

iTunes for Authors, or Napster for Books?: Copyright and Antitrust Implications of the Publishing Industry's Campaign against Google Book Search

Hannibal Travis, Assistant Professor of Law, Florida International University College of Law

I. Introduction.

Google plans to digitize the contents of five of the world's biggest libraries into a keyword-searchable database. Publishers and many authors allege that this is 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 create an innovative book marketing platform featuring searchable 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 for the rapid searching for and previewing of relevant passages from books a development that the law should encourage, not burden or restrain.

II. What Is Google Book Search?

Google Print for Publishers

- 0. Permission-based or "opt-in" system with publishers, coupled with right of exclusion or "opt-out" from system at any time
- 0. Depending on publisher deal, allows browsing about two pages before and after a search result, with additional limits on multiple searches or pages previewed per book
- 0. Google logs its users' page views to enforce aggregate browsing limits. Users must obtain a Google Account and sign in so that the pages they've viewed can be tracked.
- 0. Users are not allowed to copy, save, or print from their Internet browsers.
- 0. 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.
- 0. "Users may also see contextually targeted Google AdWords ads.... Publishers will receive a share of the revenue generated from ads appearing on their content."

Google Print for Libraries

- 0. Permission secured from libraries, but not from publishers or authors, so Google scans all the books the library allows (all the books at Michigan, only public domain books from Oxford and N.Y. Public Library, select collections from Stanford and Harvard).
- 0. The library gets to keep a digital copy of all the books that it let Google scan.
- 0. Negotiations with publishers broke down after Google rejected suggestion that it secure individualized permission or exclude every book published since 1967 with an ISBN, whether in-print or out-of-print, so only out-of-print books without ISBN numbers could be included absent the individualized permission of both the author and publisher.
- 0. Unlike Apple's iTunes or Amazon's "search inside the book" feature, Google aims to include all the world's books unless their authors or publishers specifically request exclusion, rather than obtaining permission from copyright holders one by one to provide previews or searchability. This enables Google to provide more targeted user-initiated sampling of copyrighted books, rather than publisher-selected excerpts.
- 0. Google offered copyright holders until November 1, 2005 to opt out. It also apparently indemnified its library partners against copyright judgments.

Google Print for Authors

- 0. Google invites authors with valid International Standard Book Numbers (ISBNs) to submit books to Google Book Search. ISBNs are only sold in blocks of ten (for \$250 plus).
- 0. May raise Wikipedia-like questions regarding credibility, qualifications (whether a writing is a "book" based on length, format, etc.), and violation of tort/ IP law.
- 0. Once signed up, authors receive reports on page views, ad clicks, and purchases.
- 0. "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 you expressly permit it...."

- . *Google Print Display Interface*
 - 0. Google Search Engine: enables pinpoint searches by author, title, and keyword, and integrates text of scanned books with Web search.
 - 0. Google Book Search display: for copyrighted books, users who preview a copyrighted book will only perceive a few-sentence-long “snippet” of text absent further authorization;
 - 0. No copying or printing allowed for copyrighted books.
 - 0. Public domain books: usually full-text searchable and viewable, but sometimes there isn’t – a chilling effect of copyright law?
- . *Risk of Hacking*
 - 0. Google is confident that its system is hacker-proof.
 - 0. Publishers and the Authors Guild are not yet persuaded.
 - 0. One publisher asked, ““What happens if a disgruntled Google employee walks out the door with 200,000 book files?””
 - 0. Secondary Liability for Infringement by Hackers? Doug Lichtman has suggested that Google could be liable for it, under principles announced in the *Grokster* decision.

