Web's communications protocol (HTTP) and display func-

257. *See, e.g.*, BATTELLE, *supra* note 147, at 1 ("'The library of Alexandria was the first time humanity attempted to bring the sum total of human knowledge together in one place at one time. Our latest attempt? Google.'") (quoting Brewster Kahle, founder of the Internet Archive); Kelly, *supra* note 27 (hailing Google Book Search as a "universal library," and a potential precursor to the "long-heralded great library of all knowledge"); Steve Lohr, *Just Googling It Is Striking Fear into Companies*, N.Y. TIMES, Nov. 6, 2005, *available at* http://www.nytimes.com/2005/11/06/technology/06google.html?ex=1288933200&en=382239f45e5a64bd&ei=5088 ("'Google is the realization of everything that we thought the Internet was going to be about but really wasn't until Google,' said David B. Yoffie, a professor at Harvard Business School."); Robert J. Shapiro, *Google vs. The Publishers*, AUSTIN AM.-STATESMAN, Jan. 20, 2006, at A11 ("Google is at the forefront of a transformational technology — the Internet."). Some observers are particularly disappointed by Google's occasional concessions to censorious state power for precisely this reason. *See, e.g.*, Audio: Hearings to Review Human Rights in China, broadcast by National Public Radio (Feb. 14, 2006), http://www.npr.org/templates/story/story.php?storyId=5206175.

258. *See* Scott Carlson & Jeffrey R. Young, *Google Will Digitize and Search Millions of Books From 5 Leading Research Libraries*, CHRON. OF HIGHER ED., Dec. 14, 2004, *available at* http://chronicle.com/free/2004/12/2004121401n.htm ("Because Google is such a popular search tool — among the first employed by almost anyone doing research – '[Google Book Search is] going to help people find high-quality sources of information'") (quoting director of Philadelphia University library); Jeffrey R. Young, *Libraries Aim to Widen Google's Eyes*, CHRON. OF HIGHER ED., May 21, 2004, http://chronicle.com/weekly/v50/i37/37a00101.htm ("Google and other commercial search engines are often the first source that students and professors turn to when doing research . . . .").

259. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 44 (Random House 2001) ("Everyone knows that the government funded the research that led to the protocols that govern the Internet."); Laurent Belsie, *US Poised for New Telecommunications Era*, CHRISTIAN SCI. MONITOR, Dec. 19, 1991, at 1 (Congress passed $2.9 billion High-Performance Computing Act); William J. Broad, *Clinton to Promote High Technology, with Gore in Charge*, N.Y. TIMES, Nov. 10, 1992, at C1; Evelyn Richards, *Bush to Unveil High-Tech Initiative; $2 Billion Computing Project Would Include Data 'Superhighway'*, WASH. POST, Sept. 7, 1989, at F1 (funding for Internet intended to create a "vast electronic library that could be accessed by users seeking federally gathered information").

260. *See* BATTELLE, *supra* note 147, at 292 ("'The [World Wide Web] project started with the philosophy that much academic information should be freely available to anyone. . . .'") (quoting "father of the Web" Tim Berners-Lee in 1991).

tionality (HTML) to the public domain in 1991 and designed the HTML language on an open source model that lets visitors view Web pages in such a way that their content and the underlying code can be easily copied and modified.[261] Google's founders developed the company's search, caching, and display technologies while affiliated with Stanford Digital Library Project (subsidized by the U.S. government).[262] Stanford permitted Google's founders to utilize hardware, secured for usage in federally-funded digital library research for copying and indexing the Internet, in order to create superior search technology.[263] Eventually, "Google the research project became Google.com."[264]

Today, Google's Web search results start with Web crawlers, which access and copy entire Web pages, link by link, on an "endless binge of dialing for URLs."[265] In 2005, Google assigned more of its computers to crawl the Internet (about 175,000) than existed on the

---

261. *See* LESSIG, *supra* note 259, at 41-44, 57-58.

262. *See* Sergey Brin & Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, 30 COMPUTER NETWORKS 107, at § 7 (1998), *available at* http://dbpubs.stanford.edu/pub/showDoc.Fulltext?lang=en&doc=1998-8&format=pdf&compression=&name=1998-8.pdf ("The research described here [i.e., the development of Google] was conducted as part of the Stanford Integrated Digital Library Project, supported by the National Science Foundation . . . [,] DARPA and NASA, . . . Interval Research, and the industrial partners of the Stanford Digital Libraries Project."); Lawrence Page, Sergey Brin, Rajeev Motwani, & Terry Winograd, *The PageRank Citation Ranking: Bringing Order to the Web*, STANFORD DIGITAL LIBR. TECH., Jan. 29, 1998, at 6, *available at* http://dbpubs.stanford.edu/pub/showDoc.Fulltext?lang=en&doc=1999-66&format=pdf&compression=&name=1999-66.pdf ("As part of the Stanford WebBase project [PB98], we have built a complete crawling and indexing system with a current repository of 24 million web pages."); Jefferson Graham, *Google's Library Plan 'A Huge Help'*, USA TODAY, Dec. 15, 2004, at 3B ("Before they founded Google, former Stanford students Larry Page and Sergey Brin had an idea for a digital library project. That idea morphed into Google. 'We dreamed of making the incredible breadth of information that librarians so lovingly organize searchable online,' Page says.").

263. *See* BATTELLE, *supra* note 147, at 78 ("At one point the [Google] crawler consumed nearly half of Stanford's entire network bandwidth, an extraordinary fact considering that Stanford was one of the best-networked institutions on the planet."); *id* at 73, 77-78 ("The computing resources required to crawl [the Web to create Google] were well beyond the usual bounds of a student project. . . . [Their] faculty adviser . . . lent the students [i.e. Brin and Page] a Sun Ultra, a powerful computer that Page recalls had ten times the memory of a typical PC. . . . 'We're lucky there were a lot of forward-looking people at Stanford,' Page recalls. 'They didn't hassle us too much about the resources we were using.'"). Google co-founder Larry Page "started downloading the Web" while at Stanford. DAVID VISE & MARK MALSEED, THE GOOGLE STORY 12 (2005). He crawled the Web by downloading and storing "the entire Web," at "roughly 100 pages per second." *Id.*; *see id.* at 56 ("As the database and user base [of Google] grew, Brin and Page needed more computers. Short of cash, they saved money by buying parts, building their own machines, and scrounging around the loading dock for unclaimed computers. 'We would just borrow a few machines, figuring if they didn't pick it up right away, they didn't need it so badly,' according to Brin."). Their advisors, who knew of their scavenging, also funded them with $10,000 from the Stanford Digital Libraries Project. *See id.* at 40.

264. *Id.* at 59.

265. BATTELLE, *supra* note 147, at 20-21; *see also* CHRIS SHERMAN, GOOGLE POWER: UNLEASH THE FULL POTENTIAL OF GOOGLE 7 (2005) ("At the most basic level, Google is a

entire planet in 1970.[266] Its main "GoogleBot" crawler harvested the Web about once every month by 2005.[267] After crawling the Web, a search firm like Google must index what the crawlers found, based on URLs, metatags, links, link texts, and page contents.[268] The first Internet search engine, called Archie (as in a cute little archiver), crawled through over 1,000 anonymous FTP sites containing two million files, and indexed the files from those sites in a searchable database.[269] The WWW Wanderer and Webcrawler search engines searched the Web by copying and indexing Web sites to make them searchable, including their full text in the case of Webcrawler.[270] Altavista, Lycos, Excite, and Yahoo! took search technology further in the mid-1990s, with more complete Web crawls in Altavista's case, summary results and determinations of search relevance by link frequency in Lycos', concept-based searching in Excite's, and a hierarchical directory organizing Web pages like newspaper pages (by category such as News, Business, and Health) in Yahoo!'s.[271]

The BackRub and PageRank technology that became the heart of Google was derived from the idea of citation analysis in academic publishing, or "bibliometrics" for book-measurement.[272] For the first time in Web search history, PageRank accounted not only for the existence or description of links, but also for the frequency of links to a site, which could serve as a proxy for the site's "authority."[273] Google treated content and links from "reputable" sites, like those belonging to governments, large companies, and university administrations, as conferring more relevance upon a page containing a term than a similar link to that page from a random user's site.[274] This diluted the influence of link spammers, who create thousands or millions of links in order to boost traffic and revenue.[275] The resulting pinpoint search capability was a revelation to many Web surfers, and Google grew exponentially each year, doubling page views every two months.[276] By early 2005, it claimed fifty percent of the search market — more than one billion

---

massive web harvesting machine that stores content and makes it searchable by millions of people simultaneously."). Google's "FreshBot" updates the harvest every 30 days. *See id.* at 9.

266. BATTELLE, *supra* note 147, at 24.

267. *See* SHERMAN, *supra* note 265, at 8.

268. *See* BATTELLE, *supra* note 147, at 21-22.

269. *See id.* at 39-40.

270. *See id.* at 40-42.

271. *See id.* at 42-68.

272. *See id.* at 69-71.

273. *See id.* at 72-75.

274. *See* SHERMAN, *supra* note 265, at 12-13.

275. *See id.* at 12.

276. *See* BATTELLE, *supra* note 147, at 89.

searches per month.[277] With revenue increasing 4,000 times in five years, the company went public in a series of stock offerings that valued the company at over $80 billion.[278]

A key question, as in *Sony*, is whether the capability of a technology like Google Book Search to infringe copyrights means that that copyright holders should control the technology, or whether they should simply be compensated for actual harm caused to them in the absence of substantial noninfringing uses.[279] Despite Google's prominence, there are hundreds of other search engines in business.[280] Besides general interest search engine competitors (yahoo.com, msn.com, and aol.com), there are search engines specializing in natural language question-and-answer searches (ask.com), legal and medical information (findlaw.com and pubmed.gov), freely reproducible or transformable content (search.creativecommons.org), and results from multiple existing search engines or Web sites at once (rollyo.com or flurl.com). Google only has about half of the search engine market measured by sheer number of searches, and a much smaller share of all Web browsing or Internet usage.[281]

Google is not the only entity planning to make books searchable, nor is it the only entity that would benefit from courts holding that it is a fair use to offer short previews for books still under copyright. American libraries began digitizing and offering electronic editions of their books to students long before Google embarked upon its book scanning

277. *See id.* at 30, 36.

278. *See id.* at 216, 234; VISE & MALSEED, *supra* note 263, at 4.

279. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447-50 (1984) ("finding of contributory infringement is normally the functional equivalent" of including new product within plaintiff's copyright monopoly); Ty, Inc. v. Publ'ns Int'l, 292 F.3d 512, 521 (9th Cir. 2002) (citing need to prevent copyright owner from gaining a "monopoly" over an entire area of commerce as reason, among others, to find a guide to copyrighted works to be a fair use). The CEO of Simon & Schuster and the head of the Association of American Publishers (AAP), for example, have argued that for Google, "the dispute is about more than books," because, as the head of the AAP explained, "'Google approached our colleagues in music, movies, and broadcasting with the same deal. They said, 'We're going to copy all your stuff and only use a snippet.' And our colleagues said, 'Oh yeah? Do that and we'll sue.' I think Google believed those guys because they'd sued before, so Google let it go.'" John Heilemann, *Googlephobia – The War to Take Down Old Media*, N.Y. MAG., Dec. 5, 2005, *available at* http://newyorkmetro.com/nymetro/news/columns/powergrid/15202.

280. *See* Rahul Telang, et al., *The Market Structure for Internet Search Engines*, 21 J. OF MGMT. INFO. SYS. 137, 138 (2004).

281. *See* NETRATINGS, INC., GOOGLE AND YAHOO! OUTPACE OVERALL SEARCH GROWTH AND INCREASE MARKET SHARE IN MARCH, ACCORDING TO NIELSEN//NETRATINGS 1 (Apr. 24, 2006), http://www.nielsen-netratings.com/pr/pr_060424.pdf. Yahoo! claims more page views per day than Google as of this writing; Google's 108.7 billion or so page views per day during March of 2006 were surpassed by Yahoo!'s 137.2 billion. Press Release, comScore, 694 Million People Currently Use the Internet Worldwide According to comScore Networks (May 4, 2006), *available at* http://www.comscore.com/press/release.asp?press=849.

project.[282] These libraries recognized that their collections of books, many if not most of which are out of print, were "brittle or damaged, and at risk of being lost forever."[283] In the University of Michigan's case, for example, about a fourth of the books in its libraries are brittle, while almost half are "printed on acidic paper that eventually will break down."[284] Should Google be held liable for scanning books for a supposedly "commercial" purpose that does not involve selling access to them, university libraries might be enjoined next.

The European Community has announced plans to establish a digital library of European works of "cultural heritage," to be made available over the Web by as early as 2007.[285] Similarly, late last year Microsoft and the British Library announced a project to digitize twenty five million pages of content, the equivalent of 100,000 books, for inclusion in MSN Book Search.[286] Microsoft's mass digitization effort will be done "in conjunction with the Open Content Alliance,"[287] a coalition of state-supported libraries and archives, technology companies, and university library systems that would contribute time, technology, and/or funds to create "a digital archive of global content for universal access."[288] Usage restrictions will vary based on collection ownership status, but collections of American literature donated by the Internet Archive, the University of California, and Yahoo! will be available for

282. Coleman, *supra* note 170, at 3.

283. *Id.*

284. *Id.*

285. *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: i2010: Digital Libraries*, at 4, COM (2005) 465 final (Sept. 30, 2005), *available at* http://europa.eu.int/information_society/activities/digital_libraries/doc/communication/en_comm_digital_libraries.pdf; *see also* European Comm'n, Info. Soc'y and Media, *May 2006 Information sheet 7.4 (Fact Sheets 6, 35): What Comes Next? Plans for 2006-2007* (May 2006), *available at* http://europa.eu.int/information_society/eeurope/i2010/docs/info_sheets/7-4-i2010-futures-en.pdf.

286. Jon Boone & Maija Palmer, *Microsoft in Deal with British Library*, FIN. TIMES, Nov. 3,2005, *available at* http://news.ft.com/cms/s/b977c208-4cb3-11da-89df-0000779e2340.html.

287. *Id.*

288. Open Content Alliance, Contributors, http://www.opencontentalliance.org/contributors.html (last visited Sept. 15, 2006). The Alliance is starting with public domain or Creative Commons-licensed books and periodicals contained in the collections of the Boston Public Library, the European Archive, the National Archives of the United Kingdom, the Smithsonian Institution Libraries, the University of California and a number of other universities, the Internet Archive, Adobe Systems, Microsoft (MSN), HP Labs, Xerox, and Yahoo!. *Id.*; Open Content Alliance, Next Steps, http://www.opencontentalliance.org/nextsteps.html (last visited Sept. 15, 2006). It will also include content from O'Reilly Media, the Prelinger Archives, and the University of Toronto. *See id*; Open Content Alliance, FAQ, http://www.opencontentalliance.org/faq.html (last visited Sept. 15, 2006). O'Reilly currently offers an online rental service for technical books called Safari, which includes books published by other firms such as "Pearson Education (Addison-Wesley, Peachpit, New Riders, Que, Sams, Cisco Press, Alpha, Adobe Press, Macromedia Press, Sun Microsystems Press, Financial Times, Prentice Hall, Hewlett Packard Professional Books), Microsoft, and others." Berinstein, *supra* note 34.

unrestricted transformation and redistribution.[289] The Alliance promises to operate on a permission-first model, and indeed some of its contributors may be participating primarily to further that model.[290] But it, like the European digital library initiative, would surely gain momentum by a ruling that concludes that short previews of copyrighted works, especially in conjunction with an opt-out procedure, constitute a fair use.

2. HOW COURTS SHOULD DEVELOP INTERNET FAIR USE LAW

As courts have recognized, the "ultimate test of fair use" should be "whether the copyright law's goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it."[291] This overriding purpose of the fair use doctrine often gets lost, however, in the proliferation of subsidiary rules intended to guide courts in their application of the fair use factors.[292] Instead, these rules merely confuse matters. The courts hearing the Google Book Search cases would do well to reject or at least temper the application of these overly rigid rules in analyzing Google's fair use argument.

First, proponents of fair use defenses often face an unduly onerous burden in vindicating their right to transform copyrighted material into new works because fair use is cast as an "affirmative defense" to be forwarded by the defendant, rather than as a limitation on the plaintiff's rights.[293] Even at the preliminary injunction stage where the plaintiff has the burden of establishing a likelihood of success on the merits, even as to issues on which the defendant would bear the burden at trial,[294]

---

289. Open Content Alliance, FAQ, *supra* note 288.

290. *Id.*; Hafner, *supra* note 7 ("Instead of the 'opt-out' approach taken by the Google Print Library Project, which has given copyright holders until [November 2005] to contact Google if they do not want their work scanned, MSN and other Open Content Alliance members plan to ask copyright holders for permission before digitizing a work.").

291. Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605, 608 (2d Cir. 2006) (internal quotations and citations omitted).

292. *See* 17 U.S.C. § 107 (2006).

293. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) ("Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.") (footnote omitted); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) ("The drafters [of the Copyright Act] resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis."); Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 197 (3d Cir. 2003) ("[Fair use] is an affirmative defense for which the alleged infringer bears the burden of proof."); Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 107 (2d Cir. 1998) ("Since fair use is an affirmative defense to a claim of infringement, the burden of proof is on its proponent."); Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir. 1997) ("Since fair use is an affirmative defense, Penguin and Dove must bring forward favorable evidence about relevant markets."); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 918 (2d Cir. 1994) (defendant "typically carries the burden of proof as to all issues in the [fair use] dispute").

294. *See* Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 837 (Fed. Cir. 1992); Dr.

courts have placed the burden of proving a fair use on the alleged infringer.[295] This is improper because the Copyright Act of 1976 defined fair use as outside the exclusive rights of copyright, violations of which the plaintiff should bear the burden of proving, not violations of copyright that could be saved by an affirmative defense.[296] Correcting the erroneous shifting of the burden of proof on fair use to the defendant would help clarify Internet copyright law and thereby contribute to resolving the experience good problem. Congress may need to enact an Internet fair use law that corrects this situation because the Supreme Court itself has shifted the burden.[297]

Second, a number of developments in fair use law structure the inquiry in ways that are not necessarily consistent with the statutory articulation of fair use. Specifically, in analyzing fair use factors other than effect on the market for the work, courts have begun to ignore statutory endorsements of transformative uses,[298] equate commercial and

---

Seuss Enters. v. Penguin Book USA, Inc., 924 F. Supp. 1559, 1562 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997); Religious Tech. Ctr. v. Netcom On-Line Commc'n. Servs., 923 F. Supp. 1231, 1243 n.12 (N.D. Cal. 1995).

295. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 n.3 (9th Cir. 2001); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996); *Am. Geophysical Union*, 60 F.3d at 918.

296. *See* 17 U.S.C. § 107 (2006) (fair use "is not an infringement of copyright"); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) ("Any individual may reproduce a copyrighted wor[k] for a 'fair use'; the copyright holder does not possess the exclusive right to such a use."); Travis, *supra* note 1, at 817-18 ("The Copyright Act of 1976 . . . had enshrined fair use as a boundary limitation on exclusive rights, placing it in Chapter 1 of the Act, entitled 'Subject Matter of Copyright,' rather than Chapter 5, which set forth affirmative defenses to infringement such as the statute of limitations."). The Copyright Act of 1976 was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. No. 94-1476, at 66 (1976), *as reprinted in* U.S.C.C.A.N. 5659, 5680. Several cases articulating that judicial doctrine stated that infringement required "copying . . . to an unfair extent," or, in other words, an unfair use, not that fair use was an infringement that was nonetheless saved by an affirmative defense. West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (C.C.E.D.N.Y. 1909); *see also* Eisenschiml v. Fawcett Publ'ns, Inc., 246 F.2d 598, 603 (7th Cir. 1957) ("[T]he test is whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant's work.") (citing Nutt v. Nat'l Inst. Inc. for the Improvement of Memory, 31 F.2d 236, 237 (2d Cir. 1929)); C. T. Drechsler, Annotation, *Extent of Doctrine of "Fair Use" Under Federal Copyright Act*, 23 A.L.R. 3d 139, § 3c (2004) (some courts regarded fair use as "not an infringement at all," and U.S. Copyright Office in 1960 called fair use "an important limitation on the rights of copyright owners") (quotations and citations omitted); KAPLAN, *supra* note 82, at 67 (same).

297. *See Campbell*, 510 U.S. at 590.

