

TESTING THE BOUNDARIES OF COPYRIGHT PROTECTION: THE GOOGLE BOOKS LIBRARY PROJECT AND THE FAIR USE DOCTRINE

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INTRODUCTION

A young student is looking for a book about a young girl's journey on the Oregon Trail for her book report. A man is looking to buy a collection of works that includes his favorite short story, but he does not know the author's name. A college student is writing a paper on the connotations of "cool" in American literature. Envision that all three

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individuals are able to find exactly what they want and where to find it, without leaving the comforts of their homes. They can search catalogs of major libraries around the world with just one mouse click. The Google Books Library Project ("Library Project"), though still in its beta stages, has the promise and vision of making this possible. However, whether it will come to fruition remains to be seen.

Google Inc. ("Google"), the world's leading internet search engine,¹ unveiled its Library Project on December 14, 2004, announcing that it was working with libraries to create a book search engine by scanning books from the libraries' collections.² Participating libraries are the New York Public Library, and the library collections at Harvard University, Stanford University, the University of Michigan, Oxford University, the University of Virginia, the University of Wisconsin-Madison, the University of California, Princeton University, the University of Texas at Austin, the Universidad Complutense de Madrid, the Bavarian State Library and the National Library of Catalonia.³ The Library Project as a whole will include out-of-print works and works in the public domain, as well as books currently protected by copyright.⁴

¹ See OneStat.com, Search Engine Ratings, http://www.onestat.com/html/aboutus_pressbox21.html (last visited Apr. 11, 2007) (reporting in 2003 that Google commanded a global average usage share of 55.2%, with Yahoo following at 21.7%).

² Google Press Center, Google Checks Out Library Books, http://www.google.com/press/pressrel/print_library.html (last visited Apr. 11, 2007). Although Google initially announced the program as "Google Print," Google has since renamed the program "Google Book Search." See Google Book Search Home Page, <http://books.google.com> (last visited Apr. 11, 2007). The substantive details of the program and the two component projects, to be discussed below, remain essentially the same. See *id.*

³ Google Book Search Help Center—What Libraries Are You Working With?, <http://books.google.com/support/bin/answer.py?answer=43740> (last visited Apr. 11, 2007); Google Book Search, Library Partners, <http://books.google.com/googlebooks/partners.html> (last visited Apr. 11, 2007). When the Author's Guild suit was filed, the New York Public Library, Harvard University, Stanford University, the University of Michigan, Oxford University, and the University of California were the participating institutions. See Complaint at 32, *Author's Guild v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y. filed Sept. 20, 2005); see also Jennifer Colvin, UC Libraries Partner with Google to Digitize Books, <http://www.universityofcalifornia.edu/news/2006/aug09.html> (last visited Apr. 11, 2007). The New York Public Library and Oxford University currently restrict participation to public domain books in their collections. See Complaint at 27, *McGraw-Hill Cos., Inc. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y. filed Oct. 19, 2005); Barbara Quint, *Google Slows Library Project to Accommodate Publishers*, INFO TODAY, Aug. 15, 2005, <http://www.infotoday.com/newsbreaks/nb050815-1.shtml>; see also Katie Hafner, *At Harvard, a Man, a Plan and a Scanner*, N.Y. TIMES, Nov. 21, 2005, at C1 ("For the time being, Harvard has confined the scanning of its collections largely to books in the public domain and limited the initial scanning to about 40,000 volumes. But it hopes eventually to scan copyrighted books as well, depending on the outcome of the legal dispute.").

⁴ See Stefanie Olsen, *Google Adds Major Libraries to Its Database*, CNET NEWS.COM, Dec. 14, 2004, http://news.com.com/Google+adds+major+libraries+to+its+database/2100-1025_3-5489921.html.

The announcement caused a public furor as authors, publishers, librarians, and others weighed in on the Library Project's potential copyright infringement.⁵ In August, 2005, Google temporarily halted scanning copyrighted library books to allow copyright holders to opt out of the Library Project.⁶ Despite Google's scanning hiatus, on September 20, 2005, three outraged authors⁷ and the Authors Guild⁸ filed suit against Google in the United States District Court in Manhattan.⁹ On October 19, 2005, five large American publishing companies filed a suit of their own.¹⁰ On November 1, 2005, Google announced its intention to continue scanning copyrighted works in addition to public-domain works. Google stated that "its program is covered by the fair use provision of copyright law and that it therefore does not need permission of the copyright holders for the library project."¹¹ Google resumed scanning, albeit with a focus on scanning out-of-print titles that are no longer subject to copyright protection.¹²

Yet part of the furor stems from a misunderstanding of the Library Project.¹³ Google's latest innovation will increase consumer access to books by providing a new medium through which consumers can gain information about books that might have otherwise been overlooked.

⁵ See Authors Guild, Press Release, Authors Guild Sues Google Citing "Massive Copyright Infringement," <http://www.authorsguild.org/?article=86> (last visited April 24, 2007); Matthew Hicks, *Google's Library Project Could Drive Content Contest*, EWEEK.COM, Dec. 14, 2004, <http://www.eweek.com/article2/0,1759,1741231,00.asp>; Sally Morris, Chief Executive, ALPSP, Google Print for Libraries—ALPSP Position Statement (July 2005), http://cork.universitypress.typepad.com/cork_university_press/files/Googlestatement.pdf; Posting of Susan Crawford to Susan Crawford blog, <http://scrawford.blogware.com/blog/> (Sept. 21, 2005, 10:57 EST); Kevin J. Delaney & Jeffrey A. Trachtenberg, *Google Will Return to Scanning Copyrighted Library Books*, WALL ST. J., Nov. 1, 2005, at B1.