III. The Internet-Based Marketing of Experience Goods

- . *The Paradox of Experience Good Marketing*
 - 0. The paradox is that consumers may be unable or unwilling to purchase many products without experiencing them first.
 - 0. The quality and value of an experience good may be ascertainable to a consumer only after purchase. Unlike “search” goods, qualities or characteristics of experience goods may not be ascertainable “by inspection without the necessity of use.”
 - 0. Sellers need to exclude consumers from experiencing many products in order to make purchases necessary.
- . *Market Solutions to the Paradox*
 - 0. Pre-Internet: browsing at point of sale or exhibition, broadcast and print advertising, reputation and branding, expert reviews/directories, polling, word of mouth
 - 0. Internet-Based: browsing (amazon.com), advertising (aol.com), expert reviews (nytimes.com), online directories (imdb.com), consumer reviews (epinions.com), etc.
 - 0. Problems with Market Solutions: misleading descriptions, listings, or ads; free-riding on prior reputations or reputations of other similar works or producers, economic ties between reviewers and producers of works being reviewed, incompleteness of directories, etc.
- . *Fair Use: Legal Shelter for Market Solutions to the Paradox*
 - 1. 18th Century 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 or account, abridged version, or translation from prose to verse or into another language.¹
 - 2. 19th Century doctrine of “fair use” allowed reviewers to publish “extracts sufficient to show the merits or demerits of the work,” but not to “supersede the original book”²
 - 0. The Copyright Act of 1976 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

¹ Newbery’s Case, (1773) 98 Eng. Rep. 913 (Ch.) (extracts of novel published in abridged version); Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270, 271 (Ch.) (extracts of novel published in magazine); Gyles v. Wilcox, (1740) 26 Eng. Rep. 489, 27 Eng. Rep. 682 (Ch.) (extracts of legal treatise published in abridged version); Millar v. Taylor, (1769) 98 Eng. Rep. 201 (K.B.) (translations into verse or a foreign language, imitations, and abridgments); Burnett v. Chetwood, (1720) 35 Eng. Rep. 1008, 1009 (Ch.) (translation); see also Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853); Story v. Holcombe, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847); Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 34 PEPPERDINE L.R. 761, 814-16 & nn. 333-339 (2006) (summarizing fair abridgment law in 18th century English and 19th century American cases)

² Lawrence v. Dana, 15 F. Cas. 26, 59-61 (C.C.D. Mass. 1869); see Story v. Holcombe, 23 F. Cases 171, 173 (C.C.D. Ohio 1847); Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841); Gray v. Russell, 10 F. Cas. 1035, 1038-39 (C.C.D. Mass. 1839).

infringement of copyright.” Congress declined to “freeze the doctrine in the statute, especially during a period of rapid technological change.”

III. The Google Book Search Copyright Litigation

. *Authors’ Guild Action*

0. The Authors’ Guild’s putative class action was filed in September 2005 in New York.
0. The Authors Guild filed as “Associational Plaintiff” representing 8,000 published authors: claims “associational standing” to seek injunctive relief “on behalf of its members.”
0. Three authors as named plaintiffs: fiction, nonfiction, and poetry/criticism
0. Named plaintiffs’ works were published by Oxford University Press, Knopf, and Viking Press – question of whether authors reserved any rights
3. Alleged imminent infringement of copyrights in millions of books – 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.”³

. *The Publishers’ Joint Action*

0. Filed in October 2005 in New York by counsel at Debevoise & Plimpton, counsel for New York Times Co. in Writers Guild/Tasini litigation over LexisNexis rights.
0. Publisher plaintiffs include Simon & Schuster (Scribner), Penguin (Viking), McGraw-Hill, Pearson Education (Prentice-Hall), and Wiley.
4. Publishers claim 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.⁴
5. Doubtful that publishers secured electronic rights in contracts entered into before a certain date when electronic publishing became relevant.⁵

. *The Web Precedents*

0. Web sites like Free Republic and MP3Board claimed to be facilitating user sampling of experience goods such as articles and songs.
6. Courts found that despite significant levels of “sampling,” distribution of complete digital copies of articles or songs by a commercial Web site was not a fair use.⁶
7. Distribution of “excerpts” or “substantial portions” of articles by a commercial Web site that did not directly profit from the distribution was also not a fair use.⁷
0. Even in absence of evidence of revenue lost, 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.”
0. 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 relevant.

