

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

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Abstract

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 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 for the rapid searching for and previewing of relevant passages from books a development that the law should encourage, not burden or restrain.

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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, such as book publishing, music recording, and motion picture production. If Google is stopped, Internet companies may be prevented from facilitating the more 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. This leads to systematic market failures, most notably disappointing purchases, or media sales that should never have been made, and missed opportunities, or 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, for example by newspaper reviews of books, browsing in bookstores, radio broadcast of musical recordings, exhibition of trailers in movie theaters and on television, and the like.

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 photographs, music, and movies over the Internet. But because most of the early digital copies of copyrighted informational and cultural works made available over the Internet were housed on central servers, they were vulnerable to demands from copyright holders that Internet service providers deny users the ability to access the works. This prompted the invention of peer-to-peer file-sharing software such as Napster, Scour, and Kazaa, which allowed Internet users to create their own decentralized networks for sampling first musical works, then all manner of 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.¹ 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, and may reduce the incentive to produce new works.²

In recent years, due to the resolution of several important copyright cases in favor of copyright owners and against software and Internet service providers, the legality of diverse Internet technologies for sampling experience goods has been thrown into severe doubt. 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 licensed Napster service, and Fairplay, used in Apple Computer's popular iTunes service and iPod device.³ 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.⁴ Apple's iTunes also remains restricted to basically the same catalogue as Napster and the other digital music services licensed by the recording industry.⁵

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 a purchasing decision. Google Book Search surpasses existing technology for sampling experience goods in two

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

² See, e.g., COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 28-51, 129-33 (2000); INFORMATION 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>.

³ See Deborah Tussey, *Music at the Edge of Chaos: A Complex Systems Perspective on File Sharing*, 37 LOYOLA UNIV. OF CHICAGO 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, 41-48 (2004), at <http://cyber.law.harvard.edu/home/uploads/370/iTunesWhitePaper0604.pdf>).

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

⁵ 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).

critical respects. First, unlike 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, as Apple and Amazon have done (at least from labels and publishers).⁶ Second, Google enables user-initiated sampling of copyrighted books, rather than publisher-selected sample chapters or pages (or the 30-second free music samples available on iTunes). 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.

These distinctions between Google Book Search and the Amazon and iTunes models have led the Author's Guild and the Association of American Publishers to institute copyright litigation against Google, which they have coupled with a broad public relations effort to tarnish the company's reputation. Publishers have cast Google's library digitization scheme as just like the old Napster, only for books, a way to make a fast buck by the unauthorized distribution of millions of copyrighted works.⁷ The Authors Guild seeks class action status for its suit, 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.

This article will contend that the courts will best serve intellectual property and antitrust policy by ruling 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, 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 printed books, or of e-books for that matter. Although

⁶ 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* note ____.

⁷ See, e.g., Andrew Richard 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.").

Google's previews will be more inclusive and efficient than Apple's 30-second clips and Amazon's limited search functionality, they will rarely substitute for buying the entire book. Unlike Napster, which was widely used to download songs and entire albums for free, users accessing listings of library books on 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, along with bibliographic information about the book. 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. In fact, if any criticism of Google Book Search would be justifiable, it would be that copyright law unduly hampered its development and utility.⁸

Rather than supplanting demand for books, Google will drive readers to bookstores where a book relevant to a search term is sold, using prominent links placed alongside 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.⁹

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 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. This is the same

⁸ See Andrew Richard Albanese, *The Social Life of Books*, LIBR. J. May 15, 2006, <http://www.libraryjournal.com/article/CA6332156.html> (Ben Vershbow, a fellow at the Institute for the Future of the Book, said: "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."). Google's access controls, including the disabling of printing, saving, and copying functionality, were probably necessary concessions to copyright 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.

⁹ See Joseph Menn, *Antitrust Officials Said to Be Watching Napster Suit*, L.A. TIMES, May 31, 2006, available at <http://www.latimes.com/business/custom/cotown/la-fi-napster31may31,1,736165.story?coll=la-headlines-business-enter>.

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 a rogue employee, user hack, or other security breach 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. And 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 allow copyright owners to exercise a roving veto power over advances in Internet technology. 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. 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. This demand for exclusive control over the marketing and sale of their products by third parties raises troubling antitrust questions in addition to testing 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 tried to a jury. Google's case provides an opening for the courts to establish that copyright owners' prerogative to act in a concerted way to block efforts that provide consumers with more information about their products is not unlimited, but will be guarded strictly against overreaching.

II. What Is Google Book Search?

Google Book Search combines two principal programs. One is based on agreements between Google and publishers, and the other on agreements between Google and research libraries. The first used to be called Google Print for Publishers, and the other Google Print for Libraries. Both are now called Google Book Search to make clear that Google is not helping users print out documents.¹⁰ For convenience, I will initially use the old names when distinguishing between the two, but thereafter refer to Google Print for Libraries and Google Book Search interchangeably.

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 or "opt-out" from 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

¹⁰ See Jen Grant, *Judging Book Search by Its Cover* (Nov. 17, 2005), at <http://googleblog.blogspot.com/2005/11/judging-book-search-by-its-cover.html>.

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've viewed.¹¹ Users are not allowed to copy, save, or print from their Internet browsers.¹² 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.¹³ Google serves up "contextually targeted" advertising with the book previews, from which the publishers of each book receive the majority share of revenues.¹⁴

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 7 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 Stanford and Harvard libraries.¹⁵

Google Print for Libraries relies upon the same basic functionality as Google Print for Publishers, i.e. the Google search engine and the Google Book Search display interface.¹⁶ The search engine enables pinpoint inquiries by author, title, date of publication, and keyword; it also

¹¹ See Google Inc., *Google Book Search: Common Questions* (2005), at <http://books.google.com/googlebooks/common.html>.

¹² Google Inc., *Google Book Search: Partner Program* (2005), at http://books.google.com/intl/en_US/googlebooks/publisher.html.

¹³ See *id.*

¹⁴ *Id.*; Kevin Kelly, *Scan This Book!*, N.Y. TIMES, May 14, 2006, available at http://www.nytimes.com/2006/05/14/magazine/14publishing.html?_r=1&ei=5087%0A&en=e5359b8aa2308790&ex=1147838400&pagewanted=print&oref=slogin.

¹⁵ 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* (2006), <http://www.bodley.ox.ac.uk/google/>; 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 Univ. Libraries, *The Harvard-Google Project* (2006), http://hul.harvard.edu/news/2004_1214_faq.html; *Stanford Google Library Project: FAQ* (2006), http://www.sul.stanford.edu/about_sulair/special_projects/google_sulair_project_faq.html.

¹⁶ Google has patents on a great deal of its search technology. See U.S. Patent No. 6,526,440 (Google assigned patent on "[r]anking search results by reranking the results based on local inter-connectivity"); U.S. Patent No. 6,725,259 (similar); U.S. Patent No. 6,839,702 (Google assigned patent on "[s]ystems and methods for highlighting search results").

integrates results from scanned books with the results of Web searches.¹⁷ The display interface disables copying, printing, or saving excerpts from copyrighted works, as well as from some public domain works.¹⁸ Absent further authorization, moreover, users who preview a copyrighted book will only perceive a few-sentence-long “snippet” of text.¹⁹ 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.²⁰

Google has already added thousands of public domain books to Google Print for Libraries.²¹ There should be free access to all of these public domain books, but sometimes there isn't; for example, Google offers only snippets of some congressional hearings published prior to 1923, and therefore doubly in the public domain.²² This may be a chilling effect of copyright law, which may have prompted Google to err on the side of caution by giving more books the “snippet” treatment than the law actually requires.²³

Google has announced plans to scan 15 million books by 2010.²⁴ This would be nearly half

¹⁷ See, e.g., Google, *Google Book Search* (2006), at http://books.google.com/books?q=inauthor%3Ashakespeare+and+date%3A1500-1923&as_brr=0; Google, *Google Book Search* (2006), at http://books.google.com/books?q=intitle%3Acopyright&as_brr=0; Google, *Google Book Search* (2006), at http://books.google.com/books?q=copyright+date%3A1900-1923&as_brr=0.

¹⁸ See John Markoff & Edward Wyatt, *Google Is Adding Major Libraries To Its Database*, N.Y. TIMES, Dec. 14, 2004, at A1.

¹⁹ See *id.*; Hiawatha Bray, *Google to Index Works at Harvard, Other Major Libraries*, BOSTON GLOBE, Dec. 14, 2004, at A1; Heidi Benson, *A Man's Vision: World Library Online*, S.F. CHRON., Nov. 22, 2005, at A1.

²⁰ 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 65 million books, artifacts, and multimedia materials; it is “created and maintained collectively by more than 9,000 member[s]” of the OCLC Online Computer Library Center. OCLC, *WorldCat* (2006), at <http://www.oclc.org/worldcat/>; OCLC, *About OCLC* (2006), at <http://www.oclc.org/about/default.htm>.

²¹ A couple of recent searches retrieved listings for 119 full-text public domain books with “Lincoln” in the title, and 29 with “copyright” in the title. See Google Inc., *Google Book Search (Beta)* (2006), at <http://books.google.com/books?q=intitle:copyright+date:1500-1923&lr=&sa=N&start=30>; Google Inc., *Google Book Search (Beta)* (2006), at <http://books.google.com/books?lr=&q=intitle:lincoln+date:1500-1923&sa=N&start=120>.

²² See, e.g., U.S. Congress, House Cmte. on Patents, *Hearings on Amendment of Copyright Act* (1919), at <http://books.google.com/books?vid=0flyKkCM3zEBM5j0S9kw6g0&id=ZtBNorZvW8C&q=copyright+inauthor:congress+date:1500-1922&dq=copyright+inauthor:congress+date:1500-1922&pgis=1>.

²³ Google asks its users to inform it if it has given the “snippet” treatment to a book that should be in the public domain. See Google, *Google Book Search Help* (2006), <http://books.google.com/googlebooks/help.html>.

²⁴ See *Online Books: Several Initiatives for Virtual Libraries Without Offending Publishers*, TECH. EUROPE, Nov. 15, 2005, available at

of all the books ever published, by one count.²⁵ Google is reportedly investing \$200 million in scanning books, and has also apparently indemnified its library partners against “any costs arising from lawsuits.”²⁶ Each library gets to keep digital copy of all the books in its collection that it let Google scan.²⁷

Authorization for Google to scan these books is based on permission secured from libraries, but 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 Numbers (ISBN), whether in-print or out-of-print. 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.²⁸

Google 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 33 million pages and published by 190 distinct firms.²⁹ Amazon believes that

<http://www.highbeam.com/doc/1G1:138841562/ONLINE+BOOKS%7eC%7e+SEVERAL+INITIATIVES+FOR+VIRTUAL+LIBRARIES+WITHOUT+OFFENDING+PUBLISHERS.html?refid=SEO>.

²⁵ See Kelly, *supra* note __. This count may not be accurate, however, because other estimates have placed the number of out-of-print books alone at 100 to 200 million titles. See Michael Rollins, *Amazon.com Rewriting Book on How We Shop*, SUNDAY 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

²⁶ See BATTELLE, *supra* note __, at 237. See also Charles Arthur, *As Long as Google Sells Ads, Publishers Be Damned*, THE GUARDIAN (U.K.), Feb. 23, 2006, at 6; Burt Helm, *A New Page in Google’s Books Fight*, BUSINESS WEEK ONLINE, June 22, 2005.

²⁷ See David Vise, *The Google Story*, WASHINGTONPOST.COM, Nov. 15, 2005, at <http://www.washingtonpost.com/wp-dyn/content/discussion/2005/11/09/DI2005110901098.html>.

²⁸ Burt Helm, *Google’s Escalating Book Battle*, BUSINESS WEEK ONLINE, Oct. 20, 2005, http://www.businessweek.com/technology/content/oct2005/tc20051020_802225.htm; Albanese, *supra* note __, at 17.

²⁹ See 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 & n. 28 (citing Matt Marshall & Charles Matthews, *Amazon’s New Search Finds Kudos*, SAN JOSE MERCURY NEWS, Oct. 25, 2003, at C1).

“Search Inside the Book” is simply one of the various “limited promotional activities” that publishers frequently obtain the rights to conduct as part of their license of the 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.³⁰ When Apple launched its iTunes music store in 2003, it also included a 30-second preview for “each song” on the site, then only about one-tenth as many as it has today.³¹

Both Amazon’s and Apple’s previews seem 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 whatever collections Oxford, Harvard, Stanford and the New York Public Library end up authorizing for scanning and online search. This will make it 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.³² Google offered copyright holders until November 1, 2005 to opt out of the program.³³

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 Monica Soto, *Will Amazon Deliver on Its Profit Promise?*, SEATTLE TIMES, Oct. 11, 2001, at C1; David D. Kirkpatrick, *Amazon Plan Would Allow Searching Texts of Many Books*, N.Y. TIMES, July 21, 2003, at C1.

³⁰ See Amazon.com, *Search Inside™ Participation Agreement* (2006), at <http://www.amazon.com/exec/obidos/tg/feature/-/530169/104-3731123-5417551>.

³¹ Richard Siklos, *Apple Tunes Out the Pirates*, SUNDAY TELEGRAPH (U.K.), May 11, 2003, at 06. 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 two 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 Computer, Inc., *Apple – iTunes – Overview* (2006), at <http://www.apple.com/itunes/overview/>.

³² 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.