⁶ Margaret Kane, *Google Pauses Library Project*, CNET NEWS.COM, Aug. 12, 2005, http://news.com.com/Googlepauses+libraryproject/2100-1025_3-5830035.html.

⁷ The individual plaintiffs in the suit are Daniel Hoffman, Betty Miles, and Herbert Mitgang. See Complaint at 9–12, *Author's Guild v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y. filed Sept. 20, 2005). Each claims copyright to at least one literary work in the University of Michigan library. See *id.*

⁸ The Authors Guild, "the nation's largest and oldest society of published authors and the leading writers' advocate for fair compensation, effective copyright protection, and free expression," represents more than 8,000 published authors. Authors Guild, *supra* note 5; Edward Wyatt, *Writers Sue Google, Accusing It of Copyright Violation*, N.Y. TIMES, Sept. 21, 2005, at C3.

⁹ See Complaint, *Author's Guild v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y. filed Sept. 20, 2005); see also Authors Guild, *supra* note 5; Posting of Susan Wojcicki to Official Google blog, <http://googleblog.blogspot.com/> (Sept. 20, 2005, 21:04 PST).

¹⁰ See Complaint, *McGraw-Hill Cos., Inc. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y. filed Oct. 19, 2005). Pearson Education, Inc., Penguin Group (USA), Inc., Simon & Schuster, Inc., and John Wiley & Sons, Inc. joined McGraw-Hill in the suit. *Id.*

¹¹ Edward Wyatt, *Major Publishers Sue Google*, N.Y. TIMES, Oct. 20, 2005, at E2.

¹² See Delaney & Trachtenberg, *supra* note 5, at B1.

¹³ See Kevin Maney, *Critics Should Grasp Google Projects Before Blasting Them*, USA TODAY, Nov. 9, 2005, at B3.

Google is not the only organization digitizing books,¹⁴ but it is the first to scan copyrighted books in their entirety without express permission from the copyright holder.¹⁵ However, the Library Project's end "product"—what users see on their Internet browsers—will never be the book in its entirety.¹⁶ Google maintains that the "Google Book Search helps you discover books, not read them online."¹⁷ Search results of copyrighted works show, at most, only "snippets" of the protected text "like a card catalog – a few sentences of [a user's] search term in context."¹⁸ Google does not sell the books, but rather provides a "Find this book in a Library" link to local libraries and "Buy this Book" links to book sellers and publishers on the results page.¹⁹ It does not receive revenue from linked book sellers or publishers.²⁰ The only revenue Google earns from the Google Books Partner Program ("Partner Program") is from contextually targeted ads that appear, "with publisher permission, on some books that are part of the Partner Program, and [they] share this ad revenue with those partners."²¹

At the heart of this controversy is the inherent conflict underlying U.S. copyright law. At issue is the proper balance between protecting the rights of authors to promote creative production, and a democratic society's need for access to information and "a free flow of ideas, information, and commerce."²² Books are synonymous with learning. Therefore, it is seemingly unthinkable that the authors of those books would seek to restrict the public's access to them. However, authors themselves are creators of that learning and innovation, and they must not be deprived of their statutory rights.

¹⁴ See Project Gutenberg Main Page, <http://www.gutenberg.org/> (last visited Nov. 30, 2005); The Open Library, <http://www.openlibrary.org/> (last visited Nov. 30, 2005); Amazon.com, Search Inside!, <http://www.amazon.com/gp/help/customer/display.html/103-8364322-5896641?ie=UTF8&nodeId=10197041> (last visited Apr. 11, 2007); Chris Gaither & Julie Tamaki, *Amazon to Let Readers Buy Just the Good Parts*, L.A. TIMES, Nov. 4, 2005, at C1.

¹⁵ See Project Gutenberg: The Project Gutenberg License, http://www.gutenberg.org/wiki/Gutenberg:The_Project_Gutenberg_License (last visited Jan. 8, 2007); see also sources cited, *supra*, note 14.

¹⁶ See Delaney & Trachtenberg, *supra* note 5. In fact, the only time a user will be able to view the entire work is when the work is in the public domain. See *id.*

¹⁷ Google Book Search Help Center, How to See More of This Book, <http://books.google.com/support/bin/answer.py?answer=4373> (last visited Apr. 11, 2007).

¹⁸ Google Book Search Library Project, <http://books.google.com/googlebooks/library.html> (last visited Apr. 11, 2007).

¹⁹ See Google Book Search Help Center, How Does Google Book Search Work?, <http://books.google.com/support/bin/answer.py?answer=43724> (last visited Apr. 11, 2007); Google Book Search Help Center, Who Profits When I Buy a Book?, <http://books.google.com/support/bin/answer.py?answer=43734> (last visited Apr. 11, 2007).

²⁰ Google Book Search Help Center, Who Profits When I Buy a Book?, *supra* note 19.

²¹ *Id.*

²² See Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 429 (1984); GRETCHEN MCCORD HOFFMANN, COPYRIGHT IN CYBERSPACE: QUESTIONS AND ANSWERS FOR LIBRARIANS, 7 (2001).