. *The Sony Case*

8. A broad reading of the *Sony* case is that the creators of new technologies capable of infringing uses should not be held liable for infringements by users unless technology is not capable of substantial noninfringing uses in the future. “Congress has the constitutional authority and the institutional ability to accommodate ... major technological innovations [which] alter the market for copyrighted materials.”⁸
0. A narrow reading would be that *Sony* represents a “staple article of commerce doctrine” that

³ Pls.’ Compl., ¶ 20, *The Authors Guild et al. v. Google Inc.*, No. 05-CV-8136 (S.D.N.Y. compl. filed Sept. 20, 2005).

⁴ Pls.’ Compl., ¶¶ 13-17, *McGraw-Hill et al. v. Google Inc.*, No. 05-CV-8881 (S.D.N.Y. compl. filed Oct. 19, 2005).

⁵ See Eriq Gardner, *Online Disputes Expose Publishers’ Copyright Vulnerability*, IP LAW & BUSINESS, Mar. 6, 2006 (F. Scott Fitzgerald and Ernest Hemingway are among many “authors who signed contracts before the digital age”).

⁶ See, e.g., *Arista Records, Inc. v. Mp3Board, Inc.*, 2002 Copr .L. Dec. ¶ 28,483, 2002 WL 1997918, at *12-13 (S.D.N.Y. 2002).

⁷ *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2D (BNA) 1453, 1469-71 (C.D. Cal. 2000).

⁸ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

does not apply where a new technology involves commercial copying, or principal use to reproduce or distribute or display copyrighted works to unauthorized persons, or works which public has not been invited to view free of charge, or a service requiring ongoing and direct contact with consumers as opposed to release of product into stream of commerce.

. *The Napster Case*

9. Napster was not entitled to *Sony* defense because it had knowledge of infringing uses.⁹

0. Napster's fair use defense was rejected based on expert reports showing a decline in sales of music in college markets, as well as threat to other existing and planned markets.

10. Harm to market may include: (1) "harm to an established market," and (2) "right to develop alternative markets"¹⁰ Court found that "[h]aving digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads," and "[a]ny allegedly positive impact ... on plaintiffs' prior market in no way frees defendant to usurp a further market...."¹¹

. *The Grokster Case*

11. Ninth Circuit found triable issue as to whether "decentralized" peer-to-peer (p2p) file sharing software was capable of substantial noninfringing uses, including of works in the public domain or whose owners authorized p2p use.¹²

12. The opinion of the Supreme Court did not address fair use, but in their concurrence several justices dismissed the evidence of fair use as resting on "mostly anecdotal evidence, ... of authorized ... works or public domain works" shared through p2p networks.¹³

II. A Preliminary Fair Use Analysis of Google Book Search

. *Purpose and Character of the Use*

13. Making entire libraries of books searchable in an online index and facilitating book previews and purchases is a genuinely new information-disseminating and transformative use of the books.¹⁴

14. Google Book Search also 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.'"¹⁵

0. Google Book Search is not a "mere" reproduction or distribution of works in a new medium like Napster or Grokster, or in other words an exploitative or consumptive use.

15. The transformative character of Google Book Search outweighs the commercial nature of Google as an enterprise, which would otherwise count against its fair use argument.¹⁶

⁹ See *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1020-21 (9th Cir. 2001).

¹⁰ *Id.* at 1017 (citing *Free Republic*, 54 U.S.P.Q.2D (BNA) at 1469-71, for harm demonstrated where plaintiff threatened "[defendants] are attempting to exploit the market for viewing their articles online").

¹¹ *Id.* (quoting *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y.), *certification denied*, 2000 U.S. Dist. LEXIS 7439, 2000 WL 710056 (S.D.N.Y. June 1, 2000).

¹² See *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161-62 (9th Cir. 2004).

¹³ *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2785 (Ginsburg, J., joined by Rehnquist, C.J., and Kennedy, J., concurring).

¹⁴ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) (reproducing copyrighted works for purpose of "improving access to information 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."); *New York Times v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (S.D.N.Y. 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").

¹⁵ *Kelly*, 336 F.3d at 820 (quoting *Sony Computer Entmt. Am., Inc. v. Bleem*, 214 F.3d 1022, 1027 (9th Cir. 2000)).

¹⁶ 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); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1120 (D. Nev. 2006) ("The fact that Google is a commercial operation is of

. *Nature of the Copyrighted Work*

0. All of the works scanned into Google Book Search from library collections have already been published, a fact which counts in favor of Google's fair use argument.