³³ See *id.*

Before the deadline expired, both the Authors Guild and several publishers had filed suit.³⁴

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 ... on page views, ad clicks, as well as ‘Buy the Book’ clicks.”³⁵ Google promises to 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 you expressly permit it...”³⁶

Google’s strategy to reach out beyond libraries directly to authors is vaguely reminiscent of the attempts by Napster and Grokster to bolster their fair use and substantial noninfringing use defenses by inviting famous musicians and unsigned bands to authorize the free downloading of their work from these services.³⁷ ISBNs are only sold in blocks of ten (for \$250 plus), however, making signing up much more costly than was signing up for Napster.³⁸ The opening up of Google

³⁴ See Edward Wyatt, *U.S. Publishers Sue Google Over Searchable Library*, N.Y. TIMES, Oct. 21, 2005, at Finance-13; Hillel Italie, *Publishers Also Sue Google Over Scanning Plan*, ASSOCIATED PRESS/VENTURA COUNTY (CALIFORNIA) STAR, Oct. 20, 2005, at 1.

³⁵ Google Inc., *Google Book Search: Authors: Common Questions* (2005), at http://books.google.com/googlebooks/author_faq.html#8.

³⁶ *Id.*

³⁷ Napster and Grokster struggled in basing their fair use claims on authorized uses because they facilitated the unauthorized trading of other copyrighted works in their entirety, which Google Book Search most definitely does not. 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, at <http://online.wsj.com/public/resources/documents/SB973734583104397441.htm>. But the district court hearing the Napster case 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. *Id.* 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.” *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2789 (2004) (Breyer, J., joined by O’Connor, J., and Stevens, J., concurring) (citations omitted). In their concurring opinion, Justices Ginsburg and Kennedy and then-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).

³⁸ See R.R. Bowker LLC, *Application for an ISBN Publisher Prefix* (2006), at <http://www.isbn.org/standards/home/isbn/us/printable/isbn.asp>. Napster, by contrast, suggested that artists create a profile, but the process of making music available over the service required no expense or any actions other than placing their music in the files containing their MP3 music collection. See Napster, *Artist Resources* (2000), at <http://web.archive.org/web/20000815072224/artist.napster.com/resources.html>

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 split a 10-pack of ISBNs with other authors) may also raise Wikipedia-like questions regarding whether Google's book search results are credible, even qualify as book results given the brevity or format of some of the materials contributed, or violate tort and/or intellectual property laws.³⁹

D. Possibility of Hacking

Google is confident that its book search functionality is hacker-proof, but many publishers and the Authors Guild are not yet persuaded.⁴⁰ 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.”⁴¹ Another publisher asked, “[c]redit card information was supposed to be safe, and look what’s happened with that.... What happens if a disgruntled Google employee walks out the door with 200,000 book files?”⁴² Doug Lichtman has suggested that Google could be liable for the distribution of copies of books it scanned by hackers, under

³⁹ See Lauren Barack, *A Wiki War on Vandals*, SCHOOL LIBR. J., May 1, 2006, at 24 (arguing that “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.”); *Wikipedia’s Search for the Truth*, FIN. TIMES (U.K.), Dec. 23, 2005, at 12 (suggesting that there are “probably countless ... 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 *Copyvio*, WIKTIONARY (Nov. 23, 2005), at <http://en.wiktionary.org/wiki/copyvio>; Wikisource, *Copyvio Archives* (2005), at http://wikisource.org/wiki/Wikisource:Copyvio_archives_%282005%29.

⁴⁰ See, e.g., Burt Helm, *A Google Project Pains Publishers*, BUSINESS WEEK ONLINE, May 23, 2005, 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.”).

⁴¹ Burt Helm & Hardy Green, *Google This: ‘Copyright Law,’* BUSINESS WEEK, June 6, 2005, at 42.

⁴² Jim Milliot, *Authors, Google Square Off*, PUBLISHERS WEEKLY, Sept. 26, 2005, at 12.

principles announced in the *Grokster* decision discussed below.⁴³

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, as at least one publishing executive seems to have admitted.⁴⁴ Various bloggers have claimed to have discovered ways to hack Google's system to permit more browsing and saving of books that Google allows, but more than a year into the operation of Google Book Search, no major vulnerabilities resulting in leaks of many books have been reported.⁴⁵ Second, physical books, e-books authorized by the publishing industry, and services like iTunes or Amazon are also subject to methods of hacking that might be even easier than getting into Google's databases or circumventing its page limits.⁴⁶ Third, if new technologies are going to be banned because they are subject to hacking, we would have to get rid of banks, credit cards, university databases, vinyl records, cassette tapes, VHS tapes, compact discs, DVDs, Apple's iTunes, streaming audio and video, and most Microsoft software.⁴⁷ A more appropriate solution would be to give the victims of such hacking, when it has

⁴³ Bloomberg News, *Suit Over Google Library*, NEWSDAY (NEW YORK), Oct. 20, 2005, at A47.

⁴⁴ See *Coming to a Computer Near You*, WASH. TIMES, Aug. 19, 2005, at A20 ("Google says that its databases are very secure...."); Markoff & Wyatt, *supra* note __ at A1 ("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.'"). As the President of the University of Michigan pledged: "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." Sue Coleman, *Google, the Khmer Rouge and the Public Good* (Feb. 6, 2006), at <http://www.law.pitt.edu/madison/downloads/coleman.pdf>.

⁴⁵ See Greg Duffy, *Google's Cookie and Hacking Google Print* (Mar. 4, 2005), at <http://web.archive.org/web/20050310014555/http://www.gregduffy.com/2005/03/04/1109964561920.html>; Ben Smyth, *Google Print - Hack It*, HCI BLOG (May 17, 2005), at <http://bensmyth.blogspot.com/2005/05/google-print-hack-it.html>.

⁴⁶ See Rachel Deahl, *The Looming Threat of Book Piracy*, 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").

⁴⁷ See, e.g., *Rights Clearinghouse' Is Goal for Book Search Online, But Path Murky*, WASH. INTERNET DAILY, Feb. 27, 2006 (citing "[d]ata breaches at credit card firms, universities and financial institutions"); *High Cost of Data Loss* INFORMATIONWEEK March 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."); 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); Admiresoft, *Super Mp3 Recorder* (2006), at

actually occurred, some form of monetary relief or class action remedy.⁴⁸

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.⁴⁹ 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 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”⁵⁰

Unlike “search” goods, experience goods may not disclose their qualities or characteristics “by inspection without the necessity of use.”⁵¹ Because their external appearance announces their quality level and characteristics, “the advertising of search goods mainly informs—gives

<http://www.supermp3recorder.com> (advertising software enabling conversion of cassette tapes to MP3); Bryan Bergeron, *Creating a Digital Library*, 6 MEDGENMED. 52 (2004), available at <http://www.pubmedcentral.nih.gov/articlerender.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); Videora Holdings, *Videora Converter: Conversion Guides* (2006), at <http://www.videora.com/en-us/Converter/guides.html#1000> (describing how to “rip” DVDs into digital files); John Borland, *iTunes hack disabled by Apple*, CNET NEWS.COM, Mar. 21, 2005, at http://news.zdnet.com/2100-9588_22-5628616.html (describing successful hack of iTunes copyright protection); JOSHUA PAUL, DIGITAL VIDEO HACKS: TIPS & TOOLS FOR SHOOTING, EDITING, AND SHARING, ch. 8 (2005), available at <http://www.oreilly.com/catalog/digitalvideohks/chapter/hack90.pdf> (describing how to record streaming video); 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).

⁴⁸ See *High Cost of Data Loss*, *supra* note __ (describing class action valued at \$7 to \$9 million filed against health care firm whose lax security procedures allowed sensitive patient data to be stolen); *Cyber Pivacy Rules Challenge Employers; Regulations Prompt More Lawsuits*, BUS. INS., Nov. 28, 2005, at 11 (describing 20 class action suits filed against firm 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”).

⁴⁹ See B. JOSEPH PINE & JAMES H. GILMORE, *THE EXPERIENCE ECONOMY: WORK IS THEATRE & EVERY BUSINESS A STAGE* 1-2, 8-12, 171-72 (1999).

⁵⁰ ADAM SMITH, *THE WEALTH OF NATIONS*, bk. II, ch. 3 (1776), at <http://www.readprint.com/chapter-8621/Adam-Smith>.

⁵¹ Carl Shapiro, *Optimal Pricing of Experience Goods*, 14 BELL J. OF ECON. 497, 497 (1983). See also Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312-13 (1970).

information about price, quality, and location of suppliers....”⁵² 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.”⁵³

Experience goods are less often standardized than search goods.⁵⁴ They are more often personalized, given the undesirability to most consumers of most experience goods of an informational or entertaining nature.⁵⁵ Individually distinct tastes render most experience goods unsuited to most consumers, and generate continual uncertainty about purchasing decisions. This characteristic of experience goods has been called their “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.⁵⁶ 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 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.”⁵⁷

⁵² MICHAEL PARKIN, MICROECONOMICS 468 (2d ed. 1994).

⁵³ *Id.* Cigarettes and alcoholic beverages are sometimes called experience goods, but for most consumers, who have already smoked and drunk the brand they are consuming once again, perhaps for the thousandth time, their favorite brand may be a search good. *See id.*

⁵⁴ *See* PINE & GILMORE, *supra* note __, AT 1-10, 71-72, 82, 86, 92.

⁵⁵ *See id.*

⁵⁶ *See id.* at 1-27.

⁵⁷ 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, ed., 2001), *available at*

As one-time purchases, books, recorded music, movie admissions, DVDs, and software are particularly impervious to consumer attempts to ascertain their quality.⁵⁸ 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.⁵⁹ The legislative history of the 1976 Copyright Act also acknowledged the frequent “impossibility of determining a work’s value until it has been exploited.”⁶⁰ 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.”⁶¹

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 of enabling 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.⁶² With the development of the Internet, these

<http://www.sims.berkeley.edu/~hal/Papers/japan/japan.html#SECTION00040000000000000000>.

⁵⁸ 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, 96-7 (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.”).

⁵⁹ See Ramnath K. Chellappab & Shivendu Shivendu, *Managing Piracy: Pricing and Sampling Strategies for Digital Experience Goods in Vertically Segmented Markets*, 16 INFO. SYS. RES. 400 (2005) (citing H. Cheng, R. Sims & H. Teegeen, *To Purchase or to Pirate Software: An Empirical Study*, 13 J. OF MGMT. INFO. SYS. 49 (1997)).

⁶⁰ H.R. Rep. 94-1476, 1976 U.S.C.C.A.N. 5659, 5740

⁶¹ Varian, *supra* note ____.

⁶² See, e.g., 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); J. Liebeskind & R. P. Rumelt, *Markets for Experience Goods with Performance Uncertainty*, 20 RAND J. OF ECON. 601 (1989); F. S. Zufryden, *Linking Advertising to Box Office Performance of New Film Releases - A Marketing Planning Model*, 36 J. OF ADVERT. RES. 29 (1996); J. Eliashberg and S. M. Shugan, *Film Critics: Influencers or Predictors*, 61 J. OF MKTG. 68 (1997); C. Avery, P. Resnick, & R. Zeckhauser, *The Market for Evaluations*, 89 AM. ECON. REV. 564 (1999); CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 5 (1999); Varian, *supra* note ____; C. Dellarocas, *The Digitization of Word-of-Mouth: Promise and Challenges of Online Reputation Mechanisms*, 49 MGMT. SCI. 1407 (2003); J. Chevalier & D. Mayzlin, *The Effect of Word of Mouth on Sales: Online Book Reviews*, NATIONAL BUREAU OF ECONOMIC RESEARCH (2003), at <http://www.nber.org/papers/w10148.pdf>; C. Dellarocas, *The Impact of Online Opinion Forums on Competition and Marketing Strategies* (Sept. 10, 2003), at <http://scholar.google.com/scholar?hl=en&lr>

methods of marketing experience goods were translated into digital form. Most notably, the browsing and sampling of experience goods has evolved with technologies like Amazon's "Search Inside the Book" and 30-second iTunes 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 Bibliofind.

These market solutions do not adequately resolve 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.⁶³ 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. 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 perhaps blurbs possibly taken out of context.⁶⁴ Publishers and other producers of experience goods also have a significant incentive

=&q=cache:Joc3iy1jrXgJ:catalyst.gsm.uci.edu/tools/dl_public.cat%3Fyear%3D2003%26file_id%3D127%26type%3Dcal%26name%3Donlineopinionforums-0910.pdf; Vogel, *supra* note ___ at 126; 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 (survey results indicating that consumers gather information about movies from friends, trailers, (newspaper) critics, television, and radio).

⁶³ Book sales are up dramatically over the past decade, *see infra* note ___, with American publishers releasing more books than ever in 2004, and British publishers releasing even more than American ones in 2005. *See* Agence France-Presse, *Britain Published More New Books in 2005 than US*, YAHOO! NEWS, May 12, 2006, at http://news.yahoo.com/s/afp/20060512/lf_afp/afplifestyleusbritain. 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 REPORT, July 2005, 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.*

⁶⁴ *See* Daniel Akst, *The Problem in Aisle One*, WALL ST. J., Aug. 16, 2002, available at <http://www.opinionjournal.com/taste/?id=110002143> ("the book business ... publishes something like 122,000 titles annually and promotes almost none of them more than minimally."); Daniel A. Akerberg, *Empirically Distinguishing Informative and Prestige Effects of Advertising*, 32 RAND J. OF ECON. 316 (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)).