Regardless of the potentially enormous social benefit, literary community members have challenged the Library Project, and Google does not have the legal right to continue unless it can establish in court that its activities are exempt from copyright infringement laws and are protected by the “fair use” exception. The crux of the matter lies in the basic fact that the Internet has revolutionized modern life—the way we do business, communicate, speak,²³ and research. It has done so by providing faster and greater access to information. “The Internet has been likened to an enormous copying machine—misappropriation and unauthorized distribution of protected digital works has never been easier.”²⁴ It now tests the copyright law and challenges a doctrine of equity which has been described as “so flexible as virtually to defy definition,”²⁵ and as “the most troublesome in the whole law of copyright.”²⁶ The Internet now forces the copyright laws to catch up and adapt, as they have adapted to past technological changes.²⁷

This Note examines the Library Project and the application of traditional copyright law to the non-traditional Internet. Part I describes Google Book Search, which is comprised of the Partner Program and the controversial Library Project.²⁸ This section describes each project’s stated purposes and distinguishes the two. Part II examines the general value of book digitization from the consumer’s perspective and describes alternative book digitization projects.²⁹ Part III provides a background on U.S. copyright law, specifically focusing on the fair use doctrine. Part IV applies copyright law to the Library Project and argues that by adding

²³ See generally WEBSTER’S NEW MILLENNIUM DICTIONARY OF ENGLISH, Preview Edition (v 0.9.6), available at <http://dictionary.reference.com/search?q=google> (last visited Sept. 29, 2006) (defining “google” as a verb, meaning “to search for information about a specific person though the Google search engine,” or “to search for information on the Internet, esp. using the Google search engine.”).

²⁴ ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS, 142 (2003).

²⁵ *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 144 (S.D.N.Y. 1968). This case was decided before the Copyright Act, however, the Act incorporates the existing common law of fair use. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (explaining the Copyright Act’s approach as “intend[ing] to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in anyway.” (quoting H.R.Rep. No. 94-1476, 66 (1976))).

²⁶ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

²⁷ Such a change in response to new technology would in fact be consistent with the tradition of copyright law development in the U.S. See *Sony*, 464 U.S. at 430-31 (“From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection.”).

²⁸ Google Book Search, About Google Book Search, <http://books.google.com/google/books/about.html> (last visited Sept. 29, 2006).

²⁹ See Complaint, *McGraw-Hill Cos., Inc. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y. filed Oct. 19, 2005).

new functionality that will benefit scholarship and research, the Library Project's use of copyrighted works should be considered fair use.

I. WHAT IS GOOGLE BOOK SEARCH AND HOW DOES IT WORK?

Google Book Search³⁰ has the ambitious goal "to make the full text of all the world's books searchable by anyone"³¹ to help "users discover new books and publishers discover new readers."³² The project seeks to facilitate the process of searching "the oceans of information contained in the world's books, and to also help authors and publishers promote their books and expand their sales."³³ This latest project reflects Google's overall corporate mission "to organize the world's information and make it universally accessible and useful."³⁴ Comprised of the Partner Program and the Library Project, Google Book Search Project seeks to digitize vast collections of books into its searchable database.

While the Library Project is promoted as a book-finder and the Partner Program is promoted as a marketing tool, the projects are substantially similar except for key differences in authorization and user access. The extent of users' access to the scanned books depends on the degree of copyright protection. In general, search results will show a greater part of the book as copyright protection decreases according to statute or as a result of the copyright holder's permission.³⁵ Books already in the public domain appear in "Full View."³⁶ Books for which the copyright holder has given Google permission to use appear in "Limited Preview."³⁷ If Google scans a copyrighted work without express permission, the search results appear in "Snippet View."³⁸ Finally, the "No Preview Available" view only shows users "basic information about the

³⁰ See Google Book Search Beta, <http://books.google.com> (last visited Sept. 29, 2006).

³¹ Posting of Adam M. Smith to Official Google Blog, <http://googleblog.blogspot.com/> (Aug. 11, 2005, 11:53 PST).

³² Google Book Search: Library Project Overview, What's the Goal of This Project?, <http://books.google.com/googlebooks/library.html> (last visited March 9, 2007).

³³ Google, Press Release, Google Makes Public Domain Books Accessible to the World (Nov. 3, 2005), http://www.google.com/press/pressrel/print_publicdomain.html; see also Google Book Search, Partner Program, <https://books.google.com/partner/> (last visited March 25, 2007).

³⁴ Google—Corporate Information, <http://www.google.com/corporate/index.html> (last visited Sept. 29, 2006).

³⁵ See Google Book Search, <http://books.google.com/googleprint/about.html> (last visited Sept. 29, 2006).

³⁶ About Google Book Search, <http://books.google.com/googleprint/about.html> (last visited Sept. 29, 2006). Beginning August 30, 2006, users can also download, print and save out-of-copyright titles in the public domain. Posting of Adam Langley to Inside Google Book Search, <http://booksearch.blogspot.com/> (Aug. 30, 2006, 9:55 PST).

³⁷ About Google Book Search, *supra* note 36.

³⁸ *Id.*

book” and whether their search terms appear in the book.³⁹ Participation is free, and participants can remove books from the program at any time.⁴⁰

A. THE PARTNER PROGRAM

The Partner Program is the component which works directly with publishers and authors, digitally copying books with the express consent and participation of the copyright holders.⁴¹ Google encourages copyright holders to participate in the Partner Program by appealing to their financial interests, promoting the program as an “online book marketing program” and “free worldwide sales and marketing system.”⁴² Interested parties who hold the rights to the books may apply and send books to the program.⁴³ Once the application is approved and a copyright holder sets up a Google Books account, the participant submits a list of books to include in the Google Book Search.⁴⁴ Participants may either send the books to Google to scan, directly upload electronic Portable Document Format (“PDF”) versions, or have Google scan them at a library.⁴⁵

The Partner Program seeks to maximize accessibility to books while also protecting copyrights. When a user searches on Google Book Search, she will receive search results that include relevant books containing her search terms.⁴⁶ For each book, the search results will list the book’s title and author, “a short excerpt” containing the search terms, and the excerpt’s page number.⁴⁷ Users can then browse sample pages for each listing, which will include the front cover, copyright page, table of contents, index, and back cover.⁴⁸ To protect copyrights, only a limited number of pages are viewable, and users are required to log in.⁴⁹

³⁹ Google Book Search, No Preview Available, <http://books.google.com/googlebooks/screenshots.html> (last visited March 9, 2007).