16. Some of the copyrighted works are highly creative fictional and poetic works, a fact which may count against a fair use argument.¹⁷

17. Perhaps the "vast majority"¹⁸ will be nonfiction and factual works, and many will address controversial public issues, and this should count strongly in favor of fair use.¹⁹

. *Amount and Substantiality of Portions Taken*

0. Google is copying all the books from participating library collections into Google Book Search in their entirety.

18. This factor may not count significantly against its fair use argument, however, because the scanning was necessary to provide the indexing and search functionality.²⁰

. *Effect on the Market for the Works*

19. Authors and publishers fear that with Google Book Search they "would lose the whole academic market."²¹ They want Google to license excerpts of copyrighted works, pointing to existing markets for doing so (Copyright Clearance Center, Amazon's preview deals).

20. But 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 "plus a few sentences of [a] search term in context."²²

21. Few if any printed books have suffered lost sales because Google has made them searchable. Penn State Press saw sales of print-on-demand books triple after availability on Google Book Search.²³ Overall, book sales were 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.²⁴ This indicates a fair use.²⁵

only minor relevance in the fair use analysis. The transformative purpose of Google's use is considerably more important, and ... means the first factor of the analysis weighs heavily in favor of a fair use finding."); *Fin. Information v. Moody's Investors Serv.*, Copy. L. Rep. (CCH) ¶ 25,617, 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... [I]n making available [much] needed financial information, [it] is performing a public function which clearly brings it within the ambit of the first requirement for fair use protection.").

¹⁷ See, e.g., *Campbell*, 510 U.S. at 586.

¹⁸ Jonathan Band, *The Google Print Library Project: A Copyright Analysis*, E-COMMERCE LAW & POLICY (Aug. 2005), available at <http://www.policybandwidth.com/doc/googleprint.pdf>. But see Elisabeth Hanratty, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 10, ¶ 22-23 (Apr. 2005), <http://www.law.duke.edu/journals/dltr/articles/2005dltr0010.html>.

¹⁹ See *Campbell*, 510 U.S. at 586; *Kelly*, 336 F.3d at 820; *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. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983)); *New York Times*, 434 F. Supp. at 221 (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").

²⁰ See *Kelly*, 336 F.3d at 821; *Perfect 10*, 416 F. Supp. 2d at 850.

²¹ Milliot, *supra* note __, at 12.

²² *Id.*

²³ Google Inc., *Google Book Search: Partner Program: Google Book Search Case Study* (2005), at <https://books.google.com/partner/pennstate>.

²⁴ In February 2006, total publishing sales were up by 6.6 percent compared to the year previously. 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. Publ's, *Books [sic] Sales Continue to Rise in February* (April 13, 2006), at <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=323>. Google debuted its Google Print by 2004, and resumed scanning in November 2005 after suspending it for a time due to publishers' and authors' concerns over alleged copyright infringement. See John Markoff & Edward Wyatt, *Google Is Adding Major Libraries to Its Database*, N.Y. TIMES (Dec. 14, 2004), at A1; 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.

²⁵ See *Kelly*, 336 F.3d at 821 (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

22. The 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.²⁶

0. Google Book Search can prevent systematic failures in the market for books, most notably disappointing purchases, or sales that should never have been made, and missed opportunities, or sales that would have benefited producers and consumers of books alike had information flowed better between them.

0. Like the samples available on iTunes and similar digital music services, Google Book Search will enable Internet users to preview works about which they lack adequate information to make a purchasing decision. As Google's CEO Eric Schmidt wrote in *The Wall Street Journal*, "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.

0. The benefits of this 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 author of a book on the Persian Gulf War, who saw sales jump considerably when it became searchable on Google.

0. Google is therefore creating a highly efficient marketing platform for authors. As an efficient method for bringing information about the contents and quality of books to the attention of consumers, Google Book Search deserves the protection of the fair use doctrine.

• *An Opportunity to Remedy Ten Distortions of Fair Use Law*

0. Courts should stop treating fair use as an affirmative defense rather than a limitation on rights, which is what the Copyright Act of 1976 confirmed that it is.