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.⁶⁵ Expert reviews are often unhelpful due to lack of detail, made-up blurbs, and financial inducements to so-called “junket journalists” to write favorable reviews.⁶⁶

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.”⁶⁷ 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.”⁶⁸ 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.⁶⁹ Given these realities, too many works appealing to minority tastes are “castoff artifact[s], forever exiled, beyond the reach of the reader,

⁶⁵ 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.

⁶⁶ See Sarah Gardner, MARKETPLACE, June 4, 2001, available at 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* 20, EXPRESSO PREPRINT SERIES, WORKING PAPER 750 (Aug. 26, 2005), 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”) (quoting David Shaw, *Thumbs Up or Down on Movie Critics?*, L.A. TIMES, Mar. 20, 1999, at A1).

⁶⁷ Ellen 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).

⁶⁸ *Id.*

⁶⁹ See Akst, *supra* note __; David D. Kirkpatrick, *Report to the Authors Guild Midlist Books Study Committee* (2000), at <http://www.authorsguild.org/miscfiles/midlist.pdf> (describing how influence of chain-store marketing practices may reduce diversity of books published).

[the] authorial voice condemned to silence and all potential earning power gone.”⁷⁰

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 permission of their owners to be essential to promoting the economic and cultural purposes of copyright “to promote the Progress of Science and useful Arts,”⁷¹ or, in the English formulation, to promote the “Encouragement of Learning.”⁷² Prior to the enactment of the first copyright statute, the Statute of Anne,⁷³ 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 fictional and nonfictional works.⁷⁴ Bibles and other religious texts, which constituted 40 percent of English book production in the latter half of the sixteenth century, were often subject to patents such as that

⁷⁰ Google, *Thoughts from Authors* (2006), at <http://books.google.com/googlebooks/newsviews/author.html> (quoting Warren Adler, author of several books published by Ballantine Books, among others).

⁷¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., Art. I, § 8, cl. 8).

⁷² 8 Anne, ch. 19, § 1 (1710).

⁷³ See HARRY HUNTT 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 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE*, ch. 1 (2000), at <http://digital-law-online.info/patry/patry2.html>; MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 18-21 (1993); GILLIAN DAVIES, *COPYRIGHT AND THE PUBLIC INTEREST* passim (1994). 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 MESSAGE: AN INVENTORY OF EFFECTS* 122 (1967). “The invention of printing did away with anonymity, fostering ideas of literary fame and the habit of considering intellectual effort as private property. Mechanical multiples of the same text created a public—a reading public.” *Id.* at 122

⁷⁴ See BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 3 (Iris C. Geik et al., eds. 2005); NIGEL WHEALE, *WRITING AND SOCIETY: LITERARY, PRINT, AND POLITICS IN BRITAIN 1590-1660*, at 56 (1999); LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 5-6 (1968); JOHN FEATHER, *A HISTORY OF BRITISH PUBLISHING* 26-7, 35-6, 41-4 (2d ed. 2006); 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) (“privileges 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).

granted to the Queen's Printer, Christopher Barker, in 1577.⁷⁵ 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.⁷⁶

Despite some latitude for fair use, royal printing patents were not enforceable without substantial resistance. Printers flouted a “growing number” of them by printing protected works without authorization, resulting in intervention by the Court of Star Chamber.⁷⁷ 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.⁷⁸ Queen Mary chartered the Company of Stationers in 1557 to police the licensing system, and Queen Elizabeth confirmed their charter upon taking power.⁷⁹ 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

⁷⁵ See WHEALE, *supra* note __, at 56; David L. Gants, *A Quantitative Analysis of the London Book Trade 1614-1618*, 55 STUDIES IN BIBLIOGRAPHY 185, 201 (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.”).

⁷⁶ As the highest common-law court in England remarked in a later case, the King’s “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, 209 (C.C.E.D. Pa. 1853) (No. 13,514) (quoting *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769) (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. COMMONWEALTH OF AUSTRALIA, COPYRIGHT LAW REVIEW COMMITTEE, CROWN COPYRIGHT ch. 6, n. 84 (Apr. 29, 2005), <http://www.ag.gov.au/agd/WWW/clrHome.nsf/AllDocs/6684C5EDF392D498CA256FF00005B923?OpenDocument> (citing *Universities of Oxford and Cambridge v Eyre & Spottiswoode Ltd* [1964] 1 Ch. 736, 3 All E.R. 289); Roger Syn, (*c*) *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 10-12 (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).

⁷⁷ Gants, *supra* note __, at 201.

⁷⁸ See KAPLAN, *supra* note __ at 3.

⁷⁹ See FEATHER, *supra* note __ at 33.

printing.⁸⁰ 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.⁸¹

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.”⁸² Such outrage at “[r]oyal abuse of the Crown’s prerogative to grant monopoly” proved to be “a major cause of the English Civil War” which started in 1641.⁸³ After a second successful revolution against the English Crown, Parliament abolished licensing and the Stationers’ Company monopoly on printing,⁸⁴ and erected in their place the Statute of Anne, known as the first copyright statute.⁸⁵

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

⁸⁰ See *id.* at 36.

⁸¹ See H. G. ALDIS 18 THE CAMBRIDGE HISTORY OF ENGLISH AND AMERICAN LITERATURE § 3 (1907-21), available at <http://www.bartleby.com/214/1803.html> (summarizing Star Chamber decrees of 1566 and 1586); ROSE, *supra* note __, at 31 (summarizing the Licensing Act of 1662).

⁸² WHEALE, *supra* note __, at 61.

⁸³ Br. for Pet’rs, 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, 5 THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, 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 from 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.”).

⁸⁴ See J. D. Forrest, *Anti-Monopoly Legislation in the United States*, 1 AM. J. OF SOCIOLOGY 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).

⁸⁵ See JOHN FEATHER, PUBLISHING, PIRACY, AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 49-51 (1994); JULIET GARDINER & NEIL WEINBORN, THE COLUMBIA COMPANION TO BRITISH HISTORY 648 (1997). 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 __, at 18 (quoting ANDRE KEREVER, THE ACHIEVEMENTS AND FUTURE DEVELOPMENT OF EUROPEAN LEGAL CULTURE 131 (1990)).

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).⁸⁶ After the Statute of Anne, the Stationers’ Company was just another copyright owner, and for the most part not a monopolist or roving censor.⁸⁷ Authorship, rather than guild membership, became the ultimate source and foundation of exclusive rights in books.⁸⁸

The Framers of the American Constitution limited the copyright power of Congress in order to preclude the revival of “oppressive [publishing] monopolies.”⁸⁹ 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 to achieve it.”⁹⁰ 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.⁹¹ 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.⁹² Congress had to confine copyrights to a “short” duration so that books would return to uninhibited public use,

⁸⁶ 8 Anne, ch. 19, § 1 (1710). See ROSE, *supra* note __, 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 __, at 811 (Statute of Anne “vested rights ‘in the Authors, or Purchasers, of such Copies,’ rather than in ‘the rightful Owners’ of ‘Books’”) (footnotes omitted) (quoting 8 Anne ch. 19 (1710) and ROSE, *supra* at 47).

⁸⁷ See CYPRIAN BLAGDEN, *THE STATIONERS’ COMPANY: A HISTORY, 1403-1959*, at 176 (1960).

⁸⁸ See ROSE, *supra* note __, at 4, 14.

⁸⁹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 164 (1975).

⁹⁰ *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) (“The congressional power ... is ... limited to that which accomplishes the stated purpose of promoting ‘the Progress of Science and useful Arts.’”) (Stevens, J.) (quoting U.S. Const., Art. I, § 8, cl. 8).

⁹¹ See James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.*, in *WRITINGS* 756 (Jack Rakove ed., 1999) (under U.S. Constitution, monopolies restricted to “the authors of Books, and of useful inventions”). Madison believed that monopolies were “justly classed as among the greatest nuisances 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 (2002) (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in *THE REPUBLIC OF LETTERS* 566 (James Morton Smith ed., 1995)).

⁹² See, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

transformation, and low-cost reprinting after a “short interval” of monopolistic exploitation.⁹³

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.⁹⁴ The “English experience” prompted Madison and the other framers of the U.S. constitution to “exclude publishers from the copyright clause.”⁹⁵ 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.”⁹⁶ Courts have therefore declined to enforce copyrights in a way that would diminish the progress and broad dissemination of scientific, literary, and artistic works.⁹⁷

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 in being named an “Act for the Encouragement of Learning”; granting rights principally to authors

⁹³ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 557, at 402-03 (R. Rotunda & J. Nowak eds., 1987).

⁹⁴ See Marci 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 Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause* 6-8 (1999), available at http://www.cardozo.yu.edu/news_events/papers/5.pdf.

⁹⁵ L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 32-33 (1987).

⁹⁶ *Aiken*, 422 U.S. at 156. See also *Sony*, 464 U.S. at 429; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994).

⁹⁷ See, e.g., *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”). 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., *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); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 492-94 (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”); *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001) (refusing to countenance “misuse or over-extension” of trademark rights in ways that would unduly restrain competition); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33034 (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”).

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.⁹⁸ Until the late nineteenth century Congress also followed the lead of the Statute of Anne⁹⁹ in denying copyright protection to works of foreign origin, 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.¹⁰⁰

Fair use served, under both the Statute of Anne and the Copyright Act of 1790, as legal shelter for efforts to disseminate information about goods and other 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 or account, abridged version, or translation from prose to verse or into another language.¹⁰¹ In the mid-

⁹⁸ Act of May 21, 1790, 1st Cong., 2d Sess., 1 Stat. 124. *See also* *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 347 (1908). Today, the term of copyright stands at anywhere from 95 years to 70 years after the author’s death. *See Eldred v. Ashcroft*, 537 U.S. 186, 242-43 (2003) (Breyer, J., dissenting).

⁹⁹ 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....” 8 Anne, ch. 19, § 7 (1710). *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).

¹⁰⁰ *See* SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 61 (2003). The Copyright Act of 1790 went farther 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 21, 1790, § 5, 1st Cong., 2d Sess., 1 Stat. 124 (“[N]othing in this act shall be construed 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.”).

¹⁰¹ *Newbery’s Case*, (1773) 98 Eng. Rep. 913 (Ch.) (lawful to print extracts of novel in abridged version); *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); *Dodsley v. Kinnersley*, (1761) 27 Eng. Rep. 270, 271 (Ch.) (lawful to print extracts of novel in magazine); *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489, 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); *see also* *Story v. Holcombe*, 23 F. Cas. 171, 173-74 (C.C.D. Ohio 1847) (“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.”); *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853); 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 __, at 814-15 (same); Travis, *supra* note __, at 820-21 (same).

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”¹⁰² 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 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.”¹⁰³

The Copyright Act of 1976 reaffirmed American law’s exclusion from the scope of copyright of mere “comment” or “criticism” concerning a copyrighted work that serves to enhance, rather than detract, from its marketability.¹⁰⁴ It codified the fair use inquiry into four “factors,” as they came to be known,¹⁰⁵ 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.”¹⁰⁶ Congress set forth “general scope of the judicial doctrine of fair use” without

¹⁰² Lawrence v. Dana, 15 F. Cas. 26, 59-61 (C.C.D. Mass. 1869); *see also* 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).

¹⁰³ Folsom v. Marsh, 9 F. Cas. 342, 348-49 (C.C.D. Mass. 1841) (citations and internal quotation marks omitted). For a critique of this decision as retracting the generous right of fair abridgement as previously recognized, see Travis, *supra* note __, at 821-25, 846-51.

¹⁰⁴ 17 U.S.C. § 107 (1976). *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.”).

¹⁰⁵ 17 U.S.C. § 107 (1976) (“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.”).

¹⁰⁶ *Id.*

“freez[ing] the doctrine in the statute, especially during a period of rapid technological change.”¹⁰⁷

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, pleading an entitlement as an “Associational Plaintiff” representing 8,000 published authors to assert “associational standing” to seek injunctive relief “on behalf of its members.”¹⁰⁸ In addition to the Guild, three authors are named plaintiffs in the suit, representing three principal genres of writing: fiction, nonfiction, and poetry/criticism.¹⁰⁹ 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.¹¹⁰ (A successful copyright infringement action requires proof not only of unlawful copying, but also “ownership of a valid copyright.”¹¹¹) The suit alleges 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.”¹¹² In addition to injunctive relief, the suit requests that Google be forced to hand over its profits and/or pay statutory and/or actual damages.¹¹³

¹⁰⁷ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

¹⁰⁸ Pls.’ Compl., ¶ 15, *The Authors Guild et al. v. Google Inc.*, No. 05-CV-8136 (S.D.N.Y. compl. filed Sept. 20, 2005).

¹⁰⁹ *See id.* ¶¶ 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”).

¹¹⁰ *See id.*

¹¹¹ *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 327 (S.D.N.Y. 2005), *aff’d*, 2006 U.S. App. LEXIS 11593 (2d Cir. May 9, 2006).

¹¹² Pls.’ Compl., ¶ 20, *The Authors Guild et al. v. Google Inc.*, No. 05-CV-8136 (S.D.N.Y. compl. filed Sept. 20, 2005).

¹¹³ *See id.*, Prayer for Relief.

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 are seeking only injunctive and declaratory relief, rather than an injunction plus damages like the Authors Guild.¹¹⁴ The publisher plaintiffs include Simon & Schuster (Scribner), Penguin (Viking), McGraw-Hill, Pearson Education (Prentice-Hall), and Wiley.¹¹⁵ They are represented by Debevoise & Plimpton, which was also counsel for New York Times Co. in Writers Guild/Tasini litigation over LexisNexis rights.¹¹⁶ These 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.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ The courts hearing litigation brought against these

¹¹⁴ See Pls.' Compl., ¶ 1, McGraw-Hill et al. v. Google Inc., No. 05-CV-8881 (S.D.N.Y. compl. filed Oct. 19, 2005).