⁴⁰ See Google Book Search, Authors: Common Questions, http://books.google.com/googlebooks/author_faq.html#6 (last visited Sept. 29, 2006).

⁴¹ See Google Book Search, Partner Program, *supra* note 33.

⁴² See *id.*

⁴³ Google Book Search Help Center, Book Eligibility, <http://books.google.com/support/partner/bin/answer.py?answer=18625&topic=322> (last visited April 25, 2007).

⁴⁴ Google Book Search, Partner Program, *supra* note 33.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Google Book Search, How Google Users Find Your Books, http://www.google.com/services/print_tour/print2.html (last visited March 25, 2007).

⁴⁸ Google Book Search, What You’ll See on Limited Preview, <http://books.google.com/intl/en/googlebooks/screenshots.html#limitedpreview> (last visited Sept. 29, 2006).

⁴⁹ Google Book Search, Partner Program, *supra* note 33. The program limits user access to the book so that users can only browse two pages forward and backward from pages where the search term appears. Additionally, users can only access a limited portion of any given book each month. Google Book Search, Your Content Is Protected, http://books.google.com/services/print_tour/print4.html (last visited Jan. 19, 2006). Publishers have the option to individually set the percentage of each book that users may browse during a thirty-day period.

Furthermore, the copy, save and print functions are disabled.⁵⁰ To view the entire book, interested users can click on accompanying “Buy this Book” links to online booksellers to purchase the book.⁵¹

Google integrates its advertising business model into the Partner Program as well, and participants gain a new source of revenue from contextual ads that appear on pages displaying their works⁵² in addition to potential increased sales of the scanned books.⁵³ Google technology analyzes a particular user’s access to a book to concurrently display advertisements for related products and services.⁵⁴ “And when people click on these ads, Google pays ‘the copyright holder.’”⁵⁵

B. THE LIBRARY PROJECT

The Library Project expands upon the Partner Program by including books from participating libraries in its searchable database, with or without the copyright holder’s permission. The Library Project operates similarly to the Partner Program in that it allows users to search for specific terms within a database of books. The Library Project, however, operates on passive consent, rather than express consent. The Library Project scans all books in the participating library collections unless copyright holders opt out of the Project.⁵⁶

Another key distinction between the projects is the degree of user access to the scanned books. In deference to copyright holders, users will only see a limited portion of copyrighted materials which publishers have not expressly offered to the Partner Program.⁵⁷ Each search result

Google Book Search, Percent Browsable, <https://books.google.com/partner/glossary> (last visited Jan. 19, 2006).

⁵⁰ Google Book Search, Your Content Is Protected, *supra* note 49.

⁵¹ Google Book Search, Partner Program—An Online Book Marketing Program, <http://books.google.com/googlebooks/publisher.html> (last visited Jan. 19, 2006). Participants who sell their books from their own websites can also have a “Buy this Book” link. Google Book Search, Drive More Book Sales, http://books.google.com/services/print_tour/print3.html (last visited Jan. 19, 2006).

⁵² Google Book Search, Earn New Revenue with Contextual Ads, http://www.google.com/services/print_tour/print5.html (last visited Jan. 19, 2006).

⁵³ See *id.*; Answer, Jury Demand and Affirmative Defenses at 28, *Author’s Guild v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y. filed Nov. 30, 2005) (“Google admits that it provides Internet search services to the public and derives approximately 98 percent of its revenue from the sale of advertising.”).

⁵⁴ Google Book Search, Earn New Revenue with Contextual Ads, *supra* note 52.

⁵⁵ *Id.*

⁵⁶ Google Book Search Help Center, What If I Would Like My Book Removed?, <http://books.google.com/support/bin/answer.py?answer=43756&topic=9011> (last visited March 9, 2007).

⁵⁷ See Google Books Library Project, An Enhanced Card Catalog of the World’s Book, <http://books.google.com/googlebooks/library.html> (last visited Sept. 29, 2006). Google has taken great pains to stress that it wants to protect the rights of copyright holders, repeatedly emphasizing on its site that in contrast to an electronic replacement for the literary works, the

for a copyrighted book names the book's title, author, and publisher.⁵⁸ For certain books, such as dictionaries, users will only see this basic bibliographic information.⁵⁹ In some cases, Snippet View further displays the number of times the search terms appear in the book, three snippets including the search terms the book, and the page numbers on which the snippets appear.⁶⁰ Users may run another search within the particular book, but only three instances of a given word will ever be shown.⁶¹ Sidney Verba, author and director of Google partner Harvard University Library, is reassured by "Google's notion of showing only the snippets, which have everything to do with what's in the book, but nothing to do with reading the book."⁶²

Users will also see related information such as online reviews and other web pages related to the book.⁶³ As in Limited Preview, Snippet View includes "Buy this Book" links to online booksellers.⁶⁴ Users searching for out-of-print books may be directed to used copies at online booksellers such as Abebooks, Alibris, and Google's shopping search engine, Froogle.⁶⁵ The Project also includes a "Find this book in a library" link to local libraries.⁶⁶ The contextually targeted ads which appear on Sample Pages are notably absent on the Snippet View pages.⁶⁷

When Google is "unable to show you snippets"—presumably because the copyright holder opted out of the Library Project—"No Preview Available" view displays minimal factual information about the book.⁶⁸ If a book contains the search term, users will only see the book's

Project is rather "like a card catalog, show[ing] users information about the book, and in some cases, a few snippets—a few sentences of your search term in context." See Google Book Search, Why Can't I Read the Entire Book?, <http://books.google.com/support/bin/answer.py?answer=43729&topic=9259> (last visited Sept. 29, 2006).