0. Courts should no longer require defendants to prove a negative, i.e. lack of harm.

0. Courts should not ignore the Copyright Act's statutory endorsements of educational uses such as teaching, scholarship, and research, in deciding fair use cases.

0. Courts should not treat commercial sales of works as equivalent to transformative indexes, search engines, or directories of information about copyrighted material that is not itself for sale.

0. Courts should no longer treat *de minimis* infringements as equivalent to more serious ones.

0. Courts should not disregard an infringer's conferring of benefits on the plaintiff as irrelevant.

0. Courts should stop elevating effect on the market for works into a privileged factor.

0. Courts should not treat actual and merely potential harms to the market as equivalent.

0. Courts should not regard conduct as widespread when it is not.

0. Courts should no longer potential licensing markets as an adequate alternative to fair use.

• *Why the Google Book Search Copyright Litigation Is Ultimately Not About Google*

0. Google represents the nation's aspirations for the Internet as a whole, because it simply owns the most advanced (non-classified) technology for the searching and indexing of information.

23. 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.²⁷

24. Stanford permitted Google's founders to utilize hardware bought for federally-funded digital

F.2d 1345, 1357-58 (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).

²⁶ Wendy Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1606-8 (1982).

²⁷ See Lawrence Page, Sergey Brin, Rajeev Motwani, & Terry Winograd, *The PageRank Citation Ranking: Bringing Order to the Web*, 6, 12 (Jan. 29, 1998), at <http://dbpubs.stanford.edu/pub/showDoc.Fulltext?lang=en&doc=1999-66&format=pdf&compression=&name=1999-66.pdf>; Sergey Brin & Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, 30 WWW7 / COMPUTER NETWORKS 107, § 7 (1998), at <http://dbpubs.stanford.edu/pub/showDoc.Fulltext?lang=en&doc=1998-8&format=pdf&compression=&name=1998-8.pdf>; Jefferson Graham, *Google's Library Plan 'A Huge Help'*, USA TODAY, Dec. 15, 2004, at 3B.

library research to copy and index the Internet in order to create superior search technology.²⁸
 25. The U.S. government subsidized a great deal of the research and development that led to the Internet and the Web, so that these tools would be used to provide digital libraries to the public.²⁹
 0. The question, as in *Sony*, is whether the capability of a technology to infringe copyrights means that that copyright holders should control the technology, or whether they should simply be compensated for actual harms in the absence of substantial noninfringing uses.

III. Antitrust Implications of the Google Book Search Copyright Litigation

. *A Joint Venture Alternative to Google Book Search?*

0. If there is there is to be any alternative to Google Book Search, it will likely to be, at least initially, a joint venture between publishers. HarperCollins has already introduced its own version of Google Book Search using its backlist. Is an industry-wide joint venture a likely consequence of a Google defeat?

0. The music and motion picture industries developed joint ventures to exploit digital previewing and download markets while pursuing litigation against technology companies such as Napster, MP3.com, Grokster, KaZaa, and Scour.

0. These joint ventures, including Musicnet, Pressplay, Movies.com, and Movielink, have raised antitrust questions.

. *Potential Economic Benefits of Joint Ventures*

0. Pooling resources can leverage economies of scale in research and development, production, and distribution.

0. Consolidating projects into one entity can lower transaction and communications costs, and mitigate “hold out” power.

26. Sharing technology, intellectual property, branding, experience, investments, and responsibility for failures can combine unique advantages of several firms in one enterprise, and minimize financial and legal risks.³⁰

. *Tensions Between Joint Ventures and Antitrust Laws*

0. Copyrights may confer power over some firms or coalitions of firms to control prices or exclude competition. Joint ventures may aggregate such concentrations of power formerly spread across several different firms.

27. Sherman Act (§ 1): An agreement or combination between competitors to stabilize the price of a product is a per se violation of the antitrust laws.³¹ Even without an “explicit agreement . . . , joint and collaborative action [that] was pervasive in the initiation, execution, and fulfillment of the plan” to eliminate “discounters” of a product sold by a number of joint venturers may constitute a conspiracy in restraint of trade in violation of the Sherman Act.³²

28. Sherman Act (§ 2): A violation of the Sherman Act may occur where a dominant entity, or a conspiracy of multiple entities, acquires control over copyrights that added to those already owned by the entity or conspiracy will create monopoly power,³³ uses copyrights to dominate an

²⁸ See JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* 78 (2005).