298. *See id.* at 579-88 (finding that comment and criticism might be infringing depending on how "reasonable" or "excessive" its imitation despite statutory endorsement of these uses); *Harper & Row*, 471 U.S. at 562 (finding infringement by defendant engaged in "news reporting," despite Copyright Act's statutory endorsement of that use); L.A. News Serv. v. Reuters Television Int'l, 149 F.3d 987, 993-94 (9th Cir. 1998) (same); L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122-23 (9th Cir. 1997) (same); *see also* Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1384-93 (6th Cir. 1996) (en banc) (finding infringement by defendant engaged in preparing coursepacks for university professors and students, despite statutory

noncommercial uses,[299] and regard *de minimis* infringements as more serious takings.[300] These distortions of fair use law may have a particularly adverse effect on search engines and other Internet firms striving to improve the public's access to information because these enterprises typically expect to earn revenue from one source or another and make trivial uses of many works. Justice Brennan has pointed out the problem with focusing on the commercial nature of the use instead of the purpose of the use:

> Many uses § 107 lists as paradigmatic examples of fair use, including criticism, comment, and *news reporting*, are generally conducted for profit in this country, a fact of which Congress was obviously aware when it enacted § 107. To negate any argument favoring fair use

---

endorsement of educators' right to make copies for "teaching," including "multiple copies for classroom use"); *Am. Geophysical Union*, 60 F.3d at 918-34 (finding infringement by defendant engaged in what dissent characterized as "research" and "scholarship," despite statutory endorsement of these uses); Marcus v. Rowley, 695 F.2d 1171, 1174-79 (9th Cir. 1983) (finding infringement by public school teacher in copying of portions of home economics materials for classroom use despite statutory endorsement of uses for "teaching," including "multiple copies for classroom use"); Dahlen v. Mich. Licensed Beverage Ass'n, 132 F. Supp. 2d 574, 586-88 (E.D. Mich. 2001) (finding infringement by nonprofit's reproduction of poster for use in teaching); Coll. Entrance Examination Bd. v. Pataki, 889 F. Supp. 554, 556 (N.D.N.Y. 1995) (finding potential infringement by nonprofits' copying of standardized tests for use in teaching); Bridge Publ'ns, Inc. v. Vien, 827 F. Supp. 629, 635-36 (S.D. Cal. 1993) (finding infringement by educational use); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (similar to *Princeton University Press*).

299. Courts conflating solely commercial uses such as reprinting a work in competition with the plaintiff, with uses for purposes such as news reporting, comment, criticism, or teaching, frequently argue that the defendant expected to earn a salary or boost its sales, audience, or efficiency by copying protected work. *See, e.g.*, *Harper & Row*, 471 U.S. at 562 (although "the purpose of news reporting is not purely commercial, . . . [t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."); *Am. Geophysical Union*, 60 F.3d at 922 ("courts will not sustain a claimed defense of fair use . . . when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material" or when it "makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work") (citing *Harper & Row*, 471 U.S. at 562); *Bridge Publ'ns*, 827 F. Supp. at 635 (copying of religious texts for use in classroom teaching was "commercial" because teacher earned a salary in connection with her teaching).

300. *See Harper & Row*, 471 U.S. at 564-65 (copying of an "insubstantial portion" of plaintiff's work was not fair use); *id.* at 598 (Brennan, J., dissenting) (copying was only of 300 words out of 200,000, "drawn from isolated passages in disparate sections of the work" so that the "taking was quantitatively 'infinitesimal'") (citation omitted); Ringgold v. Black Entm't Television, 126 F.3d 70, 75-77, 80 (2d Cir. 1997) (although district court found that portion of copyrighted work used "was minimal and the use was . . . brief and indistinct," court refused to find fair or *de mimimis* use); Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found., No. 04 Civ. 5332 (NRB), 2005 U.S. Dist. LEXIS 26302, at *29-30 (S.D.N.Y. Nov. 1, 2005) (although defendant copied clip that "was extremely small in comparison with the total length of the [plaintiff's] movie," court declined to find it a fair use); Roy Exp. Co. Establishment of Vaduz, Liechtenstein, Black, Inc. v. Columbia Broad. Sys., Inc., 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (copying about 1% of plaintiff's work was not fair use).

> based on news reporting or criticism because that reporting or criticism was published for profit is to render meaningless the congressional imprimatur placed on such uses.[301]

Similarly, when courts regard the mere fact of unauthorized copying as proof that the copied excerpt had sufficient "qualitative value" to make the third fair use factor weigh in the plaintiff's favor,[302] the third fair use factor becomes superfluous, contrary to an established canon of statutory interpretation because it could never favor the alleged infringer as long as there was any copying.[303]

Finally, courts have established a variety of subsidiary rules governing the inquiry under the fourth fair use factor that make it unreasonably difficult to assert fair use rights in the Internet context. Among these rules are those that elevate the effect on the market for the copyrighted work to the status of a privileged factor[304] and require defendants to prove a negative, i.e., lack of harm to the market for the copyrighted work.[305] Both of these rules rewrite the Copyright Act's exemption of fair uses from the scope of copyright infringement, dramatically impairing the ability of transformative users like search engines to make fair uses of works that they would make searchable.[306] Over the past thirty years, courts have also misapplied the fourth fair use factor by equating potential harms to the market to actual harms,[307] viewing harms to the market as widespread when they were not,[308] treat-

---

301. *Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting) (footnote omitted).

302. *Princeton Univ. Press*, 99 F.3d at 1389.

303. *See* Beck v. Prupis, 529 U.S. 494, 506 (2000) (citing "the longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous"); Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1879).

304. *See Harper & Row*, 471 U.S. at 566 (effect on market "undoubtedly the single most important element of fair use").

305. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590-93 (1994) (remanding for assessment of whether parodists could prove an absence of harm to the plaintiff's market, because proponent of fair use argument "would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets").

306. The Copyright Act of 1976 made effect on the market just one out of four coequal factors and placed fair use outside an owner's exclusive rights rather than placing it among affirmative defenses such as the statute of limitations. *See* Travis, *supra* note 1, at 817 (criticizing *Harper & Row* for elevating "potential harm from a factor to be considered along with many others, which made sense, into a new test, which does not," and for declaring fair use "to be an affirmative defense on which the burden of proof falls on the alleged infringer, rather than a limitation on exclusive rights, in avoiding which the burden falls on the plaintiff").

307. *See* Travis, *supra* note 1, at 818 ("Courts and commentators have steadily undermined educational fair use using the principle articulated in *Sony* and *Harper & Row* that mere 'potential' harm to the market for copyrighted work may be considered sufficient in itself to negate fair use.").

308. *See Campbell*, 510 U.S. at 590 ("The fourth fair use factor . . . requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.") (internal

ing licensing markets as an adequate alternative to mandatory fair use,[309] and dismissing the infringer's positive contributions to the marketplace as irrelevant.[310]

Courts should lower the hurdles that these rules pose to fair users. Operating together, these subsidiary rules on fair use present too many counterfactual assumptions that search engines or other Internet firms must overcome in advancing a fair use claim. As a whole, these rules create what several courts have characterized as a vicious circle whereby

---

quotations and citation omitted); *Harper & Row*, 471 U.S. at 568 ("[T]o negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'") (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)) (emphasis supplied); L.A. News Serv. v. Reuters Television Int'l, 149 F.3d 987, 994 (9th Cir. 1998) (despite plaintiff's failure to provide evidence of lost sales or harm to market, court speculated that if defendant's use became widespread it could "result in a substantially adverse impact on the potential market for the original works"); *Ringgold*, 126 F.3d at 81 (despite plaintiff's failure to provide evidence of lost sales or harm to market, court speculated that such uses might harm a "'likely to be developed' market for licensing [the] work"); L.A. Times v. Free Republic, No. CV 98-7840 MMM (AJWx), 2000 WL 565200, at 1469-71 (C.D. Cal. 2000) (despite plaintiff's failure to provide evidence of lost sales or harm to market, court speculated that a likelihood of harm was present, which "only increases when one considers the impact on the market if defendants' practice of full text copying were to become widespread"). The *Sony* case, which first announced this rule, cited no precedent or support for it whatsoever. *See Sony*, 464 U.S. at 451. None of these cases relying upon the harm that would occur if conduct became widespread discussed much evidence indicating that such conduct had actually multiplied or become widespread.

309. *Campbell*, 510 U.S. at 593-94 (indicating that defendant's use would not be fair if upon remand, plaintiff showed harm to potential licensing market for a "nonparody, rap version" of its song); *Reuters*, 149 F.3d at 994 (where there was no evidence of actual harm to sales, harm to potential licensing market defeated fair use claim); *Ringgold*, 126 F.3d at 81 (where there was no evidence of actual harm to sales, harm to potential licensing market defeated fair use claim); *Free Republic*, 2000 WL 565200, at 1469-71 (where there was no evidence of actual harm, potential harm to market "licensing others to display or sell the articles" defeated fair use claim).

310. *See, e.g.*, *Campbell*, 510 U.S. at 591, n.21 (when a "film producer's appropriation of a composer's previously unknown song . . . turns the song into a commercial success[,] the boon to the song does not make the film's . . . copying fair"); *Harper & Row*, 471 U.S. at 569 ("Any copyright infringer may claim to benefit the public by increasing public access to the copyrighted work. But Congress has not designed, and we see no warrant for judicially imposing, a 'compulsory license' permitting unfettered access . . . .") (citation omitted)); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001) (despite defendant's evidence that its facilitating of music previews enhanced sales, court assumed that "[h]aving digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to [license] the same downloads"); *Ringgold*, 126 F.3d at 81 n.16 ("Even if the unauthorized use of plaintiff's work in the televised program might increase [her] sales, that would not preclude her entitlement to a licensing fee.") (citation omitted)); D.C. Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) ("[E]ven a speculated increase in DC's comic book sales as a consequence of RFI's infringement would not call the fair use defense into play as a matter of law."); *Free Republic*, 2000 WL 565200, at 1471 ("Courts have routinely rejected the argument that a use is fair because it increases demand for the plaintiff's copyrighted work."); Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 790 (N.D. Ill. 1998) ("This argument that increased distribution of the author's work is a benefit to the author has been rejected by the Supreme Court.") (citing *Harper & Row*, 471 U.S. at 569)).

improving the public's access to information over the Internet or otherwise cannot be a fair use if outlawing it, and all uses like it, might enhance licensing revenue.[311] Many commentators have criticized these mutually reinforcing speculative assumptions that courts are making about the market as making the harm to the market factor superfluous and fair use virtually impossible to establish.[312]