⁵⁸ Google Book Search, What You'll See When You Search, <http://books.google.com/googlebooks/screenshots.html> (last visited Sept. 29, 2006).

⁵⁹ Posting of Ryan Sands to Inside Google Book Search, <http://booksearch.blogspot.com/> (July 5, 2006, 16:41 PST); see Google Book Search, No Preview Available, *supra* note 39.

⁶⁰ Google Book Search, What You'll See When You Search on Google Book Search: Snippet View, <http://books.google.com/googlebooks/screenshots.html> (last visited Sept. 29, 2006).

⁶¹ In fact, running repeat searches of previously searched words returned the exact same snippets. See Google Book Search, True Stories of Pioneer Life, <http://books.google.com/books?q=were&id=hjhu2OaXKw4C&ie=UTF-8&pgis=1> (last visited Jan. 24, 2006).

⁶² See Hafner, *At Harvard, A Man, A Plan and a Scanner*, *supra* note 3.

⁶³ Google Book Search, Snippet View, *supra* note 60.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *id.*

⁶⁸ See About Google Book Search, What Can I View?, <http://books.google.com/googlebooks/about.html> (last visited April 3, 2007).

bibliographic information and none of the text.⁶⁹ Users can get more information about the book through links to booksellers and libraries.⁷⁰

II. BOOK DIGITIZATION PROJECTS IN GENERAL

A. VALUE TO THE CONSUMER AND SOCIETY

Google Book Search has the potential to use the Internet to redirect students and other researchers back to the full range of knowledge available within traditional print sources. There is a growing trend in research methods of individuals increasingly migrating from library books to the Internet and other electronic sources.⁷¹ For example, Mr. Verba of Harvard University skeptically points to student course papers “thick with URL’s in the bibliography.”⁷² Yet, the Internet is a source of misinformation as well as information. With the ease of publication and anonymity on the Internet, information on the Internet is not always reliable or comprehensive. Internal research at Microsoft estimated that fifty percent of online queries go unanswered on today’s search engines.⁷³ The Library Project includes works from major research libraries, many of which are out-of-print or otherwise inaccessible to most of the public.⁷⁴ Thus, more than simply facilitating the research process, the Library Project will also expand the types of information available to be integrated into the research results.

On the other hand, the Project’s critics and opponents argue that the nature of Google’s Internet display of print works is inconsistent with the works’ purpose. Michael Gorman, president of the American Library Association and university librarian at California State University, Fresno calls the Project a “potential disaster.”⁷⁵ He argues “[t]hey are reducing scholarly texts to paragraphs. The point of a scholarly text is they are written to be read sequentially from beginning to end, making an

⁶⁹ See Google Book Search, No Preview Available, *supra* note 39.

⁷⁰ See *id.*

⁷¹ Hafner, *At Harvard, a Man, a Plan and a Scanner*, *supra* note 3.

⁷² *Id.*

⁷³ Microsoft—Press Release, MSN Search Announces MSN Book Search (Oct. 25, 2005), <http://www.microsoft.com/presspass/press/2005/oct05/10-25MSNBookSearchPR.msp>.

⁷⁴ See Edward Wyatt, *Google Adds Library Texts to Search Database*, N.Y. TIMES, Nov. 3, 2005, at C11. Professor Lessig estimates that almost ninety percent of the books Google might scan are out of print. Lawrence Lessig, *Google’s Tough Call*, WIRED MAGAZINE, Nov. 2005, <http://www.wired.com/wired/archive/13.11/posts.html?pg=8>. Some books are inaccessible because they are “orphan works” for which copyright status is unknown. Christopher T. Heun, *Courts Unlikely to Stop Google Book Copying*, Sept. 2, 2005, <http://www.informationweek.com/showArticle.jhtml;jsessionId=JDZCQXV3T32JAQSNL0SKHSCJUNN2JVN?articleID=170700423>; see also 2–8 NIMMER ON COPYRIGHT § 8.03 n.122.18 (2005) (citing 151 Cong. Rec. H2114 (daily ed. Apr. 19, 2005) (Statement of Rep. Berman)) (“The name ‘orphan works’ refers to ‘works not available in the marketplace at a reasonable price.’”).

⁷⁵ Hafner, *At Harvard, a Man, a Plan and a Scanner*, *supra* note 3.

argument and engaging you in dialogue.”⁷⁶ Although Mr. Gorman’s argument raises a valid concern, the response is that the Library Project’s goal is to create not a *readable* digital library, but a *searchable* one.⁷⁷ The Library Project does not eliminate the need for bookstores or libraries, and simply makes users aware of such resources.⁷⁸

The Library Project may bring the future of a worldwide digital library to the public sooner rather than later through its time-reducing and cost-cutting proprietary technology. The University of Michigan library staff estimated that it would take them more than a thousand years to digitize the library’s seven million volumes.⁷⁹ Google estimated it could digitize the library in six years.⁸⁰ Mr. Verba of Harvard University stated “I didn’t think it could be done by anyone, including Google.”⁸¹ He believes the University’s partnership with Google will thus “aid the library’s broader mission to preserve academic material and make it accessible to the world.”⁸²

B. ALTERNATIVE PROJECTS

The number of book digitization projects currently in operation or in development illustrates the potential social benefit, and perhaps the commercial viability, of a digital library.⁸³ Book digitization initiatives involve a range of institutions, collaborations and business models.

The Library of Congress’s World Digital Library illustrates the public service perspective. The Library aims to digitize materials from institutions around the world to “recreate the memory of cultures that have much longer memories than we do . . . [and] bring, free of charge to anyone with Internet access, a series of Web sites that will seamlessly integrate materials of different cultures as much as possible.”⁸⁴ In fact, Google is one of the first private investors in the Library of Congress’s ambitious undertaking, although the Library of Congress emphasizes that

⁷⁶ Delaney & Trachtenberg, *supra* note 5, at B1.