¹¹⁵ See *id.* ¶¶ 13-17.

¹¹⁶ See *id.* at 1; *Tasini v. New York Times Co.*, 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.

¹¹⁷ Pls.' Compl., ¶¶ 13-17, McGraw-Hill et al. v. Google Inc., No. 05-CV-8881 (S.D.N.Y. compl. filed Oct. 19, 2005).

¹¹⁸ See Eriq Gardner, *Online Disputes Expose Publishers' Copyright Vulnerability*, IP LAW & BUS., Mar. 6, 2006 (questioning whether Simon & Schuster's contracts with F. Scott Fitzgerald and 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”).

¹¹⁹ See, e.g., *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d (BNA) 1453, 71 (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’

sites by the major newspapers and record labels, respectively, found that despite significant levels of “sampling,” distribution of complete digital copies of articles or songs by these commercial Web site was not a fair use.¹²⁰ In the *Free Republic* case, the court relied in particular on the facts that the site distributed, without transformative commentary, “excerpts” or “substantial portions” of articles with the expectation of generating traffic that would result in advertising revenue, merchandise sales, marketable consumer data, donations, subscriptions, and “dues.”¹²¹ Even in absence of 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.”¹²² 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.¹²³

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

works”); Mem. of Points and Authorities in Supp. of Def.’s Mot. for Summ. Judg., at 16, *Arista Records, Inc. v. Mp3Board, Inc.* (S.D.N.Y. Aug. 29, 2002), <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.”).

¹²⁰ 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. Aug. 29, 2002); *Free Republic*, 54 U.S.P.Q.2d (BNA) at 1469-71.

¹²¹ *Free Republic*, 54 U.S.P.Q.2d (BNA) at 1469-71.

¹²² *Id.*

¹²³ *Id.*

owners of underinclusive copyright laws that allow infringement using new technologies.¹²⁴ On one reading of these precedents, because Internet search 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.”¹²⁵ Is there any support for this argument in legal principles articulated by *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.¹²⁶ Nevertheless, the Supreme Court has grafted such secondary liability onto the Copyright Act based on its view of what it “just.”¹²⁷ 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.¹²⁸ 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” or is “capable of substantial noninfringing uses.”¹²⁹

In Sony’s case, a principal noninfringing use of which the Betamax was capable was taping television programs to watch them 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

¹²⁴ 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>.

¹²⁵ *Id.*

¹²⁶ 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, 35 U. S. C. § 271(b), and further imposes liability on certain individuals labeled ‘contributory’ infringers, § 271(c).”).

¹²⁷ *Id.* at 435.

¹²⁸ *Id.* at 441.

¹²⁹ *Id.* at 443.

alternative.¹³⁰ 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.¹³¹ Therefore, the Court concluded that the movie studios had not come forward with evidence 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.¹³²

Since *Sony* was decided, owners of large copyright holdings have quarreled with technology companies and individuals making fair uses 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.¹³³ 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.”¹³⁴ 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, or its principal use is to reproduce or distribute or display copyrighted works to unauthorized persons, or it facilitates copying of works which the public has not been invited to view free of charge, or it involves a service requiring ongoing and direct contact with consumers as opposed to a release of a product

¹³⁰ *Id.* at 452-53.

¹³¹ *Id.* See also *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, 469 (C.D. Cal. 1979)).

¹³² *Id.* at 456.

¹³³ *Br. of Internet Amici (Cellular Telecommun. & Internet Ass’n, United States Telecom Ass’n, United States Internet Indus. Ass’n, AT&T Corp., Bellsouth Corp., MCI, Inc., Savvis Commun. Corp., SBC Internet Servs., Inc., Sun Microsystems, Inc., and Verizon Commun. Inc.) in Support of Affirmance*, at 7-8, *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480).

¹³⁴ *Sony*, 464 U.S. at 431.

into the stream of commerce.¹³⁵ 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.¹³⁶

2. The *Napster* case

Publishers accusingly compare Google Book Search to Napster’s permission-insensitive music index.¹³⁷ To a certain extent, Napster did conceive of itself 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 user’s computers.¹³⁸ 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.¹³⁹ “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.’”¹⁴⁰ Barry testified before Congress that Napster made lists of MP3s, but it neither created, copied, transferred, nor provided the technology for copying MP3s.¹⁴¹

When Napster was sued by several major record labels and owners of music publishing

¹³⁵ See, e.g., Br. for Pls./Appellees at 40-57, *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401, 00-16403), at <http://www.riaa.com/News/filings/pdf/napster/Napster09082000.pdf>; Br. of the National Ass’n of Broadcasters As Amicus Curiae in Support of Pet’rs, *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480); Br. of Amici Curiae Office of the Commissioner of Baseball, National Basketball Ass’n, National Football League, Professional Photographers of Am., Inc., Am. Soc. of Media Photographers, Inc., Ass’n of Am. Publishers, Inc., Ass’n of Am. University Presses, Producers Guild of Am., Inc., Graphic Artists Guild, Entertainment Software Ass’n, The Authors Guild, Inc., and the Independent Film & Television Alliance in Support of Pet’rs, *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480).

¹³⁶ See Br. of the Digital Media Association, NetCoalition, The Center for Democracy and Technology, and The Information Technology Ass’n of Am. as Amici Curiae in Support of Neither Party, at 1-14, 21-30, *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480).

¹³⁷ See, e.g., Lewis Smith, *Publishers Wrestle with Digital Era*, THE TIMES (U.K.), 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*, TECH. DAILY, Mar. 10, 2006 Vice President of government affairs at News Corp., which owns HarperCollins, stated that: “‘This is the Napster case all over again....’”

¹³⁸ See JOSEPH MENN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING’S NAPSTER 34 (2003).

¹³⁹ See *id.* at 35.

¹⁴⁰ BATTELLE, *supra* note __, at 172.

¹⁴¹ Testimony of Hank Barry, Chief Executive Officer, Napster, Inc. Before the Senate Judiciary Committee (July 11, 2000), available at http://judiciary.senate.gov/oldsite/7112000_hb.htm.

rights, it sought shelter under *Sony*'s substantial noninfringing use defense.¹⁴² The Ninth Circuit, however, held that Napster was not entitled to the defense because it had knowledge of infringing uses, other than constructive knowledge that its software was used to infringe music copyrights.¹⁴³ 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 threat to other existing and planned markets. 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 downloads.¹⁴⁴ 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,"¹⁴⁵ 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."¹⁴⁶

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

¹⁴² 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 technology," so 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." Br. in Opp. to Pls.' Motion for Preliminary Injunction, at 14, *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (No. 00-16401, No. 00-16403) (citing *Sony*, 480 F. Supp. at 438, and Expert Report of Peter S. Fader, Ph.D. ¶ 43, at 14). 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. ¶ 17, at 4-5 (citing Walter Mossberg, *Behind the Lawsuit: Napster Offers Model for Music Distribution*, WALL ST. J., May 11, 2000, at B1).

¹⁴³ See *Napster*, 239 F.3d at 1020-21.

¹⁴⁴ *Id.* at 1017 (citing *Free Republic*, 54 U.S.P.Q.2D (BNA) at 1469-71, for proposition "that online market for plaintiff newspapers' articles was harmed because plaintiffs demonstrated that '[defendants] are attempting to exploit the market for viewing their articles online'").

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ *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).

include bibliographic information “plus a few sentences of [a] search term in context.”¹⁴⁷ Thus, Google will not impede publishers’ efforts to develop online markets for e-books. Indeed, Google would probably be quick to link from its previews to these markets, should they ever exist.

3. The *Grokster* case

When most of the major movie studios, record labels, and others sued the distributors of “decentralized” peer-to-peer (p2p) file sharing software, the Ninth Circuit found a triable issue of fact as to whether the software was capable of substantial noninfringing uses, including of works in the public domain or whose owners authorized p2p use.¹⁴⁸ 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 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.”¹⁴⁹ Ultimately, the Supreme Court did not resolve the simmering conflict between technologists’ broad and content owners’ narrow readings of *Sony*.¹⁵⁰

Google recently asserted a *Sony/Grokster* defense to a claim that it should be held contributorily and vicariously liable for the conduct of third parties in reproducing, distributing, and displaying photographs which participated in Google’s AdSense program and to which Google’s search engine contained links.¹⁵¹ 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

¹⁴⁷ Milliot, *supra* note 8, at 12.

¹⁴⁸ See *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161-62 (9th Cir. 2004).

¹⁴⁹ *Grokster*, 125 S. Ct. at 2785 (Ginsburg, J., joined by Rehnquist, C.J., and Kennedy, J., concurring).

¹⁵⁰ See *id.* at 2778-79 (opinion of the Court) (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.”).

¹⁵¹ “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.” *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 834 (C.D. Cal. 2006) (citation omitted).

in fact used for infringement.”¹⁵² 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*.¹⁵³

This holding suggests, contrary to what some scholars have suggested, that 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.¹⁵⁴ Only if authors or publishers described the infringing hack in “sufficient detail” to enable Google to take remedial action, and Google failed to do so, could the company conceivably be held liable for its user’s conduct under *Sony* and *Grokster*.¹⁵⁵

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 1790.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ Congress agreed that a library exemption was necessary, but limited it, among other ways, to only one copy per book or phonorecord, made without purpose of either direct or indirect commercial advantage,

¹⁵² *Perfect 10*, 416 F. Supp. 2d at 853 (citing *Grokster*, 125 S. Ct. at 2778)).

¹⁵³ *Id.* at 853-55.

¹⁵⁴ See Bloomberg News, *supra* note __, at A47 (citing Doug Lichtman for argument that Google could be liable under *Grokster* for user hacking into database of scanned books).

¹⁵⁵ See *Perfect 10*, 416 F. Supp. 2d at 853-54.

¹⁵⁶ See Mary Rasenberger & Chris Weston, *Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning* (Apr. 14, 2005), at <http://www.loc.gov/section108/papers.html>.

¹⁵⁷ *Id.* at 16 (quoting THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 27-28 (1983)).

¹⁵⁸ *Id.* at 17 (internal quotation marks omitted) (quoting S. REP. NO. 91-519, at 8-9 (1969)).

by a library or archive either open to the public or to all researchers in a given specialized field.¹⁵⁹

Given Google's contracts with university libraries, its opening up 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."¹⁶⁰ Mary Rasenberger, Policy Advisor for Special Programs in the Office of Policy and International Affairs of 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."¹⁶¹ Rebecca Tushnet has similarly argued that the Copyright Act's library exemption, section 108, "does not authorize systematic, deliberate reproduction of multiple copies."¹⁶²

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. The court concluded without discussion that section 108 "defines an archive with some precision, and [the service] does not [qualify]."¹⁶³ 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."¹⁶⁴ 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, preserving books for posterity, and "serving effectively as a museum of

¹⁵⁹ 17 U.S.C.A. § 108(a)(1)-(3) (1977). The exemption contains other limitations as well, including to the "isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions," as opposed to 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." 17 U.S.C.A. § 108(g)(1) (1977).

¹⁶⁰ Pls.' Compl., at 4, McGraw Hill Cos. et al. v. Google Inc., No. 05-CV-8881 (S.D.N.Y. compl. filed Oct. 19, 2005).

¹⁶¹ *Library of Congress Comments on Section 108 Exemptions and Book Scanning 3/1*, TECH L.J. DAILY E-MAIL ALERT NO. 1,321 (Mar. 2, 2006), at <http://www.techlawjournal.com/alert/2006/03/02.asp>.

¹⁶² Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 1007 (2006) (citing 17 U.S.C. § 108(g) (2000)).

¹⁶³ *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1494 (11th Cir. 1984) (citing 17 U.S.C.A. § 108 (1977)).

¹⁶⁴ 17 U.S.C.A. § 108(a)(1)-(2) (1977).

information.”¹⁶⁵ The former rationale is also debatable as applied to Google Book Search, for the legislative history of the section 108 exemption states that “spontaneous making of single photocopies by a library in a for-profit organization” may qualify in certain circumstances.¹⁶⁶ Moreover, the dissemination of information is often viewed as noncommercial even if undertaken by an ultimately commercial enterprise, e.g. in commercial speech doctrine and trademark law.¹⁶⁷

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. There, the 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. In dicta, the Court suggested

¹⁶⁵ Laura Quilter, *Essence of a Library* (Aug. 17, 2005), at <http://lquilter.net/blog/archives/2005/08/17/essence-of-library>. 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. See *Library of Congress to Examine Digital Copying Under Section 108*, TECH L.J. DAILY E-MAIL ALERT NO. 1,321 (Feb. 27, 2006), at <http://www.techlawjournal.com/alert/2006/02/27.asp>. The U.S. Copyright Office recently published a notice and request for comment acknowledging that the “section 108 exceptions and limitations may need to be amended, specifically in light of the changes produced by the widespread use of digital technologies,” and that “further definition of the terms ‘libraries’ and ‘archives’ (or other types of institutions) [may need to] be included in section 108, or additional criteria for eligibility be added to subsection 108(a).” *Library of Congress Comments on Section 108 Exemptions and Book Scanning 3/1*, TECH L.J. DAILY E-MAIL ALERT NO. 1,321 (Mar. 2, 2006), at <http://www.techlawjournal.com/alert/2006/03/02.asp>. An amendment to the exemption would be needed, the notice acknowledged, 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.” Section 108 Study Group: Copyright Exceptions for Libraries and Archives, 71 FED. REG. 7999, 7999-8000 (Feb. 15, 2006), available at <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-2127.htm>.