---

311. *See* Castle Rock Entm't, Inc. v. Carol Publ'g Group, 150 F.3d 132, 141, 146 n.11 (2d Cir. 1998) ("The ultimate test of fair use . . . is whether the copyright law's goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it. . . . Just as secondary users may not exploit markets that original copyright owners would 'in general develop or license others to develop' even if those owners had not actually done so, copyright owners may not preempt exploitation of transformative markets, which they would not 'in general develop or license others to develop,' by actually developing or licensing others to develop those markets. Thus, by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets.") (citations omitted); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 117 (2d Cir. 1998) (holding that copyright owner is "not entitled to a licensing fee for a work that otherwise qualifies for the fair use defense," and rejecting copyright owner's "argument for actual market harm . . . that the defendant has deprived her of a licensing fee"); *Sega*, 977 F.2d at 1523-24 (holding that defendant engaged in fair use despite failing to obtain a license and even competing with plaintiff and its licensees, although that "undoubtedly 'affected' the market for [licensing] in an indirect fashion," because there is "no basis for assuming" other than a "minor economic loss"); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1357 n.19 (Ct. Cl. 1973) ("It is wrong to measure the detriment to plaintiff by loss of presumed royalty income - a standard which necessarily assumes that plaintiff has a right to issue licenses. That would be true, of course, only if it were first decided that the defendant's practices did not constitute 'fair use.' In determining whether the company has been sufficiently hurt to cause these practices to become 'unfair,' one cannot assume at the start the merit of the plaintiff's position . . . ."), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir. 1964) ("[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."), *cert. denied*, 379 U.S. 822 (1964); *see also* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 934 (2d Cir. 1994) (Jacobs, J., dissenting) (criticizing majority's conclusion that a use "becomes unfair when the copyright holder develops a way to exact an additional price for the same product"). Simply assuming that copyright holders suffer market harm by foregoing possible licensing revenue also contravenes the holding of the Supreme Court in *Campbell* that "[n]o 'presumption' or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes." *Campbell*, 510 U.S. at 591.

312. *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990) ("By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties."); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 5 (1997) (criticizing courts' focus on lost potential licensing fees as circular in that it assumes "as its premise the legal conclusion at issue: that the use at issue is not a fair use and, therefore, the owner is allowed to charge permission fees for such use."); *Symposium: The Road To Napster: Internet Technology & Digital Content*, 50 AM. U. L. REV. 363, 377-78 (2000) (statement of Shuba Ghosh, University of Buffalo Law School) (criticizing the idea that fair use analysis should probe for harms in "any possible market" because in *Sony*, "the difference between the majority and the dissent is that the majority . . . looked at the actual market in which the movie producers operated and analyzed the effects of the then new VCR technology on existing markets," while it was the dissent that

Most importantly, courts should abandon their past reluctance to find a fair use based on the tendency of an alleged infringement to enhance the plaintiff's sales. For markets to maximize individual and social utility, they must provide perfect information about the qualities, characteristics, prices, sellers, and availability of all products.[313] As an efficient method for bringing information about the contents and quality of books to the attention of consumers, services like Google Book Search deserve the protection of the fair use doctrine. When a search engine makes copies of protected works for a purpose other than reselling them, such as cataloguing and making them searchable, and thereby enhances sales of the works in the process, it should be regarded as a fair use.

VI. ANTITRUST IMPLICATIONS OF THE GOOGLE BOOK SEARCH COPYRIGHT LITIGATION

Courts that have decided seminal copyright cases have endorsed important public interest limitations on the scope and enforcement of copyrights in order to prevent the monopolization of new technologies by firms holding large catalogues of copyrights.[314] Thus, the encourage-

---

"looked at all possible markets, not just currently existing markets") (footnotes omitted); Travis, *supra* note 84, at 823 (courts are "eliminating fair use" when they allow copyright holders to defeat fair use by "ask[ing] for prices greater than zero for virtually any use" and "invent[ing] methods of collecting fees for each and every use, no matter how trivial"); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4] (2005) ("[I]t is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar."); Travis, *supra* note 1, at 818 (emphasis on potential licensing revenue rather than actual sales results in courts rejecting fair use arguments despite "a complete absence of evidence of actual damages or reduced profits from exploitation of the copyrighted works"); Frank Pasquale, *Toward an Ecology of Intellectual Property: Lessons from Environmental Economics for Valuing Copyright's Commons*, 8 YALE J. OF L. & TECH. 78, 91 n.46 (2006) (arguing that "the speculative nature of potential uses could be discounted by an appropriate formula reflecting the relative (un)likelihood of their development"); Christina Bohannan, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENTM'T L.J. 567, 597 (2006) ("Such a broad view of the copyright owner's rights - the right to control virtually any market in which some portion of the work has been used, whether or not the use supplants sales of the copyrighted work – produces confusion, even circularity, in the fair use analysis. The copyright owner could always argue that she has suffered some market harm because the defendant could have paid a fee for the very use at issue in the case. This argument is circular, however, because if the defendant's use is a fair use, then the copyright owner had no right to compensation from the defendant in the first place and there would be no harm to a legally recognized market.").

313. *See* Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1606-08 (1982). For that reason, Professor Gordon supports a finding of fair use whenever "the free flow of information is at stake," and especially when the defendant disseminates information that reveals the "flaws" in the copyright owner's work, as Google Book Search often does. *Id.* at 1633

314. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431, 441 (1984) (expressing "reluctance" to copyright monopoly to cover an entire technology "without explicit legislative guidance"); *see also* Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415

ment of innovation and the preservation of price competition, usually the domain of antitrust law, have crept into copyright law on occasion to curb overbroad assertions of rights.[315]

A. *Joint Ventures as Antitrust Problems*

Assuming that Google Book Search loses its fair use claim and suffers the fate of Napster, it seems likely that a publishing industry joint venture would, at least initially, be the only viable alternative to realize its vision of making searchable as many books as possible.[316] The music and motion picture industries developed joint ventures to exploit digital preview and download markets while pursuing litigation against technology companies such as Napster, MP3.com, Grokster, Kazaa, and Scour. Thus, an industry-wide joint venture seems to be a possible consequence of a Google defeat. Similar joint ventures, including MusicNet, Pressplay, Movies.com, and Movielink, have raised antitrust questions that warrant reexploration.

B. *Potential Economic Benefits of Joint Ventures*

Generally speaking, joint ventures may produce economic benefits not present in single-firm enterprises absent a merger or asset sale. Pooling resources can leverage economies of scale in research and development, production, and distribution. Consolidating projects into one entity can lower transaction and communications costs and mitigate

---

U.S. 394 (1974) (declining to sweep cable television technology under control of copyright owners offended by retransmission of their programs over cable); Fortnightly Corp. v. United Artists Television., Inc., 392 U.S. 390 (1968) (similar); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908) (declining to grant control over piano rolls to owners of sheet music copyrights); *Williams & Wilkins Co.*, 487 F.2d 1345 (declining to hold that all photocopying must be licensed by copyright owners).

315. *See, e.g.*, H.R. REP. NO. 94-1476, at 108 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5723 (rejecting proposals for overly narrow sound recording compulsory licenses, and summarizing critiques of these proposals as threatening to put certain "producer[s] at a great competitive disadvantage with performing rights societies, allow discrimination, and destroy or prevent entry of businesses"); *id.* at 361 ("The copyright laws should not limit the extent to which cable serves the public interest. . . . Cable has a yet unrealized capability to broaden our horizons and to bring education, information and entertainment to people everywhere. Surely this is in the public interest and for the public benefit. The copyright laws should not be used to restrict or impair that flow of knowledge."); *id.* at 89 ("The Committee recognizes . . . that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to . . . establish a compulsory copyright license for [cable].").

316. HarperCollins has already announced that it will introduce its own searchable versions of the books in its catalogue and backlist. Internet companies will be able to "crawl" HarperCollins' Web sites, apparently to the same extent as other sites, but must redirect surfers to HarperCollins for the content. *See* Berinstein, *supra* note 34 (HarperCollins will permit "search engines to crawl its site and create an index. Search engines are not allowed to take or make page images, though").

"hold out" power. Sharing technology, intellectual property, branding, experience, investments, and responsibility for failures can combine unique advantages of several firms into one enterprise and minimize financial and legal risks.[317]

C. *Tensions between Joint Ventures and Antitrust Laws*

Joint ventures also impose costs, however, especially when they aggregate concentrations of economic power formerly spread across several different firms.[318] Copyrights may confer such power in some firms or coalitions of firms to control prices or exclude competition.[319] Copyright law suppresses output of books and raises the prices publishers may charge for them – effects which exactly parallel the concept of "market power" in antitrust law.[320] Simply stated, permitting "IP owners to limit competition conflicts directly with the antitrust law's promotion of competition."[321]

To prevent some of these costs of joint ventures from being imposed upon the public, federal antitrust law limits their formation and exercise. Under section 7 of the Clayton Act, which bars anticompetitive mergers and acquisitions, a joint venture may be unlawful if it forecloses competition between prior competitors in a market.[322] Moreover,

---

317. *See* John J. Miles, *Joint Venture Analysis and Provider-Controlled Health Care Networks*, 66 ANTITRUST L.J. 127, 134-35 (1997); Andrew S. Oldham, *The MedSouth Joint-(Ad)venture: The Antitrust Implications of Virtual Health Care Networks*, 14 ANN. HEALTH L. 125, 133-34 (2005).

318. *See* Miles, *supra* note 317, at 128 & n.6.

319. *See* United States v. Loew's, Inc., 371 U.S. 38, 48 (1962) ("each defendant by reason of its copyright had a monopolistic' position" and "sufficient economic power to impose an appreciable restraint on free competition") (quotation marks omitted)).

320. *See, e.g.*, Steven G. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 318-19 (1970) ("Copyright may also injure the public by allowing publishers selling different books to restrict competition within the industry. . . . [W]ell-established publishers may find that they have obtained the power to raise their prices and to resist authors' demand for higher royalties. Any such power can curtail book circulation (by raising prices) and may even limit the number of titles produced (by restricting royalties)."); *see also* Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966), *available at* http://www.jstor.org/view/00028282/di950389/95p04662/0?currentResult=00028282%2bdi950389%2b95p04662%2b0%2c03&searchUrl=http%3A%2F%2Fwww.jstor.org%2Fsearch%2FBasicResults%3Fhp%3D25%26si%3D1%26Query%3D%2522economic%2Brationale%2Bof%2Bcopyright%2522; Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (1934), *available at* http://links.jstor.org/sici?sici=0013-0427%28193405%292%3A1%3A2%3C167%3ATEAOCI%3E2.0.CO%3B2-9.