⁷⁷ See Google, Press Release, Google Makes Public Domain Books Accessible to the World (Nov. 3, 2005), *supra* note 33.

⁷⁸ See Google Book Search, Why Can’t I Read the Entire Book?, *supra* note 57. Of course, as a general matter, informing people where to obtain the print books does not necessarily mean they will actually go find them. However, the lack of interest of a few should not detract from the benefit to others who will in fact use the search engine to seek out works.

⁷⁹ The University of Michigan also claims it is “among the most aggressive of libraries doing their own digitizing.” Hafner, *At Harvard, a Man, a Plan and a Scanner*, *supra* note 3.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See sources cited *supra* note 14.

⁸⁴ Katie Hafner, *Google Gift to Digital Library*, N.Y. TIMES, Nov. 22, 2005, at C6.

the relationship goes no farther than investment and does not include partnership in Google Book Search.⁸⁵

Publishers are also developing their own projects. Random House Publishers, the biggest American publisher, has long been digitizing all of their new content for in-house use, as well as digitizing many older books that are still in print.⁸⁶ Users can search for terms within a particular book, browse selected pages, and buy the book.⁸⁷ HarperCollins Publishers plans to create a searchable digital library of all its book and audio works.⁸⁸ Internet users will be able to search the HarperCollins library using general search engines, including Google, or through retailers like Amazon.com.⁸⁹ Both companies are introducing features which will allow consumers to incorporate portions of books into their websites.⁹⁰ On November 3, 2005, Random House proposed a business model which would charge readers about five cents per page for access to digital content.⁹¹ The publisher and author would share four of the five cents of proceeds.⁹² According to one author, "[t]he fact that Random House has already developed such a model indicates that it supports the concept, and that other publishers are likely to follow."⁹³

Amazon.com also recently announced plans to incorporate a user payment structure in its existing "Search Inside" feature for books.⁹⁴ The "Amazon Pages" service will allow users to purchase digital portions of a book, from a few pages to entire chapters, for a few cents a page.⁹⁵ "Amazon Upgrade" will also offer Amazon customers ordering print books the option of digitally "upgrading" some books for an addi-

⁸⁵ *Id.*

⁸⁶ See Edward Wyatt, *HarperCollins Will Create a Searchable Digital Library*, N.Y. TIMES, Dec. 13, 2005, at E8; Edward Wyatt, *Want 'War and Peace' Online? How About 20 Pages at a Time?*, N.Y. TIMES, Nov. 4, 2005, at A1.

⁸⁷ Random House, Inc., *How to Use Browse & Search*, <http://www.randomhouse.com/about/insight/> (last visited Apr. 8, 2007).

⁸⁸ See Edward Wyatt, *HarperCollins Will Create a Searchable Digital Library*, *supra* note 86.

⁸⁹ *Id.*

⁹⁰ CNN.com, *Publishers OK Online Book Browsing*, <http://www.cnn.com/2007/TECH/internet/02/28/book.browsing.reut/index.html> (Mar. 2, 2007).

⁹¹ Edward Wyatt, *Want 'War and Peace' Online? How About 20 Pages at a Time?*, *supra* note 86.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Amazon.com, Press Release, Amazon.com Announces Plans for Innovative Digital Book Programs, <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=778248&highlight> (last visited Sept. 29, 2006).

⁹⁵ See Gaither & Tamaki, *supra* note 14; *Amazon Announces Digital Book Sales Program*, 23 THE COMPUTER & INTERNET LAWYER 23, (Jan. 2006).

tional fee.⁹⁶ Customers who purchase the upgrade will receive a digital version to read online as well as the print copy.⁹⁷ Amazon plans to offer these options only with publishers' authorizations.⁹⁸

The Open Content Alliance ("the Alliance") is Google's most direct competition and takes a more conservative approach to copyright law.⁹⁹ A collaboration between Google's search engine rival Yahoo!, Microsoft, and several universities and archives,¹⁰⁰ the Alliance is digitizing millions of books for display on the Internet.¹⁰¹ Because the Alliance plans to ask copyright holders for permission to include their works, users will have access to the *full* text of *all* digital works.¹⁰² Microsoft is to date the largest financial contributor to the Alliance, contributing \$5 million—enough to scan about 150,000 books.¹⁰³ Microsoft also announced plans for MSN Book Search, which will offer substantially the same services as the Google Books Library Project.¹⁰⁴ MSN Book Search will offer access to out-of-copyright books for free. For copyrighted books, Microsoft and publishers are discussing how Microsoft might charge, either per page or per chapter.¹⁰⁵

III. AN INTRODUCTION TO U.S. COPYRIGHT LAW AND THE FAIR USE DOCTRINE

The dual purpose of copyright law in the U.S.—to promote creativity and innovation, while protecting authors' rights—dates to the birth of

⁹⁶ Amazon.com, Amazon Upgrade, <http://www.amazon.com/gp/help/customer/display.html?nodeId=110744011> (last visited Sept. 29, 2006); Gaither & Tamaki, *supra* note 14; *Amazon Announces Digital Book Sales Program*, *supra* note 95.

⁹⁷ Gaither & Tamaki, *supra* note 14.

⁹⁸ Amazon.com, Amazon Upgrade: Why Are Some Books Not Eligible, <http://www.amazon.com/gp/help/customer/display.html?nodeId=110744011> (last visited Sept. 29, 2006).

⁹⁹ Danielle Tiedt, general counsel and manager of search content acquisition at MSN, stated, "We're pretty strongly 'opt-in' We're very aligned with protecting copyright and intellectual property." Katie Hafner, *Microsoft to Offer Online Book-Content Searches*, N.Y. TIMES, Oct. 26, 2005, at C6.