¹⁶⁶ H.R. Rep. 94-1476, 1976 U.S.C.C.A.N. 5659, 5689. Here is the full quote from the legislative history:

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 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.

¹⁶⁷ See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (for-profit company’s “informational pamphlets” were not necessarily “commercial speech” in the sense 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 into “commercial speech”) (citations and footnotes omitted); see also *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002 (9th Cir. 2004); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

that these “libraries” did not qualify, without actually deciding the issue one way or the other.¹⁶⁸

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* articles¹⁶⁹ because the Act only authorizes reproduction of copyrighted works “without any purpose of direct or indirect commercial advantage.”¹⁷⁰ Publishers may not want to avail themselves of *Tasini* as a precedent against Google, however, because if its holding is extended to the online 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.¹⁷¹

B. A Preliminary Fair Use Analysis of Google Book Search

1. Purpose and Character of the Use

In any event, whether Google is a “library” or not when it scans books in partnership with physical libraries, this does not affect its ability to assert the “right of fair use.”¹⁷² 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.¹⁷³ As the Association of American Publishers points out, Google is a for-profit corporation whose shares have been valued as highly as \$90 billion.¹⁷⁴ “Our position is plain and simple,” counsel for the authors told a legal magazine, “[i]f Google is doing it for commercial

¹⁶⁸ See *Tasini*, 533 U.S. at 503 n.12.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (quoting 17 U.S.C. § 108(a)(1) (1994 ed., Supp. V)). 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 existing format in which the work is stored has become obsolete” in the case of published works. *Id.* (quoting 17 U.S.C. § 108(b)-(c) (1994 ed., Supp. V)).

¹⁷¹ See Kerry-Tyerman, *supra* note __, 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).

¹⁷² 17 U.S.C.A. § 108(f)(4).

¹⁷³ Kopytoff, *supra* note __, at C1.

¹⁷⁴ See Association of American Publishers, *To Have and to Hold*, INFORMATION TODAY, Jan. 1, 2006, at 1-2.

purposes, [it should] cut the copyright holder in to whatever revenues are generated....”¹⁷⁵

The fact that Google is a business, even a very successful one, is not controlling, however. What is critical is that Google Book Search is not a engaging in the mere commercial reproduction or distribution of works in a new medium, or in other words an exploitative or consumptive use.¹⁷⁶ Instead, 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 catalog.¹⁷⁷ This is not simply a retransmission of copyrighted material in a new medium, but a contribution to our understanding of the universe of published books.¹⁷⁸ Google Book Search also facilitates “comparative advertising” of books, which “redounds greatly to the purchasing public’s benefit

¹⁷⁵ Tresa Baldas, *Copyright Law Put to Test in Google Case*, NAT’L L.J., Oct.3, 2005, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1128071111801>.

¹⁷⁶ Compare, e.g., *Napster*, 239 F.3d at 1015.

¹⁷⁷ 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); see also *Bill Graham Archives v. Dorling Kindersley Limited*, No. 05-2514-cv, 2006 U.S. App. LEXIS 11593, *17 (2d Cir. May 9, 2006) (“Here, [defendant] does not exploit the use of [plaintiff’s] images as such for commercial gain. Significantly, [plaintiff] 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.”); *Perfect 10*, 416 F. Supp. 2d at 848-49 (“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”); Elisabeth Hanratty, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 10, ¶ 20 (Apr. 2005), <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 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>; Robin Jeweler, *The Google Book Search Project: Is Online Indexing a Fair Use Under Copyright Law?* CONG. RESEARCH SERV. RS22356 (Dec. 28, 2005), available at http://www.opencrs.com/rpts/RS22356_20051228.pdf.

¹⁷⁸ Compare *UMG Recordings*, 92 F. Supp. 2d at 350-51 (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”); compare also *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (retransmission of radio broadcasts over telephone wires was neither transformative nor a fair use); lines); *Los Angeles News Serv. v. Reuters Tel. Int’l Ltd.*, 149 F.3d 987 (9th Cir. 1998) (retransmission of news video was neither transformative nor a fair use).

with very little corresponding loss to the integrity of [the] copyrighted material.”¹⁷⁹ In fact, “Google has suggested it may consider setting up an online book store ... [with] permission from copyright holders.”¹⁸⁰

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.¹⁸¹ Any use that “adds value to the original” by drawing upon it “as raw material, transformed in the creation of ... new insights and understandings ... is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”¹⁸² Thus, Google’s nature as a commercial enterprise should not deny it the ability to assert fair use rights.¹⁸³

2. Nature of the Copyrighted Work

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.¹⁸⁴ In addition, the “vast

¹⁷⁹ *Kelly*, 336 F.3d at 820 (quoting *Sony Computer Entmt. Am., Inc. v. Bleem*, 214 F.3d 1022, 1027 (9th Cir. 2000)).

¹⁸⁰ Alfred Hermida, *Google Mulls Online Book Future*, BBC NEWS.COM (Jan. 10, 2006), at <http://news.bbc.co.uk/1/hi/technology/4598478.stm>.

¹⁸¹ *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); *American 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 ... means the first factor of the analysis weighs heavily in favor of a fair use finding.”); *Financial 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.... 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.”).

¹⁸² *Campbell*, 510 U.S. at 579 (internal quotations omitted) (quoting Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

¹⁸³ At a minimum, whether Google’s use was “commercial” notwithstanding its decision not to charge Web surfers for book searches or snippets, or the transformative character of its use, would be an issue of fact triable by a jury. *See International Linguistics, Inc. v. Language Link, Inc.*, No. 04-1109-CV-W-GAF, 2006 WL 859297, *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.”).

¹⁸⁴ *See, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985); *Kelly*, 336 F.3d at 820.

majority”¹⁸⁵ of scanned books will likely be nonfiction and fact-based books, including those which address controversial public and political debates, and this should count strongly in favor of a finding of fair use in Google’s case.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ Even as to these artistically creative works, whose nature sometimes weighs against an alleged infringer, this weight is quite “limited,” however, because the works are being transformed into a searchable online index.¹⁸⁹ 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.¹⁹⁰

3. Amount and Substantiality of Portions Taken

Google is copying all the books from participating library collections into Google Book Search in their entirety. This factor may not count significantly against its fair use argument, however, because the scanning was 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 with the work or its author or publisher on the merits, this factor may

¹⁸⁵ Band, *supra* note 31, at 3. *But cf.* Hanratty, *supra* note 31, at ¶¶ 22-23.

¹⁸⁶ See *Sony*, 464 U.S. at 455 n.40 (“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. 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”).

¹⁸⁷ See BATTLE, *supra* note __, at 28.

¹⁸⁸ See, e.g., *Campbell*, 510 U.S. at 586.

¹⁸⁹ *Bill Graham Archives*, 2006 U.S. App. LEXIS 11593, *18.

¹⁹⁰ *Id.* at *19.

weigh in favor of the alleged infringer or only minimally in favor of the copyright owner.¹⁹¹

Google needed to scan the entire books in order to be able to tell users which books contain which words, how many other words the books contain, and in which order the words appear in the books, all of which are critical facts concerning the quality and characteristics of the books as products.¹⁹²

In a brilliant formulation on her blog, Laura Quilter of the Brennan Center for Justice, a

¹⁹¹ See *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 not weigh against him or her”); *Perfect 10*, 416 F. Supp. 2d at 850 (copying of entire works was necessary for Google’s intended use of creating image search engine); *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....”); *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); *Bill Graham Archives*, 2006 U.S. App. LEXIS 11593, *20-21 (“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].”) (citing *Kelly*, 336 F.3d at 821); *id.* (noting that sometimes, “to copy any less than the entire [work] would have made the [word] useless to the [transformative use]”) (citing *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000)); *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”); *Ty, Inc. v. Publications 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) (citing *Sony*, 464 U.S. at 447-50); *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 a 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.”) (citing *Sony*, 464 U.S. at 449-50); *American Geophysical Union*, 60 F.3d at 921-22 (although Texaco’s 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”) (quoting *Sega Enters.*, 977 F.2d at 1522-23); *Ticketmaster Corp. v. Tickets.com, Copy. L. Rep. (CCH) ¶ 28,607*, 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, 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 extent that defendants scanned entire copyrighted works “onto their computer and placing 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).

¹⁹² Cf. Laura Quilter, *Lost Licensing Revenue & Google Print* (Oct. 27, 2005), at <http://lquilter.net/blog/archives/2005/10/27/lost-licensing-revenue-google-print> (“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.”).

former Electronic Services Librarian in the University of Illinois system, captures how Google is generating knowledge *about* 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.”¹⁹³ 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 – so that readers can form their own judgments about the quality, resemblances, or monetary value of a book, cannot be dismissed as a simple 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.”¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ By 2000, however, the profitability of hardcover book publishing may have increased, with up to 20% of revenue going to profit.¹⁹⁷ 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.¹⁹⁸

¹⁹³ *Id.*

¹⁹⁴ Milliot, *supra* note 8, at 12.

¹⁹⁵ See Pls.’ Compl., ¶ 19, McGraw-Hill et al. v. Google Inc., No. 05-CV-8881 (S.D.N.Y. compl. filed 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.”).

¹⁹⁶ See HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 325 (6th ed. 2004).

¹⁹⁷ See Kirkpatrick, *supra* note __, at 16.

¹⁹⁸ 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>

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 the evidence so far is that few if any printed books have suffered lost sales because Google has made them searchable. 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.¹⁹⁹ This absence of harm posed by Google to established markets indicates a fair use.²⁰⁰

In the past, fair use and the first sale doctrine have shielded libraries not only against copyright lawsuits based on providing services crucial to sampling 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.²⁰¹ In 1975, for example, the

&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 Hosseni, and Jonathan Safran Foer earning anywhere from several hundred thousand dollars to \$2 million in advances on their first novels).

¹⁹⁹ 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 Association of American Publishers, *Books [sic] Sales Continue to Rise in February* (April 13, 2006), at <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=323>. The net sales of the book industry increased nearly 10% between 2004 and 2005, to surpass \$25 billion in 2005. See Diane Cole, *Publish or Panic*, U.S. NEWS & WORLD REPORT Mar. 13, 2006, at 46-53 ("Nielsen BookScan recorded 709.8 million sales--a healthy 9.3 percent uptick from 2004."); Ass'n of Am. Publ'rs, *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 *Google 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; Harvard University Library, *FAQ: The University's Pilot Project with Google* (Dec. 13, 2004), at <http://72.14.203.104/search?q=cache:w1pbPzPN0tcJ:hul.harvard.edu/publications/041213faq.html>; 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*, CHRONICLE OF HIGHER ED., Nov. 18, 2005, at 34; Trachtenberg & Delaney, *supra* note __.

²⁰⁰ 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 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).

²⁰¹ See, e.g., R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 577 (2003).

Supreme Court found 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.²⁰²

As the lower courts 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 work.²⁰³

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 keywords.²⁰⁴

The prospect of future harm being wrought by Google Book Search seems very unlikely, moreover, for 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.²⁰⁵ 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.²⁰⁶ The CEO of Random House reported that Amazon's search function "helped boost her backlist sales by 6% to 8% annually."²⁰⁷ Google's and Amazon's experiences are consistent with the results of other experiments with providing online samples of books:

²⁰² *Williams & Wilkins*, 487 F.2d at 1346, 1348, 1354, 1356-58, *aff'd by an equally divided court*, 420 U.S. 376.

²⁰³ *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.")).

²⁰⁴ 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.

²⁰⁵ Google Inc., *Google Book Search: Partner Program: Google Book Search Case Study* (2005), at <https://books.google.com/partner/pennstate>.

²⁰⁶ Amazon, *Amazon.com Announces Sales Impact from New Search Inside the Book Feature* (Oct. 30, 2003), at <http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-newsArticle&ID=465155&highlight=>.

²⁰⁷ *St.*

The National Academy of Sciences Press found that when they posted the full text of book 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 similar experience with monographs and online journals.²⁰⁸

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.²⁰⁹ To the contrary, unit sales of books doubled between 1993 and 2003.²¹⁰

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.²¹¹ 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.”²¹² It has held that the existence of “a workable market” for corporate libraries to purchase licenses entitling them to photocopy individual articles via photocopying weighed against a 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.²¹³ The potential licensing revenues that the corporate library could have paid would have gone to the Copyright Clearance Center (CCC), which publishers developed in 1977 to assess and distribute photocopying royalties on the model of

²⁰⁸ Varian, *supra* note ____.

²⁰⁹ See Linton Weeks, *Don't Steal This Book*, WASH. POST, Aug. 9, 2000, at C1 (acknowledging threat of book trading on p2 sites like Gnutella); M.J. Rose, *How to Crack Open an E-Book*, WIRED NEWS, Apr. 27, 2001, at <http://www.wired.com/news/business/0,1367,43401,00.html> (reporting release to Internet of instructions for cracking e-book encryption format).

²¹⁰ See *Did You Hear?*, EDSF REPORT, Sept.-Oct. 2004, 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.”) (citing BISG and Bowker).

²¹¹ See Pls.’ Compl., ¶ 19, *McGraw-Hill et al. v. Google Inc.*, No. 05-CV-8881 (S.D.N.Y. compl. filed Oct. 19, 2005) (“[T]he sale of each 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.”).