321. Phillip Areeda, Louis Kaplow, & Aaron S. Edlin, ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 343 (6th ed. 2004); *see also* Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 170 (1999) ("Intellectual property is a deliberate, government-sponsored departure from the principles of free competition, designed to subsidize creators and therefore to induce more creation.").

322. *See, e.g.*, United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

an agreement or combination between competitors to stabilize the price of a product, as part of a joint venture or otherwise, constitutes a *per se* violation of section 1 of the Sherman Act.[323] Even in the absence of an "explicit agreement . . . , [pervasive] joint and collaborative action" by a number of joint venturers to eliminate "discounters" of their product can amount to an unlawful conspiracy in restraint of trade.[324] On the other hand, merely "internal" decisions of a joint venture to price its output uniformly must be analyzed under the rule of reason where the venturers no longer offer competing products in the geographical area covered by the venture.[325] The rule of reason assesses whether a course of conduct "'promotes competition or whether it . . . *may* suppress or even destroy competition.'"[326]

Monopolization, attempted monopolization, and conspiracy to monopolize any part of interstate trade or commerce are violations of section 2 of the Sherman Act.[327] A violation of this provision may occur where a dominant entity, or a conspiracy of multiple entities,[328] acquires control over intellectual property rights that adds to those already owned by the entity or conspiracy of entities, thereby creating monopoly

323. *See, e.g.*, Texaco Inc. v. Dagher, 126 S. Ct. 1276, 1279 (2006); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940); Gerlinger v. Amazon.com, Inc., 311 F. Supp. 2d 838, 845-46 (N.D. Cal. 2004).

324. United States v. Gen. Motors Corp., 384 U.S. 127, 142-43 (1966) (joint venture between General Motors and associations of its individual dealers).

325. *See Dagher*, 126 S. Ct. at 1280 & nn.1-2. In *Dagher*, "Texaco and Shell Oil formed a joint venture, Equilon, to consolidate their operations in the western United States, thereby ending competition between the two companies in the domestic refining and marketing of gasoline. Under the joint venture agreement, Texaco and Shell Oil agreed to pool their resources and share the risks of and profits from Equilon's activities. . . . The formation of Equilon was approved by consent decree, subject to certain divestments and other modifications, by the Federal Trade Commission . . . ." *Id.* at 1278-79. The Supreme Court held that the joint venture, which had "been approved by federal and state regulators," was subject to scrutiny under the rule of reason for its anticompetitive impact. *Id.* at 1280 n.1. The plaintiffs, however, had "eschew[ed] rule of reason analysis," which meant that their claim had to be dismissed. *See id.* at 1279, 1281. The holding in *Dagher* may not apply to joint ventures that do not "act as a selling agent" for the venturers, as Equilon did, but that instead permit the venturers to make "individual sales" of the product, in which case agreements on "fixed prices and output limitations" will continue to be *per se* violations of section 1 of the Sherman Act. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 113 (1984); *see also* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 9 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf ("In any case, labeling an arrangement a 'joint venture' will not protect what is merely a device to raise price or restrict output; the nature of the conduct, not its designation, is determinative.") (footnote omitted)).

326. Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 n.15 (1977) (quoting Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)) (emphasis added).

327. 15 U.S.C. § 2 (2006).

328. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 172-75 (1948).

power.[329] Unlawful monopolization may also occur when an entity uses its copyrights to dominate another industry, or when it boycotts its competitors absent a legitimate purpose for doing so.[330]

D. *Alleged Agreements Not to Compete on Price and Quality in Digital Markets*

1. PARALLEL PRICING OF DIGITAL MUSIC

Like collective licensing organizations before them,[331] digital music joint ventures may have facilitated collusion as to the pricing and availability of digital music. The marginal cost of licensing an additional user of an online music service like iTunes or Napster is rather low, creating a risk of vigorous price-cutting competition between music owners and online services. Similar pressures in the offline music market, where compact discs require only about $1 investment each to burn, label, and decorate, but are priced at ten to twenty times higher than that, resulted in prices being sustained through parts of the 1990s by price-fixing or "minimum advertised price" terms in contracts between labels and retailers.[332]

Prior to 2001, the major record labels did not license any digital download services.[333] In 2001, the labels formed two joint ventures, MusicNet (Warner Music Group, EMI Group, BMG Music and RealNetworks) and Pressplay (Sony Music and Universal Music).[334] These joint ventures banned "copying all but a handful of the files onto CDs."[335] When MusicNet debuted, $9.95 per month conferred the ability to stream about 100 songs per month and download 100 more which could no longer be played at the end of the month.[336] Pressplay permitted users to download and keep songs as long as they paid a $24.95 per month subscription fee, during which time they could also burn up to twenty tracks each month onto compact discs.[337] Some perceived MusicNet and Pressplay as a disappointment to the labels because too

329. *See* SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981); In re: Indep. Serv. Orgs. Antitrust Litig., 964 F. Supp. 1454, 1459 (D. Kan. 1997).

330. *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 479 n.29, 483 n.32 (1992).

331. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9-14 (1979) (discussing history of antitrust violations by collective music licensing organizations).

332. MENN, *supra* note 145, at 152.

333. Curt Anderson, *U.S. Ends Online Music Antitrust Probe*, ASSOCIATED PRESS, Dec. 23, 2003, *available at* http://www.cnn.com/2003/TECH/ptech/12/24/antitrust.onlinemusic.ap/index.html.

334. *Id.*

335. MENN, *supra* note 145, at 310.

336. *Id.* at 157.

337. *Id.* at 157-58.

few people signed up.[338] According to one observer, they "bombed" because they required users to pay fees of up to hundreds of dollars per year simply to "rent[ ]" music for the most part, with restrictions on MP3 players and CD burning.[339]

In August 2001, the Justice Department began an investigation into MusicNet and Pressplay, but closed it without further action in 2003 after being satisfied that no anticompetitive action had been taken.[340] Napster and its investors, however, had more success raising anticompetitive aspects of MusicNet and Pressplay in defense of the labels' copyright claims. In opposing the music labels' motion for summary judgment on their copyright claims, Napster argued that the development of MusicNet and Pressplay "was an indication that that the companies were conspiring to keep music out of the hands of services like Napster."[341] Napster claimed the labels' refusal to allow Napster to license their recordings "left Napster no choice but to engage in possibly infringing behavior."[342] The labels did not license any firm to offer songs from all five major labels until a year after Napster was shut down, when Listen.com secured such a deal.[343]

In 2004, the trial court in *Napster* found that the music labels had "formed a joint venture to distribute digital music and simultaneously refused to enter into individual licenses with competitors," a move apparently "designed to allow plaintiffs to use their copyrights and extensive market power to dominate the market for digital music distribution."[344] One of Napster's expert witnesses, antitrust economist Dr. Roger Noll of Stanford University, had opined that MusicNet and Pressplay appeared to "facilitate collusive activity" such as "retail price-coordination."[345] Recently, the judge hearing the multimillion dollar case against a venture capital firm that funded Napster concluded that at least two of the four major labels had "misled" Justice Department investigators as to the exchange with competitors of information about online

338. *See id.* at 310.

339. Pogue, *supra* note 46.

340. *See* Anderson, *supra* note 333; Ethan Smith, *Big Music Firms Dealt a Legal Blow: U.S. Court Rules Top Labels Misled Federal Investigations over Online-Music Pricing*, WALL. ST. J., Apr. 24, 2006, at B4.

341. Farhad Manjoo, *Another Day of Napster Nattering*, WIRED NEWS, Oct. 10, 2001, *available at* http://web.archive.org/web/20011011081606/www.wired.com/news/politics/0,1283,47437,00.html.

342. *Id.*

343. *See* Amy Harmon, *Grudgingly, Music Labels Sell Their Songs Online*, N.Y. TIMES, July 1, 2002, at C1; Chris H. Sieroty, *Listen.com Gets Rights to Catalogs*, UNITED PRESS INT'L, July 2, 2002, *available at* http://www.highbeam.com/doc/1G1:88172094/On+the+Net.html?refid=SEO.

344. In re: Napster, Inc. Copyright Litig., Nos. MDL 00-1369 MHP, C 99-5183 MHP, 2004 U.S. Dist. LEXIS 7236, at *53, 58 (N.D. Cal. Feb. 22, 2004) (citation omitted).

345. *Id.* at *57-58.

music pricing.[346] The ruling comes as Apple's iTunes, which controls eighty percent of the U.S. online music market, reached an agreement with four major labels to continue to charge a "uniform" price of ninety nine cents per song, regardless of artist, label, song quality, or date of release.[347]

The Justice Department and the Attorney General of the State of New York have begun new investigations into whether the major labels "colluded to set prices for digital music" via "'most-favored nation' clauses, which can be used to ensure that a supplier receives terms at least as favorable as those of any competitors," and consumers have filed a class action alleging that they have.[348] These concerns may be abating somewhat, however, with the debut of the new Napster's free advertising-supported music preview service, which allows five previews prior to purchase.[349]

2. SUPPRESSION OF OUTPUT AND DIVERSITY IN THE MARKET FOR DIGITAL FILMS

In August 2001, five major movie studios accounting for half of the domestic box office formed Movielink as a joint venture to "deliver [the studios'] new release films, as well as older 'library' titles, over the Internet."[350] The studios were Sony, MGM, Paramount, Warner Bros., and Universal.[351] In September 2001, two other major studios, Disney and Fox, formed Movies.com as a joint venture to deliver their films over the Internet.[352] They dropped the deal after the Department of Justice began an investigation, and Fox later joined Movielink.[353]

---

346. *See* Smith, *supra* note 340.

347. Kevin Allison & Joshua Chaffin, *Apple Sets Tune for Pricing of Song Downloads*, FIN. TIMES, May 2, 2006, at 19.

348. Smith, *supra* note 340; *see also* Menn, *supra* note 15 ("Justice Department . . . investigators . . . [are] examining how present-day prices are set on Apple Computer Inc.'s iTunes Music Store and other authorized services.").

349. Antony Bruno, *Ad Revenue Shores Up Newfangled Napster*, REUTERS/BILLBOARD, May 7, 2006, *available at* http://ca.entertainment.yahoo.com/s/07052006/6/entertainment-ad-revenue-shores-newfangled-napster.html. Prior to the debut of the free previews, Napster had only about a tenth as many unique visitors as Apple's iTunes. *See id.* ("According to Nielsen NetRatings, rhapsody.com had 2.3 million unique visitors in March, while napster.com had 1.9 million. By way of comparison, iTunes received 20 million unique visitors in March."). According to an executive at the label EMI, there is "'a huge amount of evidence that shows consumers need to listen to streams a certain number of times before they commit to buy. Consumers who spend more time experimenting with music end up spending more money buying music.'" *Id.*

350. Press Release, U.S. Dep't of Justice, Justice Department Closes Antitrust Investigation into the Movielink Movies-On-Demand Joint Venture (June 3, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/June/04_at_388.htm.