¹⁰⁰ Other Alliance members include the University of California, Columbia University, Rice University, the Internet Archive, and the National Archives of Britain. Hafner, *Microsoft to Offer Online Book-Content Searches*, *supra* note 99; see also The Authors Guild, *Yahoo Joins In: From an October 3, 2005, E-mail to Members*, http://www.authorsguild.org/news/10_03_05.htm (last visited Jan. 20, 2006).

¹⁰¹ Hafner, *Microsoft to Offer Online Book-Content Searches*, *supra* note 99.

¹⁰² *Id.*

¹⁰³ *Id.* It is unclear, however, whether the money funds the actual scanning operations or are used to obtain copyright permission.

¹⁰⁴ See Microsoft, Press Release, MSN Search Announces MSN Book Search: MSN is Working with the Open Content Alliance to Bring Millions of Publicly Available Print Materials Worldwide to the Web, (Oct. 25, 2005), <http://www.microsoft.com/presspass/press/2005/oct05/10-25MSNBookSearchPR.mspx>; Hafner, *Microsoft to Offer Online Book-Content Searches*, *supra* note 99.

¹⁰⁵ Hafner, *Microsoft to Offer Online Book-Content Searches*, *supra* note 99.

our nation.¹⁰⁶ The framers of the Constitution of the United States expressly granted Congress the authority to enact copyright legislation under article I, section 8, clause 8: “The Congress shall have power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” (emphasis added). Thus, copyright protection is a means to the ultimate end of social progress.¹⁰⁷

A. COPYRIGHT INFRINGEMENT—STATUTORY AND POLICY PERSPECTIVES

Copyright law today is governed exclusively by federal statute—the Copyright Act of 1976, as amended, 17 U.S.C. §§ 101-810 (“Copyright Act”).¹⁰⁸ A copyright grants its owner exclusive rights to certain uses of a protected work, including the rights to reproduce, make derivative works of, distribute, and publicly display or perform the work.¹⁰⁹ Copyright infringement liability protects the copyright owner’s exclusive rights. Two elements must be proven in order to establish a prima facie case of infringement: “(1) ownership of a valid copyright, and (2) [unauthorized] copying of constituent elements of the work that are original.”¹¹⁰ There is no requirement that the infringement cause the plaintiff any damage or harm.¹¹¹ As has been affirmed on many occasions, this is a strict test, and merely “[a]cknowledging the source of the copyrighted material does not substitute for obtaining permission.”¹¹² The act of copying without obtaining prior permission is the act the law seeks to punish.

Several of these exclusive rights are relevant in assessing the Library Project—the reproduction, adaptation, and public display rights. The reproduction right defines infringement as any single act of copying,

¹⁰⁶ See U.S. CONST. art. I, § 8, cl. 8; HOFFMANN, *supra* note 22, at 7.

¹⁰⁷ See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984) (quoting *U.S. v. Paramount Pictures*, 334 U.S. 131, 158 (1948)).

¹⁰⁸ 17 U.S.C. §§ 101-810 (2006); see also SCHECHTER & THOMAS, *supra* note 24, at 11 (The Copyright Act is “effective for works created on or after January 1, 1978. Works created before this date may be governed in part by the predecessor statute—the Copyright Act of 1909—in part by the common law of the various states, and in part by selected provisions of the 1976 law.”).

¹⁰⁹ 17 U.S.C. § 106.

¹¹⁰ *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

¹¹¹ 4–13 NIMMER ON COPYRIGHT § 13.01 (1978). (“Nonetheless, it has been held that the plaintiff’s inability to recover any form of monetary or equitable relief can warrant a defense summary judgment.”). But see SCHECHTER & THOMAS, *supra* note 24, at 223.

¹¹² The Library of Congress, U.S. Copyright Office, *Fair Use*, <http://www.copyright.gov/fls/fl102.html> (last visited Sept. 29, 2006). But see *Campbell v. Acuff-Rose*, 510 U.S. 569, 585 (1994) (holding rap parody of plaintiff’s song constituted fair use); SCHECHTER & THOMAS, *supra* note 24, at 223 (“Of course [*Campbell*] involved a parody, and parodists are almost never granted permission. Nonetheless, the statement seems sound as a general rule.”).

even an intermediate step to creating a new work, or for personal or private use unless it is specifically excused by a provision of the statute.¹¹³ The related adaptation right is the copyright holder's exclusive "right to make derivative works."¹¹⁴ A derivative work is one that recasts, transforms or adapts another work with "editorial revisions, elaborations, or other modifications which, as a whole, represent an original work of authorship."¹¹⁵ The public display right protects a copyright holder's right to publicly show a copy of the protected work directly or indirectly, by means of a device or process, such as a film, slide, television image.¹¹⁶ When a lawfully obtained copy is displayed by means of projection rather than directly, only one image may be projected at a time, and that image must be visible only to viewers present at the place *where the copy is located*.¹¹⁷ A defendant's work may constitute infringement if it "impermissibly appropriates the expression rather than the idea of the copyrighted work," even though the work differs from the copyrighted work and is not a direct reproduction.¹¹⁸

Although a copyright grants an author a comprehensive "monopoly privilege," such privilege is not absolute.¹¹⁹ Nor is it based upon any "natural right" authors have in the creation.¹²⁰ Instead, copyright law makes rewarding the authors secondary to the primary concern for the public interest.¹²¹ "The copyright . . . is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public."¹²² Copyright law seeks to ensure authors' ownership in their creations, but that protection must be viewed in the context of the broader social goal of progress to the public good.¹²³ Copyright law has

¹¹³ SCHECHTER & THOMAS, *supra* note 24, at 115 ("Unless fair use or another limitation upon the reproduction right is available, a wholly private, undistributed reproduction counts as a copyright infringement.").