²⁹ See 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” and enable citizens to “tap into vast electronic libraries”); Laurent Belsie, *US Poised for New Telecommunications Era*, CHRISTIAN SCI. MONITOR, Dec. 19, 1991, at 1 (funding bill signed by President Bush); William J. Broad, *Clinton to Promote High Technology, With Gore in Charge*, N.Y. TIMES, Nov. 10, 1992, at C1.

³⁰ 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).

³¹ See, e.g., *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).

³² *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966).

³³ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 172-75 (1938); *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981); *In re Independent Serv. Orgs. Antitrust Litig.*, 964 F. Supp. 1454, 1459 (D. Kan. 1997).

industry, or boycotts competitors absent a legitimate purpose for doing so.³⁴

29. Clayton Act (§ 7): “Just as a merger eliminates actual competition, [a] joint venture may well foreclose any prospect of competition ... in the relevant ... market.”³⁵

· *Agreements Not to Compete on Price and Quality in Digital Markets*

0. Parallel Pricing of Digital Music

30. Like collective licensing organizations before them,³⁶ digital music joint ventures may have facilitated collusion as to pricing and availability of music.

31. Prior to 2001, the major record labels did not license any digital download services. Then the labels formed two joint ventures, MusicNet (Warner Music Group, EMI Group, BMG Music and RealNetworks) and Pressplay (Sony Music and Universal Music).³⁷

32. 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.³⁸

33. In 2004, however, the court having jurisdiction over the *Napster* case found that the music labels “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.”³⁹

34. Napster’s expert, antitrust economist Dr. Roger Noll of Stanford University, opined that MusicNet and Pressplay “facilitate collusive activity” such as “retail price-coordination.”⁴⁰

35. Recently, the judge hearing the multimillion dollar case against a venture capital firm that funded Napster [Hummer Winblad Venture Partners] 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 music pricing.⁴¹

36. The ruling comes as Apple’s iTunes, which controls 80% of the U.S. online music market, reached an agreement with the four major labels to continue to charge a “uniform” price of 99 cents per song, regardless of artist, song quality, or date of release.⁴²

37. The Justice Department and Attorney General of the State of New York have commenced new investigations into whether the major labels “colluded to set prices for digital music” via “‘most-favored nation’ clauses,” which restrict price and quality competition for customers, and consumers have filed a class action alleging price-fixing.⁴³

· *Suppression of Output and Diversity in the Market for Digital Films*

38. In August 2001, five major movie studios accounting for half of the 2004 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.”⁴⁴ The studios were Sony, MGM, Paramount, Warner Bros., and Universal. In September 2001, two other major studios, Disney and Fox, formed Movies.com as a joint venture to deliver films over the Net. They dropped the deal after the

³⁴ See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 479 n.29, 483 n.32 (1992).

³⁵ *United States v. Penn-Olin Corp.*, 378 U.S. 158 (1964).

³⁶ See *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9-14 (1979) (discussing history of antitrust violations by collective music licensing organizations).

³⁷ Curt Anderson, *U.S. Ends Online Music Antitrust Probe*, ASSOCIATED PRESS, Dec. 23, 2003, at <http://www.cnn.com/2003/TECH/ptech/12/24/antitrust.onlinemusic.ap/index.html>.

³⁸ See *id.*; Ethan Smith, *Big Music Firms Dealt a Legal Blow*, WALL. ST. J., Apr. 24, 2006, at B4.

³⁹ *In re Napster, Inc. Copyright Litig.*, No. MDL 00-1369 MHP, No. C 99-5183 MHP, 2004 U.S. Dist. LEXIS 7236, *53, 58 (N.D. Cal. Feb. 22, 2004).

⁴⁰ *Id.* at *57.

⁴¹ See Smith, *supra* note 38, at B4.