²¹² *American Geophysical Union*, 60 F.3d at 929.

²¹³ See *id.* at 915, 930-31.

the ASCAP group of composers, authors, and publishers formed in the 1910s.²¹⁴

Courts, however, are unlikely to find that the CCC, which was developed to prevent commercial photocopy outlets from supplanting the demand for printed books, is a “workable” model for a book search function on a search engine. For example, it would hardly seem to be appropriate to require Google to pay the same fee for providing a snippet of two or three lines of an out-of-print library book that a copyshop would pay for reproducing a whole page of a book still in print, for sale at a profit to a consumer.²¹⁵ Other severe limitations of the CCC model are that it may only cover a minority of all printed works, and “not all the articles in publications covered by

²¹⁴ 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* (2006), at http://www.copyright.com/media/pdfs/AR_CCC_05_Single.pdf; PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 204 (2003). 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, 181-82 (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, 386-88 (1992); ASCAP, *Music & Money: Performing Right Payments* (2006), at <http://www.ascap.com/musicbiz/money-payments.html> (three U.S. performing rights organizations collect \$1 billion each year); Broadcast Music Inc., *BMI and Radio Industry Reach \$1 Billion Agreement* (July 31, 2003), at <http://www.bmi.com/news/200307/20030731a.asp>.

²¹⁵ 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 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)) (internal quotation marks omitted, footnote omitted in original). 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, while leaving digital scanning of books subject to the same principles governing sampling of musical compositions, which are treated much more leniently. See *id.* at 802 n.16 (“[T]he copyright act 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.”) (emphasis in original, citation and internal quotation marks omitted).

the [CCC] are copyrighted.”²¹⁶ And it remains to be seen how the CCC will hold up to a challenge from authors to the digital exploitation of their work, as in *Tasini*. 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.²¹⁷ 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.²¹⁸

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. Authors and publishers may compare Google Book Search unfavorably to Amazon’s and iTunes’ 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. 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 without 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 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

²¹⁶ *American Geophysical Union*, 60 F.3d at 937 (Jacobs, J., dissenting).

²¹⁷ *See id.*

²¹⁸ *Cf. 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.”).

as a parody may call to mind an original copyrighted work without acting as a substitute for it in the marketplace, so Google's snippet-length previews will open a window into the contents of books without making purchases or photocopies unnecessary or undesirable.²¹⁹

Like the samples available 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 exposure and maybe even sell more books...."²²⁰ As a 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.'"²²¹ 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.²²² 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.²²³ In sum, Google Book Search "will be the best shop window ever for obscure texts."²²⁴

²¹⁹ Cf. *Campbell*, 510 U.S. at 591 ("It 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).

²²⁰ *Intellectual Property: Closing the Book*, CORP. LEGAL TIMES, Dec. 2005, at 10.

²²¹ Helm & Green, *supra* note __, at 42.

²²² Eric Schmidt, *Books of Revelation*, WALL ST. J., Oct. 18, 2005, available at <http://googleblog.blogspot.com/2005/10/point-of-google-print.html>.

²²³ See Google, *Author Richard Lowry Found More Readers, and Sales, with Google Book Search* (2005), at http://books.google.com/googlebooks/author_lowry.html.

²²⁴ John Lanchester, *The Global Id*, LONDON REV. OF BOOKS, Jan. 26 2006, available at http://www.lrb.co.uk/v28/n02/lanc01_.html.

All 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 a correspondingly weaker interest on the part of publishers and authors in controlling the exploitation for these books. Especially “in the early stages, [Google] will scan mostly older and out-of-circulation books.”²²⁵ According to an initial calculation, 80 percent of the books Google will scan are out of print but may take years or decades until they fall into the public domain, meaning that the vast majority of the books are “orphan works.”²²⁶ In other words, only a fraction of the books contained in these collections are still marketed.²²⁷ This should support Google’s fair use argument.²²⁸

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

The Google Book Search litigation should be seen as 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 which uses of the Internet to spread knowledge and create new and more efficient markets are legal, and which are not. 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.

1. Why 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

²²⁵ Kopytoff, *supra* note __, at C1.

²²⁶ Farhad Manjoo, *Throwing Google at the Book*, SALON.COM, Nov. 9, 2005, at http://dir.salon.com/story/tech/feature/2005/11/09/google/index_np.html?pn=2.

²²⁷ *See id.*

²²⁸ *See* S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1965) (“A key, though not necessarily determinative factor in fair use is whether of not the work is available for purchases through normal channels, the user may have more justification for reproducing it than in the ordinary case....”), *quoted in* Robert Kasunic, *Fair Use and the Educator’s Right to Photocopy Copyrighted Material for Classroom Use*, 19 J.C. & U.L. 271 (1993).

whole.²²⁹ Google simply owns the most advanced (non-classified) technology for the searching and indexing of information. The U.S. government subsidized a great deal of the research and development that led to the Internet and the Web, on the understanding that they would be used to provide digital libraries to the public and ensure wider access to knowledge.²³⁰ The World Wide Web on which Google is based was also founded on the principle of universal access to information.²³¹ 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 functionality (the HTML protocol) 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 the underlying code can be easily copied and modified.²³²

Google's founders developed the company's specific search, caching, and display technologies while affiliated with Stanford Digital Library Project, subsidized by the U.S.

²²⁹ See, e.g., JOHN BATELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND CHANGED OUR CULTURE* 1 (2005) (“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. Out latest attempt? Google.”) (quoting Brewster Kahle, founder of Internet Archive); 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 AMERICAN-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., Laura Sydell, *Hearings to Review Human Rights in China*, NATIONAL PUBLIC RADIO (Feb. 14, 2006), at <http://www.npr.org/templates/story/story.php?storyId=5206175>

²³⁰ 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; LAWRENCE LESSIG, *THE FUTURE OF IDEAS : THE FATE OF THE COMMONS IN A CONNECTED WORLD* 44 (2001) (“Everyone knows that the government funded the research that led to the protocols that govern the Internet.”).

²³¹ See BATELLE, *supra* note __, at 292 (2005) (“The [World Wide Web] project started with the philosophy that much academic information should be freely available to anyone....”) (quoting Tim Berners-Lee, “father of the Web,” in 1991).

²³² See LESSIG, *supra* note __, at 41-44, 57-58.

government.²³³ Stanford permitted Google's founders to utilize hardware secured for usage in federally-funded digital library research for copying and indexing the Internet for purposes of creating superior search technology.²³⁴

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.'²³⁵

Google co-founder Larry Page "started downloading the Web" while at Stanford.²³⁶ He crawled the Web by downloading and storing "the entire Web," at "roughly 100 pages per second."²³⁷

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.²³⁸

Eventually "Google the research project became Google.com."²³⁹

Today, Google's Web search results start with Web crawlers, which access and copy entire

²³³ 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> ("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."); 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> ("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."); 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.")

²³⁴ See JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* 78 (2005) ("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.")

²³⁵ See *id.* at 73, 77-78.

²³⁶ See DAVID VISE & MARK MALSEED, *THE GOOGLE STORY* 12 (2005).

²³⁷ See *id.* at 56; BATTELLE, *supra* note __, at 56

²³⁸ See VISE & MALSEED, *supra* note __, at 40.

²³⁹ *Id.* at 59.

Web pages, link by link, on an “endless binge of dialing for URLs.”²⁴⁰ In 2005, Google assigned more of its computers to crawl the Internet (about 175,000) than existed on the entire planet in 1970.²⁴¹ Its main “GoogleBot” crawler harvested the Web about once every month by 2005.²⁴² After crawling the Web, a search firm like Google must index what the crawlers found, based on URL, metatags, links, link text, and page content.²⁴³ The first Internet search engine, called Archie as in a cute little archiver, crawled through over 1,000 anonymous FTP sites containing 2 million files, and indexed the files from those sites in a searchable database.²⁴⁴ The WWW Wanderer and Webcrawler search engines brought search to the Web by copying and indexing Web sites to make them searchable, including their full text in the case of Webcrawler.²⁴⁵ 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’s, 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.²⁴⁶

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.²⁴⁷ For the first time in Web search, PageRank accounted for not only the existence or descriptions of links, but the frequency of links to a site and to the site that link to the site, which frequency could serve as a proxy for the site’s “authority.”²⁴⁸ Google treated content and links from “reputable” sites like those belonging to governments, large companies, and university administrations as

²⁴⁰ BATTELLE, *supra* note __, 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 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.

²⁴¹ BATTELLE, *supra* note __, at at 24.

²⁴² *See* SHERMAN, *supra* note __, at 8.

²⁴³ *See* BATTELLE, *supra* note __, at 21-22.

²⁴⁴ *See id.* at 38-40.

²⁴⁵ *See id.* at 40-2.

²⁴⁶ *See id.* at 42-68.

²⁴⁷ *See id.* at 69-71.

²⁴⁸ *See id.* at 72-75.

conferring more relevance upon a page containing a term than a similar link to that page from a random user's site.²⁴⁹ This diluted the influence of link spammers, who create thousands or millions of links in order to boost traffic and revenue.²⁵⁰ The resulting pinpoint search capability was a revelation to many Web surfers, and Google grew exponentially each year, even doubling page views every two months.²⁵¹ By early 2005, it claimed 50% of the search market, more than 1 billion searches per month.²⁵² 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.²⁵³

The 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 harms caused to them in the absence of substantial noninfringing uses.²⁵⁴ Despite Google's prominence, there are literally hundreds of other search engines in business.²⁵⁵ Besides general interest search engine competitors (yahoo.com, msn.com, and aol.com), there search engines specializing in natural language question-and-answer search (ask.com), legal or medical information (findlaw.com and pubmed.gov), freely reproducible or transformable content (search.creativecommons.org), or 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

²⁴⁹ See SHERMAN, *supra* note ___, at 12-13.

²⁵⁰ See *id.* at 12.

²⁵¹ See BATTELLE, *supra* note ___, at 89.

²⁵² See *id.* at 30, 36.

²⁵³ See *id.* at 216, 234; VISE & MALSEED, *supra* note ___, at 4, 306.

²⁵⁴ 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 AAP head 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., Nov. 29, 2005, <http://newyorkmetro.com/nymetro/news/columns/powergrid/15202>.

²⁵⁵ See Rahul Telang, Uday Rajan, & Tridas Mukhopadhyay, *The Market Structure for Internet Search Engines*, 21 J. OF MGMT. INFO. SYS. 137, 138 (2004).

browsing or Internet usage.²⁵⁶

Google is not the only entity planning to make books searchable, or that would benefit from a ruling 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 project.²⁵⁷ 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”; in the University of Michigan’s case, about a fourth of the books in its libraries are brittle, while almost half are “printed on acidic paper that eventually will break down.”²⁵⁸ 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 “written and audiovisual heritage” to be made available over the Web by as early as 2007.²⁵⁹ Similarly, late last year Microsoft and the British Library announced a project to digitize 25 million pages of books and other materials, including about 100,000 public domain books, for inclusion in MSN Book Search.²⁶⁰ Microsoft’s mass digitization effort will be done “in conjunction with the Open Content Alliance,”²⁶¹ a coalition of state-supported libraries and archives, technology companies, and university library systems that will contribute time, technology, and/or funds to

²⁵⁶ See NetRatings, Inc., *Google and Yahoo! Outpace Overall Search Growth and Increase Market Share in March*, According to Nielsen//Netratings (Apr. 24, 2006), at http://www.nielsen-netratings.com/pr/pr_060424.pdf. Yahoo! claims more page views per day than Google as of this writing: Google’s 3.6 billion or so page views per day are surpassed by Yahoo!’s 4.6 billion page views per day. See comScore, *694 Million People Currently Use the Internet Worldwide According To comScore Networks* (May 4, 2006), <http://www.comscore.com/press/release.asp?press=849>.

²⁵⁷ Coleman, *supra* note __.

²⁵⁸ *Id.*

²⁵⁹ 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, Com (2005) 465 final, http://europa.eu.int/information_society/activities/digital_libraries/doc/en_comm_digital_libraries.pdf. See also Europe’s Information Society, http://europa.eu.int/information_society/eeurope/i2010/docs/info_sheets/7-4-i2010-futures-en.pdf.

²⁶⁰ See 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>.

²⁶¹ *Id.*

create “a digital archive of global content for universal access.”²⁶² The Alliance is starting with public domain or Creative Commons-licensed books and periodicals contained in the collections of the European Archive, the Internet Archive, the National Archives of the United Kingdom, and the libraries of the University of California.²⁶³ Usage restrictions will vary based on collection ownership status, but collections of American literature donated for the purpose by the Internet Archive, the University of California, and Yahoo! will be available for unrestricted transformation and redistribution.²⁶⁴ The Alliance promises to operate on a permission-first model, and indeed some of its contributors may be participating primarily to further that model. But it, like the European digital library initiative, would surely gain momentum by a ruling that offering short previews of copyrighted works, especially in conjunction with an opt-out procedure, is 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,’ U.S. Const., art. I § 8, cl., 8, ‘would be better served by allowing the use than by preventing it.’”²⁶⁵ This overriding purpose of the fair use doctrine often gets lost, however, in the proliferation of subsidiary rules intended to guide courts in applying the fair use factors, which just as often confuse matters. The courts hearing the Google Book Search cases would do well to temper the application of these overly rigid rules in

²⁶² Open Content Alliance, *Contributors* (2006), at <http://www.opencontentalliance.org/contributors.html>. They include 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!. *See id.*

²⁶³ *See* Open Content Alliance, *Open Content Alliance Next Steps: 2006 Work Agenda* (2006), <http://www.opencontentalliance.org/nextsteps.html>; Open Content Alliance, *FAQ* (2006), at <http://www.opencontentalliance.org/faq.html>. It will also include content from O’Reilly Media, the Prelinger Archives, and the University of Toronto. *See id.* 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 ___ at ___.