351. *Id.*

352. *Id.*

353. *Id.*; Terence Keegan, *Digital Distribution*, DAILY VARIETY, April 25, 2006, at B13.

The Justice Department's investigation focused on whether the major studios could use the Movielink joint venture to exclude competitors from the digital distribution market and/or "to drive up fees charged to consumers."[354] The Justice Department closed its investigation in 2004 without taking further action, finding insufficient evidence that "Movielink had adversely affected competition through increased prices or decreased output."[355]

Sticking to a twenty-four hour rental model based on piracy concerns, Movielink and its studio parents did not make permanent digital downloads of major motion pictures available prior to April 2006, up to ten years after public-domain, independent, and adult-oriented films began to be distributed over the Internet.[356] By February 2006, more than three years after its founding, Movielink offered only 1,200 movies for rental, compared to more than 55,000 DVD titles available for rental on NetFlix alone.[357] Intertainer, a firm which had reached deals with some studios to offer digital movie delivery systems, has filed an antitrust suit alleging that Movielink, Sony, Time Warner, and Universal have employed Movielink as a device to boycott online competitors, fix download prices, and reduce their output.[358] The case was expected to go to trial this year.[359]

E. *Will Publishers Form a Joint Venture Like MusicNet or Movielink?*

Could MusicNet or Movielink be a model for a publishing industry

354. Katherine L. Race, *The Future of Digital Movie Distribution on the Internet Antitrust Concerns With the Movielink and Movies.com Proposals*, 29 RUTGERS COMPUTER & TECH. L.J. 89, 102 (2003) (footnote omitted).

355. Press Release, U.S. Dep't of Justice, *supra* note 350; *see also Antitrust Probe Clears Studios' Online Venture*, L.A. TIMES, June 4, 2004, at C2.

356. *See* Phil Hall, *Movies from the Web; Will Downloaded Films Take Off? Forecasters Are Pessimistic*, HARTFORD COURANT, Apr. 27, 2006, at D3.

357. Kevin J. Delaney & Bobby White, *Choices Expand for Watching TV on Your PC*, WALL ST. J., Feb. 22, 2006, at D1. Movielink did not debut the "first U.S. electronic download-to-own service for major motion pictures," an "important milestone in digital distribution of movies," until April 2006. *Movielink Launches First U.S. Electronic Download-To-Own Service for Major Motion Pictures, Marking Important Milestone in Digital Distribution of Movies*, BUS. WIRE, Apr. 3, 2006, *available at* http://www.findarticles.com/p/articles/mi_m0EIN/is_2006_April_3/ai_n16116082.

358. *See Antitrust Probe Clears Studios' Online Venture*, *supra* note 355; Michael Hiltzik, *Was Movie Service's Failure a Studio Plot?*, L.A. TIMES, June 9, 2003, *available at* http://www.intertainer.com/articles/82.html; Michael Stroud, *Movie Confab Hears Ugly 'C' Word* , WIRED NEWS, Sep, 24, 2002, *available at* http://www.wired.com/news/digiwood/0,1412,55346,00.html.

359. *See Intertainer Announces That Federal Judge Rules Warner Bros. CEO Barry Meyer Must Give Deposition in Price-Fixing and Anti-Trust Law Suit*, BUS. WIRE, Aug. 16, 2005, *available at* http://www.tmcnet.com/usubmit/2005/aug/1173863.htm.

joint venture to replace Google Book Search? Little evidence has surfaced so far that they will be, but the history of digital markets for experience goods indicate that this may be a possibility. In considering the legality of Google Book Search under the Copyright Act and all the defenses to infringement that it recognizes, the consequences of the formation of such a joint venture are worth noting. Indeed, courts should consider both the benefits and costs of such a joint venture alternative to Google Book Search in assessing the legality of the latter under copyright law.

The effects of a publishing industry joint venture replacing competition among Google, Yahoo!, Microsoft, American universities, and the European Community may not be attractive. There may be a delay in public access to searchable digital libraries if their timetable is extended to allow publishing rivals to work out their differences on priority, placement, pricing, and publicity.[360] Such a joint venture may also facilitate agreements not to compete on quality and consumer-friendliness of e-books and previews, if there is any merit to the findings of the *Napster* court about MusicNet and the allegations of Intertainer about Movielink. If MusicNet and Movielink generated at least tacit agreements to stabilize preview or download prices, or peg them in some way to non-digital media prices, a publishing industry joint venture may do the same.

F. *Will Google Book Search Facilitate Antitrust Violations by Google?*

So far, allegations of anticompetitive conduct in connection with Google Book Search have been flying at Google rather than at publishers, at least for the most part. The head of the Association of American Publishers has asked: "Do we really want one corporation controlling all the content in the world?"[361] She compared "Google's business model [to] a new kind of feudalism: The peasants produce the content; Google makes the profits."[362]

Although these visions of world domination sound scary,[363] they are unrealistic. Microsoft's network of Web sites had nearly ten percent

360. Google's negotiations and responses to publishing industry positions have already delayed its project. *See* Yuki Noguchi, *Google Delays Book Scanning; Copyright Concerns Slow Project*, WASH. POST, Aug. 13, 2005, at D01; Edward Wyatt, *Google Library Database Is Delayed*, N.Y. TIMES, Aug. 13, 2005, at B9.

361. Heilemann, *supra* note 279.

362. *Id.* (paraphrasing Alan Murray).

363. *Cf. Google Announces Plan to Destroy All Information It Can't Index*, THE ONION, Aug. 31, 2005, http://www.theonion.com/content/node/40076/print/ ("Executives at Google . . . announced Monday the latest step in [the company's] expansion effort: a far-reaching plan to destroy all the information it is unable to index.").

more visitors than Google's sites in March 2006.[364] Google claims only sixteen percent of the global visitors to the top fifteen online networks of Web sites.[365] This hardly grants it control over "all the content in the world."[366] Thus far, neither the U.S. government nor any of its competitors have accused Google of any conduct remotely approaching the charges of anticompetitive activity that have been leveled against publishers, music labels, or movie studios.[367]

---

364. *See* comScore, *supra* note 281.

365. *See id.*

366. *See The Unusual Suspects; Antitrust*, THE ECONOMIST, July 8, 2006 ("Neither Apple nor Google has anything like the market dominance that Microsoft has in operating systems."); Eric Auchard, *U.S. Judge Dismisses Antitrust Complaint vs. Google*, REUTERS, July 14, 2006, *available at* http://today.reuters.com/news/articleinvesting.aspx?view=CN&storyID=2006-07-14T055516Z_01_N14213988_RTRIDST_0_TECH-GOOGLE-LAWSUIT.XML&rpc=66&type=qcna (federal judge in California rejected claim that Google had monopolized Web search or could be liable under antitrust law for allegedly relegating Web site to bottom of relevant searches using methodology that "calculates the relevance of Web sites" so as "to ward off manipulation of search results by advertisers it deems abusers of its system").

367. So far as I am aware, Google has not been accused of antitrust violations in a formal complaint of any kind by any federal or state government, any major competitor such as a significant search engine or Internet portal, any major player in the advertising industry with whom it competes, or any of its major customers. Such antitrust claims as have been filed against it appear to involve the allegation that customers with relatively little stake in Internet or advertising industry competition have failed to achieve the positioning results that they would like in Google's search engine. *See, e.g.*, Person v. Google Inc., 06 Civ. 4683 (RPP) , 2006 U.S. Dist. LEXIS 73932 (S.D.N.Y. Oct. 11, 2006) (discussing antitrust complaint filed by Carl E. Person, a candidate for New York Attorney General in the November 2006 election, based on Google's having refused to allow him to bid for advertising space adjacent to search results for 25 English words that Google told him "were not available for keyword [advertising] use"); Katie Hafner, *We're Google. So Sue Us*, N.Y. TIMES, Oct. 23, 2006, at C1 (describing antitrust complaint filed by small search engine targeting parents of small children after Google removed the site from search results due to presence of extensive links on the site to what Google called "low-quality or pornographic sites, indicating . . . an effort to manipulate Google's search results"). By contrast, publishers, music labels, and movie studios have been entangled in extensive antitrust litigation with the federal government, their direct competitors, or major customers for substantial portions of the past century. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc, 441 U.S. 1 (1979) (blanket license offered by music licensing societies on nonexclusive basis that allowed licensees to bargain directly with copyright owners were subject to rule of reason analysis under antitrust laws); United States v. Loew's, Inc., 371 U.S. 38 (1962) (upholding injunction against motion picture distributors where agreements conditioned license of one film for television broadcast upon license of another film); United States v. Paramount Pictures, 334 U.S. 131, 156-57 (1948) (similar ruling upholding injunction against "performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features," which "prevents competitors from bidding for single features on their individual merits"); Straus v. American. Publisher's Ass'n, 231 U.S. 222, 235-36 (1913) ("[I]t appears that the Publishers' Association was composed of probably seventy-five per cent of the publishers of copyrighted and uncopyrighted books in the United States, and that the . . . Association adopted resolutions and made agreements obligating their members to sell copyrighted books only to those who would maintain the retail price of such net copyrighted books, and, to that end, that the Association[ ] combined and co-operated with the effect that competition in such books at retail was almost completely destroyed. . . . [T]he court of appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman act . . . ."); United States

VII. CONCLUSION

The debate over Google Book Search will not be resolved by one article, or even by one discipline. As significant as I believe that the implications of the analysis of Google Book Search as a solution to the paradox of experience good marketing may be, moral, political, or aesthetic arguments not presented here may be paramount for many parties, judges, and commentators. Therefore, rather than engage in a tedious recitation of my arguments in this piece, I would like to explore areas of further inquiry suggested by my analysis of the Google Book Search cases.