⁴² Joshua Chaffin & Kevin Allison, *Apple Sets Tune for Pricing of Song Downloads*, FIN. TIMES/MSNBC.COM, May 2, 2006, available at <http://www.msnbc.msn.com/id/12582164/>.

⁴³ Smith, *supra* note 38, at B4.

⁴⁴ U.S. Dep’t of Justice, *Justice Department Closes Antitrust Investigation into the Movielink Movies-On-Demand Joint Venture* (June 3, 2004), at http://www.usdoj.gov/opa/pr/2004/June/04_at_388.htm.

Department of Justice began an investigation, and Fox later joined Movielink.⁴⁵

39. The Justice Department's investigation focused on whether the major studios could use the Movielink and Movies.com joint ventures to exclude competitors from the digital distribution market and/or "to drive up fees charged to consumers."⁴⁶

40. The Justice Department ended its inquiry in 2004, finding little evidence that "Movielink had adversely affected competition through increased prices or decreased output."⁴⁷

41. Sticking to a 24-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.⁴⁸ 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.⁴⁹

42. Intertainer, which had digital distribution deals with studios, has filed an antitrust suit alleging that Movielink, Sony, Time Warner, and Universal have used Movielink to fix licensing fees and reduce output.⁵⁰ The case was set to go to trial in 2006.⁵¹

0. Although piracy of motion pictures is a significant concern, it will not excuse price-coordination in the digital download market. Price-fixing in digital delivery of motion pictures could raise prices by tens of millions in a \$1 billion per year business by 2010.

Will Publishers Form a Joint Venture Like MusicNet or Movielink?

0. May delay public access to searchable digital libraries compared to Google's model.

0. May facilitate agreements not to compete on quality/accessibility of e-books and previews, or pacts stabilizing e-book / preview prices or pegging them to print prices.

0. Authors' representatives have raised questions as to when publishers even own sufficient electronic rights for such projects – are specific grants of electronic rights needed or will "all book rights" clauses, new technological use clauses, or "promotional rights" clauses do?

0. On the other hand, a publishing joint venture might enable the pooling of resources so as to minimize the risks to publishers of liability to authors, "hold-outs," and financial disasters.

43. 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.

⁴⁵ See *id.*; Terence Keegan, *Digital Distribution*, DAILY VARIETY, April 25, 2006, at B13.

⁴⁶ 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).

⁴⁷ U.S. Dep't of Justice, *Justice Department Closes Antitrust Investigation into the Movielink Movies-On-Demand Joint Venture* (June 3, 2004), at http://www.usdoj.gov/atr/public/press_releases/2004/203932.htm.

⁴⁸ Phil Hall, *Movies From The Web; Will Downloaded Films Take Off? Forecasters Are Pessimistic*, HARTFORD COURANT (CONNECTICUT), Apr. 27, 2006, at D3; Movielink, *Movielink Launches First U.S. Electronic Download-To-Own Service for Major Motion Pictures, Marking Important Milestone in Digital Distribution of Movies* (Apr. 3, 2006), at <http://www.movielink.com/store/web/about/pressReleaseDetail.jsp?id=230002900006>.

⁴⁹ Kevin J. Delaney & Bobby White, *Choices Expand for Watching TV on Your PC*, WALL ST. J., Feb. 22, 2006, at D1.

⁵⁰ Michael Stroud & Brad King, *Movie Confab Hears Ugly 'C' Word*, WIRED NEWS, Sept. 24, 2002, at <http://www.wired.com/news/digiwood/0,1412,55346,00.html>; Phineas Lambert, *Movielink Hunkers Down*, DAILY DEAL, July 25, 2005, at <http://www.thedeal.com/NASApp/cs/ContentServer?pagename=TheDeal/StArticle&c=TDDArticle&cid=1121176501761&rp=10>.

⁵¹ See Intertainer, *Intertainer Announces That Federal Judge Rules Warner Bros. CEO Barry Meyer Must Give Deposition in Price-Fixing and Anti-Trust Law Suit*, BUSINESS WIRE, Aug. 16, 2005, at <http://www.tmcnet.com/usubmit/2005/aug/1173863.htm>.