²⁶⁴ *See* Open Content Alliance, *Open Content Alliance Next Steps: 2006 Work Agenda* (2006), <http://www.opencontentalliance.org/nextsteps.html>; Open Content Alliance, *FAQ* (2006), at <http://www.opencontentalliance.org/faq.html>

²⁶⁵ *Bill Graham Archives*, 386 F. Supp. 2d at 327 (quoting *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992) (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)), *aff’d*, 2006 U.S. App. LEXIS 11593.

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 a limitation on the plaintiff's rights.²⁶⁶ Even at the preliminary injunction stage, at which time the plaintiff should bear 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,²⁶⁷ courts have placed the burden of proving a fair use on the alleged infringer.²⁶⁸ This is improper, because the Copyright Act of 1976 defined fair uses as outside the exclusive rights of copyright, which the plaintiff should bear the burden of proving were violated, rather than rendering them violations of copyright that could be saved by an affirmative defense.²⁶⁹ 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.

²⁶⁶ See *Campbell*, 510 U.S. at 590 ("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*, 471 U.S. at 561 ("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.*, 150 F.3d at 107 ("Since fair use is an affirmative defense to a claim of infringement, the burden of proof is on its proponent."); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, (9th Cir. 1997) ("Since fair use is an affirmative defense, Penguin and Dove must bring forward favorable evidence about relevant markets."); *American Geophysical Union*, 60 F.3d at 918 (defendant "typically carries the burden of proof as to all issues in the [fair use] dispute").

²⁶⁷ See *Atari Games Corp. v. Nintendo*, 975 F.2d 832, 837 (Fed. Cir. 1992); *Dr. Seuss Enters. v. Penguin Book USA*, 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 Commun. Servs.*, 923 F. Supp. 1231, 1242 n.12 (1995).

²⁶⁸ See *American Geophysical Union*, 60 F.3d at 918; *Napster*, 239 F.3d at 1014 n.3; *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

²⁶⁹ See 17 U.S.C. § 107 (1976) (fair use "is not an infringement of copyright"); *Sony*, 464 U.S. at 433 ("Any individual may reproduce a copyrighted work for a 'fair use'; the copyright holder does not possess the exclusive right to such a use."); Travis, *supra* note __, 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 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. 94-1476, 1976 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 infringing but saved by an affirmative defense. *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (C.C. E.D. 1909); see also *Nutt v. National Inst., Inc. for Improv. of Memory*, 31 F.2d 236, 237 (2d Cir. 1939); *Eisenschiml v Fawcett Publ'ns, Inc.*, 246 F.2d 598, 603 (7th Cir. 1957); C. T. Drechsler, *Annotation: Extent of Doctrine of "Fair Use" Under Federal Copyright Act*, 23 A.L.R.3d 139, § 3 (1999) (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") (citation omitted).

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,²⁷⁰ treat commercial and noncommercial uses as equivalent,²⁷¹ and regard *de minimis* infringements as equivalent to more serious takings.²⁷² 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

²⁷⁰ See *Campbell*, 510 U.S. at 579-88 (finding that comment and criticism might be infringing depending on how "reasonable" or "excessive" its imitation of work being commented upon and criticized was, 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); *Reuters*, 149 F.3d at 993 (similar); *KCAL-TV Channel 9*, 108 F.3d at 1122 (similar); *American 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); *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (en banc) (finding infringement by defendant engaged in preparing coursepacks for university professors and students, despite statutory endorsement of educators' right to make copies for "teaching," including "multiple copies for classroom use"); *Marcus v. Rowley*, 695 F.2d 1171, 1175 (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. Michigan Licensed Beverage Ass'n*, 132 F. Supp. 2d 574, 586-87 (E.D. Mich. 2001) (finding infringement by nonprofit's reproduction of poster for use in teaching); *College Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554 (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*).

²⁷¹ Courts desiring to conflate 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."); *American 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).

²⁷² See *Harper & Row*, 471 U.S. at 564-65 (copying of an "insubstantial portion" of plaintiff's work was not fair use); *id.* at 498 (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 Entmt. TV*, 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," Second Circuit refused to find fair or *de minimis* use); *Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found.*, 04 Civ. 5332 (NRB), 2005 U.S. Dist. LEXIS 26302, *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 Export Co. Establishment 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).

pointed out the problem with focusing on commerciality to the exclusion 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 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.²⁷³

Similarly, when courts regard the mere fact of copying without authorization as proof that the copied excerpt had sufficient “qualitative value” to make the third fair use factor weigh in the plaintiff’s favor,²⁷⁴ this makes the third fair use factor superfluous, contrary to an established canon of statutory interpretation, because it could never favor the alleged infringer as long as there was any copying.²⁷⁵

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 elevating effect on the market for the copyrighted work to the status of a privileged factor,²⁷⁶ and requiring defendants to prove a negative, i.e. lack of harm to the market for the copyrighted work.²⁷⁷ Both of these rules rewrite the Copyright Act’s exemption of fair uses from the scope of copyright infringement, in such as way in each instance as to dramatically impair the ability of transformative users like search engines to make fair uses of works that they would make searchable.²⁷⁸ Over the past 30 years, courts have also increasingly

²⁷³ *Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting) (emphasis in original) (footnotes omitted).

²⁷⁴ *See Princeton Univ. Press*, 99 F.3d at 1398.

²⁷⁵ *Cf. 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.”). *See also* *Platt v. Union Pacific R.R. Co.*, 99 U.S. 48, 58 (1879).

²⁷⁶ *See Harper & Row*, 471 U.S. at 566 (harm to market “undoubtedly the single most important element of fair use”).

²⁷⁷ *See Campbell*, 510 U.S. at 590-94 (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”).

²⁷⁸ 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 __, at 817-18 (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”).

regarded merely potential harms to the market for the work as equivalent to actual harms²⁷⁹; viewed harms to the market as widespread when they were not²⁸⁰; treated licensing markets as an adequate alternative to mandatory fair use²⁸¹; and dismissed the infringer's positive contributions to the marketplace as irrelevant.²⁸²

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 a

²⁷⁹ See Travis, *supra* note __, 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.”).

²⁸⁰ See *Campbell*, 510 U.S. at 590 (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’”) (footnote omitted in original) (quoting 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4], at 13-102.61 (1993)); *Harper & Row*, 471 U.S. at 569 (“to 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’”) (emphasis added in original) (quoting *Sony*, 464 U.S. at 451); *Reuters*, 149 F.3d at 994 (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”); *Free Republic*, 54 U.S.P.Q.2d (BNA) at 1469-71 (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.

²⁸¹ *Campbell*, 510 U.S. at 593 (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*, 54 U.S.P.Q.2d (BNA) 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).

²⁸² 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); *Napster*, 239 F.3d at 1017 (despite defendant’s evidence that its facilitating of music previews enhanced sales, court assumed that “having 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”); *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*, 54 U.S.P.Q.2d (BNA) at 1469-71 (“Courts have routinely rejected the argument that a use is fair because it increases demand for the plaintiff’s copyrighted work.”) (collecting cases); *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)).

vicious circle whereby improving the public's access to information over the Internet cannot be a fair use if outlawing it and all uses like it might enhance licensing revenue.²⁸³

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.²⁸⁴ 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 simply reselling them, such as cataloguing products and making them searchable, and enhances sales of the works in the process, it should be regarded as engaging in a fair use.

VII. Antitrust Implications of the Google Book Search Copyright Litigation

Courts hearing many seminal copyright cases endorsed important public interest limitations on the scope and enforcement of copyrights out of fear that to rule otherwise would lead to the monopolization of new technologies by firms holding large catalogues of copyrights.²⁸⁵ Thus, the encouragement of innovation and the preservation of price competition, usually the domain of

²⁸³ See *Williams & Wilkins*, 487 F.2d at 1357 n.19 (“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 ...”); *American Geophysical Union*, 60 F.3d at 934 (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”).

²⁸⁴ See 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).

²⁸⁵ See, e.g., *Sony*, 464 U.S. at 431, 441 (expressing “reluctance” to copyright monopoly to cover an entire technology “without explicit legislative guidance”); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 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 Tel., 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. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (declining to hold that all photocopying must be licensed by copyright owners), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

antitrust law, have crept into copyright law on occasion to curb overbroad assertions of rights.²⁸⁶

A. *Joint Ventures as Antitrust Problems*

Assuming that Google Book Search would lose its fair use claim and suffer the fate of Napster, it seems likely that a publishing industry joint venture would at least initially be the only viable alternative to its vision of making as many books as possible searchable. HarperCollins has already announced that it will introduce its own searchable versions of the books in its catalogue and backlist.²⁸⁷ 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 which warrant exploring once again.

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 “hold out” power. Sharing technology, intellectual property, branding, experience, investments, and responsibility for failures can combine

²⁸⁶ See, e.g., H.R. Rep. 94-1476, 1976 U.S.C.A.N. 5659, 5723 (rejecting proposals for overly narrow sound recording compulsory licenses, and summarizing critiques of these proposals as threatening to certain “producer[s] at a great competitive disadvantage with performing rights societies, allow discrimination, and destroy or prevent entry of businesses”); *id.* at 5803 (“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 5704 (“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].”).

²⁸⁷ See Trachtenberg & Delaney, *supra* note ___. 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 *id.*

unique advantages of several firms in one enterprise, and minimize financial and legal risks.²⁸⁸

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.²⁸⁹ Copyrights may confer such power over some firms or coalitions of firms to control prices or exclude competition.²⁹⁰ 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.²⁹¹ Simply stated, permitting “IP owners to limit competition conflicts directly with the antitrust law’s promotion of competition.”²⁹²

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.²⁹³ Moreover, 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.²⁹⁴ Even without an “explicit agreement . . . , [pervasive] joint and collaborative action” by a number of joint venturers to eliminate

²⁸⁸ 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).

²⁸⁹ See Miles, *supra* note __, at 128 & n.6.

²⁹⁰ *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”).

²⁹¹ See, e.g., Steven G. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books*, 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 Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (1934); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966).

²⁹² Phillip Areeda, Louis Kaplow, & Aaron S. Edlin, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES ¶ 282, at 343 (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.”).

²⁹³ See, e.g., *United States v. Penn-Olin Corp.*, 378 U.S. 158 (1964).

²⁹⁴ 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).

“discounters” of their product can amount to an unlawful conspiracy in restraint of trade.²⁹⁵ 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.²⁹⁶ The rule of reason assesses whether a course of conduct “promotes competition or whether it ... *may* suppress or even destroy competition.”²⁹⁷

Monopolization, attempted monopolization, and conspiracy to monopolize any part of interstate trade or commerce are violations of section 2 of the Sherman Act. A violation of this provision may occur where a dominant entity, or a conspiracy of multiple entities,²⁹⁸ acquires control over copyrights that added to those already owned by the entity or conspiracy will create monopoly power.²⁹⁹ Unlawful monopolization may also occur when an entity uses its copyrights to dominate another industry, or boycotts its competitors absent a legitimate purpose for doing so.³⁰⁰

²⁹⁵ United States v. General Motors Corp., 384 U.S. 127, 142-43 (1966) (joint venture between General Motors and associations of its individual dealers).

²⁹⁶ See *Texaco*, 126 S.Ct. at 1280 n.1. In this case, “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,” *id.* at 1279, which meant that their claim had to be dismissed, *see id.* at 1279, 1281. The holding in *Texaco* 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. National Collegiate Athletic Ass’n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 113-14 (1984). See also United States Dep’t of Justice & Federal Trade Comm’n, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2, at 9 (2000), 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).

²⁹⁷ *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 n.15 (1977) (emphasis added) (quoting *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918)).

²⁹⁸ See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 172-75 (1938).

²⁹⁹ *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).

³⁰⁰ See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 479 n.29, 483 n.32 (1992).

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,³⁰¹ 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 an iTunes or a 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, in which compact discs require only about \$1 investment each to burn, label, and decorate, but labels aim to charge prices 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.³⁰²

Prior to 2001, the major record labels did not license any digital download services.³⁰³ 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).³⁰⁴ These joint ventures banned “copying all but a handful of the files onto CDs.”³⁰⁵ When MusicNet debuted, \$10 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.³⁰⁶ Pressplay permitted users to download and keep songs as long as they paid a \$25 per month subscription fee, during which time they could also burn up to 20 tracks each month onto compact discs.³⁰⁷ MusicNet and Pressplay were perceived by some as a disappointment to the labels because too few people signed up.³⁰⁸ According to one observer, they “bombed” because they required users to pay fees of up to hundreds of dollars per

³⁰¹ 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).

³⁰² MENN, *supra* note __, at 152.

³⁰³ 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>.

³⁰⁴ *Id.*

³⁰⁵ MENN, *supra* note __, at 310.

³⁰⁶ See *id.* at 157.

³⁰⁷ See *id.* at 158.

³⁰⁸ See *id.* at 310.

year simply to “rent[]” music for the most part, with restrictions on MP3 players and CD burning.³⁰⁹

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.³¹⁰ Napster and its investors have 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.”³¹¹ Napster claimed the labels’ refusal to allow Napster to license their recordings legitimately “left Napster no choice but to engage in possibly infringing behavior.”³¹² 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.³¹³

In 2004, the *Napster* court 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.”³¹⁴ 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.”³¹⁵ 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

³⁰⁹ Pogue, *supra* note ___, at G1 (also referring to Realnetworks’ initial version its Rhapsody service and Musicnow.