Although this Article has focused on the law and economics of fair use rights, a crucial issue in the future will be whether an Internet company or its employees have a First Amendment right to create a book index or other technology for aggregating and structuring copyrighted material.[368] Courts and commentators often quote James Madison for

---

v. Broad. Music, Inc., 426 F.3d 91 (2d Cir. 2005); United States v. Broad. Music, Inc., 316 F.3d 189 (2d Cir. 2003) (determining reasonable fee to be paid to music licensing society by provider of cable and satellite television content pursuant to antitrust consent decree); United States v. Broad. Music, Inc., 275 F.3d 168 (2d Cir. 2001) (holding that cable network and music service were entitled to obtain licenses from licensing society on reasonable fee that reflected music they had already licensed from other sources); Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors and Publishers, 744 F.2d 917, 919 (2d Cir. 1984) (discussing antitrust challenge to practices of music licensing societies by "all owners of 'local' television stations"); United States v. Am. Soc'y of Composers, Authors and Publishers (Metromedia, Inc.), 341 F.2d 1003, 1005 (2d Cir. 1965) ("The 1941 [antitrust consent] decree eventually proved to be not wholly effective and in 1950 . . . ASCAP [was enjoined] from entering into licensing agreements which discriminate between users similarly situated . . . ."); United States v. Am. Soc'y of Composers, Authors and Publishers (Salem Media of Cal., Inc.), 981 F. Supp. 199 (S.D.N.Y. 1997) (limiting music licensing society's ability to charge broadcasters a "reasonable fee"); United States v. Am. Soc'y of Composers, Authors and Publishers (Capital Cities/ABC, Inc.), 831 F. Supp. 137, 153 (S.D.N.Y. 1993) (proceedings conducted on television networks' claims that "ASCAP [can] extract excessive fees from the networks"); United States v. Am. Soc'y of Composers, Authors and Publishers (Buffalo Broad. Co.), 1993 U.S. Dist. LEXIS 2566 (S.D.N.Y. Feb. 23, 1993) (limiting music licensing society's practices regarding music played incidentally as fair use during news and sports coverage, or in commercials, public service spots, and promotional spots), *aff'd*, United States v. Am. Soc'y of Composers, Authors and Publishers (Capital Cities/ABC, Inc., et al.), 1994 U.S. Dist. LEXIS 12327 (S.D.N.Y. Sept. 2, 1994); United States v. Am. Soc'y of Composers, Authors and Publishers, 586 F. Supp. 727 (S.D.N.Y. 1984) (denying motion to amend existing antitrust consent decree); Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors and Publishers, 80 F. Supp. 888 (S.D.N.Y. 1948) (enjoining music licensing society from monopolistic conduct in connection with motion pictures); In the Matter of Harper & Row Publishers, Inc., 121 F.T.C. 125 (1996) (noting that the "American Booksellers Association has filed several private actions challenging alleged [price] discrimination in [the publishing] industry, and has already obtained consent decrees against four publishers," and that publishers had been alleged to have engaged in "unjustified quantity discounts . . . and secret discounts" not offered to all booksellers); *see also* 58 C.J.S. *Monopolies* § 127 (2006).

368. *Cf.* Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 348-349 (2004) (arguing that First Amendment "case law designed to promote public discourse" may protect "the ability to use speech goods,"

the idea that: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."[369] Seldom quoted is Madison's explanation of why, in the case of the press, a wide latitude for abuse must be allowed by law: "[T]o the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression . . . ."[370] In this he followed Macaulay, who called the lapse of prepublication licensing by the Stationers Company a reform "which has done more for liberty and for civilisation than the Great Charter or the Bill of Rights."[371] To the extent that courts credit these ideas, they may direct more searching First Amendment inquiry into any attempt to hobble the efforts of the electronic press to enlighten and entertain the public.[372] How would the First Amendment, either as orig-

---

because overbroad copyrights deny others the chance "to form their own ideas, utilize their own observations, and communicate . . . with friends, colleagues, and fellow citizens"). I plan to explore this issue in a forthcoming article entitled, "Of Blogs, eBooks, and Broadband: Access to Digital Media as a First Amendment Right ," which I will present during "Reclaiming the First Amendment: A Conference on Constitutional Theories of Media Reform," scheduled to be held at Hofstra University School of Law on January 19, 2007.

369. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (citation omitted); *see also* Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 836 (1999).

370. 6 JAMES MADISON, THE WRITINGS OF JAMES MADISON 386 (Gaillard Hunt ed., G.P. Putnam's Sons 1900-1910), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

371. 4 THOMAS BABINGTON MACAULY, THE HISTORY OF ENGLAND FROM THE SUCCESSION OF JAMES THE SECOND ch. XXI, *available at* http://www.nalanda.nitc.ac.in/resources/english/etext-project/history/England4/chapter5.html.

372. *See* Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 432-33 (1989) (suggesting that "courts' failure to heed first amendment values" may enable "copyright to unduly chill basic rights of expression," and arguing that given "the first amendment's supremacy over copyright, the courts must begin limiting [copyright expansion] before it irreversibly pushes copyright beyond its first amendment limits"); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 83-4 (2001) (arguing that when fair use doctrine "places the defendant in the onerous position of proving a negative," i.e. that its use and uses like it "will not even harm a market . . . that the copyright holder has no concrete plans to exploit," the "burden unduly chills speech and should be invalidated by the First Amendment"); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 893, 900, 908 (2002) ("Copyright law . . . empowers one private party to limit another's speech. . . . [A]ny full protection First Amendment theory should hold unconstitutional any such copyright-based restriction on [an infringer's] expression. . . . [R]ecognizing monopoly rights to say and communicate (distribute) particular word combinations (or their derivatives) that an original author . . . [expressed] unnecessarily, and probably unconstitutionally, restricts another person's speech choices."). *See also* Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 246-48 (1988) ("By loosening the chains of exclusivity under appropriate circumstances, the fair use doctrine strikes a balance between the policies of fostering creativity and encouraging wide dissemination and use of creative works. In the process, it helps to avoid a collision between copyright law and the first amendment.") (footnotes omitted). As

inally intended or as more fully articulated by the Warren, Burger, and Rehnquist Courts, regard Google Book Search?

Similarly, while my analysis of Google Book Search has largely sidestepped arguments founded on natural law and deontological moral reasoning, a court may find simply it unjust that Google is reaping where it has not sown.[373] Or an observer may feel that authors morally deserve the maximum possible compensation they can obtain for their creativity from any and every source of commercial value arising from its exploitation.[374] Or an author may insist that a quasi-democratic entity like an Authors Guild is politically preferable to a faceless technology company when it comes to making important decisions about how and in what context her work will appear.

These appeals to moral and political values could be turned in Google's favor as well. A court could insist that it would be unfair for authors and publishers to seek a mandatory share of revenue from a technology they did not invent. Or a commentator might be persuaded that, as Lord Camden once declared, there is no moral entitlement to

---

Macaulay declared, in language surprisingly evocative of the present controversies over new technologies like p2p file sharing and digital libraries like Google Book Search:

> Men very different from the present race of piratical booksellers will soon infringe this intolerable monopoly. Great masses of capital will be constantly employed in the violation of the law. Every art will be employed to evade legal pursuit; and the whole nation will be in the plot. On which side indeed should the public sympathy be when the question is whether some book as popular as Robinson Crusoe, or the Pilgrim's Progress, shall be in every cottage, or whether it shall be confined to the libraries of the rich . . . ?

Thomas Babington Macauly, Representative of Edinburgh, A Speech Delivered in the House of Commons on the 5th of February 1841, *in* 4 THE MISCELLANEOUS WRITINGS AND SPEECHES OF LORD MACAULY, *available at* http://www.gutenberg.org/dirs/etext00/4mwsm10.txt. When Congress debated copyrights for foreign authors in 1890, similar concerns were raised: "Copyrights in literary productions are creations of law and subject, of course, to such regulations and limitations as the needs of the country may demand. The higher and better education of our people and the general diffusion of intelligence claim the first consideration of our lawmakers." 21 CONG. REC. 4137 (1890).

373. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films 410 F.3d 792, 801, n.12 (6th Cir. 2005) ("When you sample a sound recording you know you are taking another's work product. . . . The opinion in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991), one of the first cases to deal with digital sampling, begins with the phrase, 'Thou shalt not steal.'") (quoting *Exodus* 20:15)). *See generally* Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO St. L.J. 517 (1990) (discussing the influence of natural law theory and rhetoric on copyright jurisprudence); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 Texas L. REV. 873 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)) (same).

374. *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1593-95, 1601-04, 1606-09 (1993) (discussing natural law arguments relating to authorial rights and fair use exception); Yen, *supra* note 372, at 550-57 (rehearsing natural law arguments for and against broad authorial rights).

reap huge profits from literary work, for "'Glory is the Reward of Science, and . . . [i]t was not for Gain, that *Bacon, Newton, Milton, Locke* instructed and delighted the World . . . .'"[375] Or finally, an author might be morally offended by the sharp practices of her publisher or of publishers generally, and prefer that the law give all possible encouragement to a new method of connecting readers with her work.

Google Book Search and other million-book digital libraries may offer our culture a chance to rethink the relationship between authorship and compensation more generally. Of many potential ways of imagining this relationship, two stand out. The first reflects the industrial-age English and American sensibility that: "'[N]o man but a blockhead ever wrote, except for money.'"[376] The second could be described as a biblical perspective,[377] and derivatively a continental European one, i.e., that:

> [T]he writers and artists, who form the proudest possession of the various nations which have given them birth, . . . all those who truly enlightened humanity, . . . with few exceptions, . . . were tormented to death, without recognition, without sympathy, without followers; . . . they lived in poverty and misery, whilst fame, honour, and riches, were the lot of the unworthy; . . . [but] they were kept up by the love of their work . . . ."[378]

---

375. ROSE, *supra* note 81, at 104-05 (citation omitted). An even more "reactionary and sardonic" observer, to borrow a phrase from Dostoyevsky, might argue that handing out large fortunes to authors may not even benefit writing. Fyodor Dostoyevsky, *Notes from the Underground*, *in* GREAT SHORT WORKS OF DOSTOYEVSKY 283 (1968). Expansive copyrights, on this understanding, would just "encourage the Spirit of writing for Money; which is a Disgrace to the Writer, and to his very Age." ROSE, *supra* note 81, at 104 (citation omitted). Hiding one's literary talents, meanwhile, might be said to be its own punishment, which there is no need to deter by offering a legal incentive to write and publish books.

376. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (quoting Letter from Samuel Johnson to James Boswell, April 5, 1776, *in* JAMES BOSWELL, LIFE OF SAMUEL JOHNSON, LL.D. 302 (Robert Maynard Hutchins eds. et al., William Benton 1952) (1791)). Even for those inclining to agree with Dr. Johnson's adage, it may not be clear that copyright law is the best way of dangling the hope of money before aspiring authors. *See, e.g.*, Michelle Boldrin & David K. Levine, *The Economics of Ideas and Intellectual Property*, 102 PROC. OF THE NAT. ACAD. OF SCIENCES 1252, 1256 (2005) ("We suggest that insofar as it is desirable for the government to provide extra incentives for invention and creation, this is not best done through grants of monopoly, but rather through proven mechanisms such as subsidies, prizes, or monopoly regulated through mandatory licensing.").

377. *Cf.* Mark 6:4-9 ("Jesus said to them, 'A prophet is not without honor, except in his own country, and among his own relatives, and in his own house. . . .' He commanded them that they should take nothing for their journey, except a staff only: no bread, no wallet, no money in their purse, but to wear sandals, and not put on two tunics").

378. Arthur Schopenhauer, *On Books and Reading*, *in* THE ESSAYS OF ARTHUR SCHOPENHAUER; RELIGION, A DIALOGUE, ETC. (T. Bailey Saunders trans., 3d ed. 2004) (1891), *available at* http://etext.library.adelaide.edu.au/s/schopenhauer/arthur/religion/chapter3.html. Conversely, those who write "for the mere purpose of making money or procuring places" may produce "bad books, those rank weeds of literature, which draw nourishment from the corn and choke it." *Id.*

Even if the digital libraries of the future did not always pay authors as much as they were accustomed to earning, might they not rekindle a pure love for writing in the cause of disinterested enlightenment? In fact, if they deemphasized the profit motive, might not these digital libraries encourage authors to transcend "the narrow circle of the ideas which happen to prevail in their time," and write instead for "those great minds of all times and countries, who o'ertop the rest of humanity . . . ."?[379]

Finally, might the generativity of the Internet, which ignites and may eventually extinguish many projects like Google Book Search, ultimately change our very understanding of books and authorship? The idea of the author developed in Europe as a way of grasping the authenticity, originality, and responsibility of a writer in and for what he or she wrote.[380] It limited the "cancerous and dangerous proliferation" of meanings that printing made possible, pinning them down in the interests of state power, religious dogma, private property, and the cultural norms of an industrializing society.[381] Phonograph recording, radio performance, motion picture exhibition, and television broadcast began to break down the distinctions between the work and its reader, enveloping the listener or watcher in a series of experiences that seem as much a part of his or her own life as the distinct "work" of an "author."[382] Where print technology presupposed an author and his or her public as "separate individuals walking around with separate, fixed points of view," broadcast and recorded media seemed to envision a mass audience laughing and crying as one.[383] As electronic media collapsed the

379. *Id.* *See also* 21 CONG. REC. 4136 (1890) ("Does anybody believe that Gibbon wrote his immortal work, The Decline and Fall of the Roman Empire, for the pounds and shillings he could wring from the pockets of the unromantic workmen of England, or that our own Emerson was only inspired by the dream of the golden eagles the works of his brain could command?").

380. *See* Michel Foucault, *What Is an Author?*, *in* THE FOUCAULT READER 118-19 (Paul Rabinow ed., 1984); ROSE, *supra* note 81, at 22 ("The first English affirmation of any kind of authorial interest . . . was primarily intended to hold authors and printers responsible for books deemed libelous, seditious, or blasphemous . . . .").

381. Foucault, *supra* note 380, at 118-19.

382. *See* MCLUHAN & FIORE, *supra* note 81, at 16 ("Electric circuitry has overthrown the regime of 'time' and 'space' and pours upon us instantly and continuously the concerns of all other men."); *id.* at 18 ("Today's television child is attuned to up-to-the-minute 'adult' news—inflation, rioting, war, taxes, crime, bathing beauties—and is bewildered when he enteres the nineteenth-century environment [of books] that still characterizes the educational establishment where information is scarce but ordered and structured by fragmented, classified patterns, subjects, and schedules."); *id.* at 123 ("As new technologies come into play, people are less and less convinced of the importance of self-expression. Teamwork succeeds private effort."); *id.* at 125 ("In television, images are projected at you. You are the screen. The images wrap around you. You are the vanishing point."); *id.* at 145 ("Electric circuitry . . . [means that the] contained, the distinct, the separate—our Western legacy—are being replaced by the flowing, the unified, the fused.").

383. *Id.* at 68.

distance between author and public, they also dissolved the lines between works; after witnessing television's ascendancy over books, literary critics began to doubt whether books had "distinct boundaries" from one other, or from "the culture that produced [them] or the succeeding cultures that have appropriated and . . . reproduced" them.[384]

Digital copying technology, like xerography and home taping, make the consumer feel like part of the process of germinating and editing content (rip, mix, burn) that authors and publishers formerly claimed as their proper domain.[385] The Internet is a "giant copying machine," among other things, which makes computer hard drives hooked up to it into adaptable libraries of user-edited snippets of language, sound, color,

---

384. ROSE, *supra* note 81, at 3; *see, e.g.*, ROLAND BARTHES & STEPHEN HEATH, IMAGE, MUSIC, TEXT 143-46 (1977) (1968) (a book "is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash, . . . a tissue of quotations drawn from the innumerable centres of culture"); Jacques Derrida, *Afterword: Toward an Ethic of Discussion, in* LIMITED INC 148 (Samuel Weber & Jeffrey Mehlman trans., 1988) (1977) ("What I call 'text' implies all the structures called 'real,' 'economic,' 'historical,' socio-institutional, in short: all possible referents. Another way of recalling once again that 'there is nothing outside the text.'"); JACQUES DERRIDA, OF GRAMMATOLOGY 158 (Gayatri Chakravorty Spivak trans., 1976) (1967) ("[R]eading . . . cannot legitimately transgress the text towards something other than it, toward a referent (a reality that is metaphysical, historical, psychobiographical, etc. . . .) or toward a signified outside the text whose content could take place, could have taken place outside of language. . . . There is nothing outside the text."); TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 138 (1983) ("[E]very word, phrase or segment is a reworking of other writings which precede or surround the individual work," so "[t]here is no such thing as literary 'originality,' no such thing as the 'first' literary work: all literature is 'intertextual.'"); STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 43, 94 (1980) (arguing that "the objectivity of the text is an illusion," and that reading is "constitutive" of "meaningful patterns" in books); MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE 99 (A.M. Sheridan Smith trans., 1972) (1969) ("[T]here is . . . no free, neutral, independent statement; but a statement always belongs to a series or a whole, always plays a role among other statements, deriving support from them and distinguishing itself from them; it is always part of a network of statements . . . ."); Julia Kristeva, *Word, Dialogue and Novel, in* THE KRISTEVA READER 37 (Toril Moi ed., 1986) (1966) ("Any text is constructed as a mosaic of quotations; any text is the absorption and transformation of another . . . ."); JONATHAN CULLER, ON DECONSTRUCTION 79-80, 175 (1982) (arguing that "all readings are misreadings," and that "[t]he best a reader can achieve is a strong misreading"); *see generally* William Irwin, *Against Intertextuality*, 28 PHIL. & LITERATURE 227 (2004). While the development of these theories of authorship and texts post-dated the popularization of television in the 1950s, Nietzchean perspectivism anticipated them by regarding "new names" as the source of "new things," and every event as an interpretation of sorts. *See* Jean Granier, *Nietzsche's Conception of Chaos, in* THE NEW NIETZSCHE 135, 140 (David B. Allison ed., 1992) (1977); Jean Granier, *Perspectivism and Interpretation, in* THE NEW NIETZSCHE, *supra*, at 190, 192-93; *see also* Peter A. Alces, *On Discovering Doctrine: "Justice" in Contract Agreement*, 83 WASH. U. L.Q. 471, 519 (2005) ("'There is only a perspective seeing, . . . [so] the more eyes, various eyes we are able to use for the same thing, the more complete will be our 'concept' of the thing, our 'objectivity. . . .'") (quoting FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 92, 119 (Keith Ansell-Pearson ed., Carol Diethe trans., 1994) (1887)).

385. *See* MCLUHAN & FIORE, *supra* note 81, at 123.

and executable code.[386] As the leisurely reading of books is increasingly accompanied by the clicking down and along endless paths of hyperlinked snippets that technology like Google Book Search serves up, something may be recalled of humanity's patterns of thought prior to the invention of writing, in an "acoustic space: boundless, directionless, horizonless . . . ."[387] Could a searchable digital library of all the books ever published, and then some, revive this preliterate tendency to roam freely among words and ideas?[388]

386. Gary Chapman, *Copyright Bill Would Infringe on the Internet's Real Promise*, L.A. TIMES, May 20, 1996, *available at* http://www.utexas.edu/lbj/21cp/Copyright.html; Jon Katz, *Hysteria Over Freewheeling Net Blinds People to the Beauty of Truly Free Expression*, FREEDOM FORUM FIRST AMENDMENT CENTER, May 26, 2000, *available at* http://www.freedomforum.org/templates/document.asp?documentID=12576.

387. MCLUHAN & FIORE, *supra* note 81, at 48.

388. *Cf.* ROSE, *supra* note 81, at 1; John Updike, *The End of Authorship*, N.Y. TIMES BOOK REV., June 25, 2006, at 27 ("In imagining a huge, virtually infinite wordstream accessed by search engines and populated by teeming, promiscuous word snippets stripped of credited authorship, are we not depriving the written word of its old-fashioned function[s] of . . . accountability and intimacy?"). Assuming, that is, that the Internet's generativity survives attempts to legalize discrimination against Internet content that is incompatible with the business models of the telecommunications companies over whose networks Internet traffic must sometimes go. *See* Letter from Coal. of Broadband Users and Innovators, to Michael K. Powell et al., Fed. Commc'ns Comm'n (Nov. 18, 2002), http://www.itaa.org/isec/docs/itaa111802cbui.pdf (discussing concerns shared by Amazon, Apple, eBay, Microsoft, and Yahoo!, among other firms, that Internet users' "ability to . . . reach desired Internet destinations" will be compromised by "impediments imposed by transmission network providers," which may "encumber relationships between their customers and destinations on the network"); *see also* Lawrence Lessig, *The Internet Under Siege*, FOREIGN POL'Y, Nov. 1, 2001, *available at* http://www.lessig.org/content/columns/foreignpolicy1.pdf#search=%22The%20Internet%20Under%20Siege%20lessig%22 (expressing similar concerns); Robert B. Reich, *The War of Internet Democracy*, AM. PROSPECT, May 10, 2006, *available at* http://www.prospect.org/web/page.ww?section=root&name=ViewWeb &articleId=11487 (similar).