³¹⁰ *See id.*; Ethan Smith, *Big Music Firms Dealt a Legal Blow*, WALL. ST. J., Apr. 24, 2006, at B4.

³¹¹ 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>.

³¹² *Id.*

³¹³ *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*, UPI, July 2, 2002, available at <http://www.highbeam.com/doc/1G1:88172094/On+the+Net.html?refid=SEO>.

³¹⁴ *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).

³¹⁵ *Id.* at *57.

with competitors of information about online music pricing.³¹⁶ The ruling comes as Apple's iTunes, which controls 80% of the U.S. online music market, reached an agreement with four major labels to continue to charge a "uniform" price of 99 cents per song, regardless of artist, label, song quality, or date of release.³¹⁷

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.³¹⁸ 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.³¹⁹

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."³²⁰ The studios were Sony, MGM, Paramount, Warner Bros., and Universal.³²¹ In September 2001, two other major studios, Disney and Fox, formed Movies.com as a joint venture to deliver their films over the Net.³²² They dropped the deal after the Department of

³¹⁶ See Smith, *supra* note __, at B4.

³¹⁷ 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/>.

³¹⁸ Smith, *supra* note __, at B4. "Justice Department ... investigators ... [are] examining how present-day prices are set on Apple Computer Inc.'s iTunes Music Store and other authorized services." Menn 2006, *supra* note __.

³¹⁹ Antony Bruno, *Ad Revenue Shores Up Newfangled Napster*, REUTERS/BILLBOARD, May 7, 2006, available at <http://abcnews.go.com/Entertainment/wireStory?id=1934565>. 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.*

³²⁰ U.S. Department 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.

³²¹ See *id.*

³²² See *id.*

Justice began an investigation, and Fox later joined Movielink.³²³

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."³²⁴ 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."³²⁵

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.³²⁶ 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.³²⁷ 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 vehicle to fix the studios [sic] licensing fees and restrict output."³²⁸ The case was expected to go to trial this year.³²⁹

³²³ See *id.*; Terence Keegan, *Digital Distribution*, DAILY VARIETY, April 25, 2006, at B13.

³²⁴ 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).

³²⁵ United States 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.

³²⁶ Phil Hall, *Movies From The Web; Will Downloaded Films Take Off? Forecasters Are Pessimistic*, HARTFORD COURANT (CONNECTICUT), Apr. 27, 2006, at D3.

³²⁷ 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, *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>.

³²⁸ Michael Stroud & Brad King, *Movie Confab Hears Ugly 'C' Word*, WIRED NEWS, Sep. 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>.

³²⁹ 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>.

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

Could MusicNet or Movielink be a model for a publishing industry 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, therefore, 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. 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 and the allegations of Intertainer about MusicNet and 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?”³³⁰ She compared “Google’s business model [to] a new kind of

³³⁰ Heilemann, *supra* note ____.

feudalism: The peasants produce the content; Google makes the profits.”³³¹

Although these visions of world domination sound scary,³³² they are unrealistic.

Microsoft’s network of Web sites had nearly 10% more visitors than Google’s sites in March 2006.³³³ Google claims only 16% of the global visitors to the top 15 online networks of Web sites.³³⁴ This hardly grants it control over “all the content in the world.” Thus far, none 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.³³⁵

³³¹ *Id.* (paraphrasing Alan Murray, *Google Library is Great for the World*, WALL ST. J., Oct. 26, 2005, available at http://online.wsj.com%2Farticle%2F028113028146277379304.html?mod=todays_us_page_one).

³³² *Cf.* *Google Announces Plan to Destroy All Information It Can’t Index*, THE ONION, Aug. 31, 2005, at <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....”).

³³³ See comScore, *694 Million People Currently Use the Internet Worldwide According to comScore Networks* (May 4, 2006), at <http://www.comscore.com/press/release.asp?press=849>.

³³⁴ *See id.*

³³⁵ So far as I am aware, Google has not been accused of antitrust violations in a formal complaint of any kind. By contrast, publishers, music labels, and movie studios have been entangled in extensive antitrust litigation for most of the past century. See, e.g., *Straus v. American Publisher’s Ass’n*, 231 U.S. 222, 235-36 (1915) (“[I]t appears that the Publishers’ Association was composed of probably 75 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 v. Broadcast Music, Inc.*, 1940-43 Trade Cas. ¶ 56,096 (E.D. Wisc. 1941) (consent decree resolving antitrust case by requiring music licensing society to offer licenses based on actual usage); *United States v. ASCAP*, 1940-43 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941) (similar), 1950-51 Trade Cas. ¶ 62,595 (S.D.N.Y. 1950) (consent decree resolving antitrust case by enjoining a variety of conduct by music licensing society); *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948) (enjoining music licensing society from monopolistic conduct in connection with motion pictures); *United States v. Paramount Pictures*, 334 U.S. 131, 156-57 (1948) (upholding injunction against motion picture producers, distributors, and exhibitors 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”); *United States v. Loew’s, Inc.*, 371 U.S. 38 (1962) (similar ruling in context of agreements conditioning license of one film for television broadcast with license of another film); *United States v. ASCAP (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. Broadcast Music, Inc.*, 1966 Trade Cas. ¶ 71,941 (S.D.N.Y.) (revisions to 1941 antitrust consent decree); *Broadcast Music, Inc. v. CBS*, 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. ASCAP*, 586 F. Supp. 727 (S.D.N.Y. 1984) (denying motion to amend existing antitrust consent decree); *Buffalo Broad. Co. v. ASCAP*, 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. ASCAP (Capital Cities/ABC)*, 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. ASCAP (Buffalo Broadcasting Co.)*, 1993-1 Trade Cas. ¶ 70,153 (S.D.N.Y. 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. ASCAP (Capital Cities/ABC)*, 157 F.R.D. 173 (S.D.N.Y.

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.³³⁶ Courts and commentators often quote James Madison for 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.”³³⁷ Less often quoted is Madison’s explanation of why, in the case of the press, a wide

1994); *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71, 378 (S.D.N.Y.) (amendments to 1966 antitrust consent decree); *In the Matter of Harper & Row Publishers, Inc.*, 122 F.T.C. 113, 113-16 (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); *United States v. ASCAP (Salem Media)*, 981 F. Supp. 199 (S.D.N.Y. 1997) (limiting music licensing society’s ability to charge broadcasters to a “reasonable fee”); *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 173 (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); *United States v. Broadcast 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. Broadcast Music, Inc.*, 426 F.3d 91 (2d Cir. 2005) (similar); *see also* 58 C.J.S. MONOPOLIES § 127.

³³⁶ *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,” 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 Jan. 19, 2007.

³³⁷ James Madison, *The Report on the Virginia Resolutions of 1798*, in 4 J. Elliot, *DEBATES ON THE FEDERAL CONSTITUTION OF 1787*, 571 (1876), *quoted in* *Gertz v. Welch*, 418 U.S. 323, 340 (1974). *See, e.g.*, 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).

latitude for abuse must be allowed by law: “to 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....”³³⁸ 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.”³³⁹ To the extent that courts credit these ideas, they may direct more searching First Amendment inquiry into any effort to hobble the efforts of the electronic press to enlighten and entertain the public.³⁴⁰ How would the First Amendment, either as originally 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.³⁴¹ Or an observer may feel that authors morally deserve the maximum possible compensation they can obtain for their creativity from any and every source

³³⁸ James Madison, *The Report on the Virginia Resolutions of 1798* (Jan. 1800), in 6 WRITINGS 385-401, available at http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

³³⁹ 4 THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND*, ch. 21 (1864), available at <http://www.nalanda.nitc.ac.in/resources/english/etext-project/history/England4/chapter5.html>.

³⁴⁰ Cf. 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”). As 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 Macaulay, *Copyright (February 5, 1841)*, in 4 THE MISCELLANEOUS WRITINGS AND SPEECHES OF LORD MACAULAY (1866), available at <http://www.gutenberg.org/dirs/etext00/4mwsm10.txt>.

³⁴¹ See, e.g., *Bridgeport Music*, 410 F.3d at 801 & n.12 (“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 *Grand Upright*, 780 F. Supp. at 183 (quoting Exodus 20:15)); 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 Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEXAS L. REV. 873 (1997) (review of JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)) (same).

of commercial value arising from its exploitation.³⁴² 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.

Each of 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 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...."³⁴³ 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: "No man but a blockhead ever wrote, except for money."³⁴⁴ The second could be described as a Biblical perspective, 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

³⁴² See, e.g., Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO St. L.J. 517, 550-57 (1990) (rehearsing natural law arguments for and against broad authorial rights); Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1593-95, 1601-4, 1606-9 (1993) (discussing natural law arguments relating to authorial rights and fair use exception).

³⁴³ ROSE, *supra* note __, at 104-5 (quoting *The Case of the Appellants and Respondents in the Cause of Literary Property, Before the House of Lords* (1774), in *THE LITERARY PROPERTY DEBATE: SIX TRACTS* 54 (Stephen Parks ed., 1975)). 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."³⁴⁴ ROSE, *supra* note __, at 104 (quoting *The Case of the Appellants, supra*, at 24). 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.

³⁴⁴ *Campbell*, 510 U.S. at 584 (quoting Samuel Johnson to James Boswell, April 5, 1776, in *JAMES BOSWELL, LIFE OF SAMUEL JOHNSON*, LL.D. 302 (R.M. Hutchins ed. 1952) (1791)).

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....”³⁴⁵ 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 the work, and 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”?³⁴⁶

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 wrote.³⁴⁷ 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.³⁴⁸ 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.”³⁴⁹ Where print technology presupposed an author

³⁴⁵ Arthur Schopenhauer, *On Books and Reading*, in *RELIGION: A DIALOGUE, AND OTHER ESSAYS* (T. Bailey Saunders trans., 3d ed. 1891), at

<http://web.archive.org/web/20030208131217/http://www.concentric.net/~Wkiernan/text/Source/roe.txt>. 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.*

³⁴⁶ *Id.*

³⁴⁷ See Michel Foucault, *What Is an Author?*, in *THE FOUCAULT READER* 118-19 (Paul Rabinow ed., 1984); ROSE, *supra* note __, 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....”).

³⁴⁸ Foucault, *supra* note __, at 118-19.

³⁴⁹ See MCLUHAN & FIORE, *supra* note __, 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 22 (“All media work us over completely.... [T]hey leave no part of us untouched, unaffected, unaltered.”); *id.* at 18 (“Today’s television child is

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.³⁵⁰

As electronic media collapsed the 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.³⁵¹

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

attuned to up-to-the-minute ‘adult’ news—inflation, rioting, war, taxes, crime, bathing beauties—and is bewildered when he enters 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.”).

³⁵⁰ *Id.* at 68.

³⁵¹ ROSE, *supra* note __, at 3. See, e.g., 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....”); 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.”); Roland Barthes, *The Death of the Author*, in ROLAND BARTHES, 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”); 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....”); Jacques Derrida, *Signature Event Context*, in LIMITED INC, 148 (Samuel Webber & Jeffrey Mehlman trans., 1988) (1971) (“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....’”); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 43, 94 (1980) (arguing that “the objectivity of the text is an illusion,” and that reading is “constitutive” of “meaningful patterns” in books); TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 138 (1983) (stating that “every word, phrase or segment is a reworking of other writings which precede or surround the individual work,” and that “[t]here is no such thing as literary ‘originality,’ no such thing as the ‘first’ literary work: all literature is ‘intertextual.’”); JONATHAN CULLER, ON DECONSTRUCTION, 79-80, 175 (1994) (arguing that “all readings are misreadings,” and that “[t]he best a reader can achieve is a strong misreading”). See also William Irwin, *Against Intertextuality*, 28 PHIL. & LIT. 227 (2004). While the development of these theories of authorship and texts post-dated the popularization of television in the 1950s, Nietzschean perspectivism anticipated them by regarding “new names” as being 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 (1977); Jean Granier, *Perspectivism and Interpretation*, in THE NEW NIETZSCHE, *supra*, at 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)).

formerly claimed as their proper domain.³⁵² 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, and executable code.³⁵³ 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 the humanity's patterns of thought prior to the invention of writing, in an "acoustic space: boundless, directionless, horizonless..."³⁵⁴ 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?³⁵⁵

³⁵² See MCLUHAN & FIORE, *supra* note __, at 123.

³⁵³ See 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), at <http://www.freedomforum.org/templates/document.asp?documentID=12576>; Tushnet, *supra* note __ passim.

³⁵⁴ MCLUHAN & FIORE, *supra* note __, at 48.

³⁵⁵ Cf. ROSE, *supra* note __, at 1 (quoting Foucault, *supra* note __, at 101). 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 Coalition of Broadband Users and Innovators, *Ex Parte Communication to the Commissioners of the Federal Communication Commission in CC Docket Nos. 02-33, 98-10, & 95-20, CS Docket Nos. 02-52 & GN Docket No. 00-815* (Nov. 18, 2002) (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 customers and their destinations on the network"); see also Lawrence Lessig, *The Internet Under Siege*, FOREIGN POLICY, Nov. 1, 2001 (expressing similar concerns); Robert B. Reich, *The War of Internet Democracy*, AM. PROSPECT, May 11, 2006, at <http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=11487> (similar).