¹¹⁴ 2-8 NIMMER ON COPYRIGHT § 8.09[A].

¹¹⁵ 17 U.S.C. § 101.

¹¹⁶ *See id.* (defining "display").

¹¹⁷ *See* 17 U.S.C. § 109(c); 2-8 NIMMER ON COPYRIGHT § 8.20 (emphasis added).

¹¹⁸ SCHECHTER & THOMAS, *supra* note 24, at 115-16.

¹¹⁹ *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984).

¹²⁰ *Id.* at 429 n.10 (quoting the report of the Judiciary Committee of the House of Representatives which accompanied the comprehensive revision of the Copyright Act of 1909, H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909)); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

¹²¹ *See Sony*, 464 U.S. at 429.

¹²² Leval, *supra* note 120, at 1107.

¹²³ *See* HOFFMANN, *supra* note 22, at 3. Hoffmann roots this commitment to the public good in the American democratic philosophy: "the fundamental right of every member of American society to better himself and his position through education." *Id.* Public access to information is not only an ideal, it is *necessary* "to maintain a democratic and educated society." *Id.*

repeatedly adapted to technological change in the past.¹²⁴ The constant factor has been the pursuit of public good.

B. THE FAIR USE DOCTRINE—SECTION 107 OF THE COPYRIGHT ACT

Copyrights grant an exclusive right to creative works, but it is not an absolute right. The fair use doctrine is one limitation on a copyright holder's exclusive right to a work. The doctrine was originally judicially created, to reach equitable results when "carrying out the letter of the law violated the spirit of the law . . . [whose object was] 'to promote the progress of science and the useful arts.'"¹²⁵

The fair use limitation was codified in the Copyright Act.¹²⁶ Section 107 provides:

Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, new reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use 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.

The fact that a work is unpublished shall not bar itself a finding of fair use if such a finding is made upon consideration of all the above factors.

A court "shall" consider the four fair use factors enumerated in the statute, but the list is not exhaustive, and "the statute itself does not indicate how the factors are to be weighed."¹²⁷ The doctrine does not provide

¹²⁴ See Edward Rothstein, *If Books Are on Google, Who Gains and Who Loses?*, N.Y. TIMES, Nov. 14, 2005, at E3.

¹²⁵ HOFFMANN, *supra* note 22, at 25.

¹²⁶ See 17 U.S.C. § 107; COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 493 (2002).

¹²⁷ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985); see SCHECHTER & THOMAS, *supra* note 24, at 217.

bright-line rules, but it rather gives courts guidelines and the discretion to decide, *ex post*, whether a particular activity should be within the copyright owner's rights.¹²⁸ Courts are not to consider the factors in isolation from each other, but to weigh them together, along with other relevant factors, in light of the Constitutional purpose of copyright—promoting the “Progress of Science and useful Arts.”¹²⁹

The flexibility of the fair use doctrine is both an advantage and a disadvantage in determining liability. On the one hand, the doctrine may be applied flexibly to reach equitable results. Within the broad criteria given in the statute, the courts have freedom to determine fair use on a case-by-case basis.¹³⁰ There “is no disposition to freeze the doctrine in the statute, *especially during a period of rapid technological change*.”¹³¹ That very flexibility also engenders uncertainty, however, and resolution often depends on individual courts' liberal or conservative interpretations of the doctrine. Circuit Judge Pierre Leval summarized the effects of this uncertainty: “[c]onfusion has not been confined to judges. Writers, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes.”¹³² The Supreme Court of the United States has noted that absent clear precedent or legislative directive, the judiciary must be cautious in expanding the scope of copyright protection, emphasizing deference to the public good.¹³³

C. THE LIBRARY AND ARCHIVE EXCEPTION OF SECTION 108

The Library Project does not meet the stringent requirements of the library and archive exemption, which expressly limits copyright holders' reproduction right with respect to libraries and archives activities.¹³⁴ This exception limiting the copyright holder's reproduction right is a nar-

¹²⁸ See *Harper & Row*, 471 U.S. at 561.

¹²⁹ *Cambell v. Acuff-Rose*, 510 U.S. 569, 575–78 (1994); Robin Jeweler, *CRS Report to Congress: The Google Book Search Project: Is Online Indexing a Fair Use Under Copyright Law?*, at CRS-3, Dec. 28, 2005, http://opencrs.com/rpts/RS22356_20051228.pdf; see also Leval, *supra* note 120, at 1110 (“Thus, the introductory language of our statute explains that fair use may be made for generally educational or illuminating purposes ‘such as criticism, comment, news reporting, teaching . . . scholarship, or research.’”) (quoting 17 U.S.C. § 107 (1982)).

¹³⁰ *Sony Corp. of Am. v. Universal Studios, Inc.* 464 U.S. 417, 448 n.31 (quoting H.R. Rep. No. 94-176, p. 66 (1976)).

¹³¹ *Id.* (emphasis added).

¹³² Leval, *supra* note 120, at 1107.

¹³³ See *Sony*, 464 U.S. at 431-32 (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)); see also Jeweler, *supra* note 129, at CRS-5 (“Although *Sony* sanctioned ‘time shifting’ of in-home television broadcasting, neither the U.S. Supreme Court nor the lower courts have evidenced willingness to expand this judicially created category of fair use.”).

¹³⁴ See 17 U.S.C. § 108. This Note discusses the section 108 library exception as it is relevant to Google's actions. Section 108 is not a blanket exception, and institutions must satisfy certain conditions in order for the section to apply.

row one, as even libraries or archives may not systematically copy protected works.¹³⁵ For its own uses, a library may make a maximum of only three copies of a published work to replace a damaged, deteriorating, lost or stolen copy, or if the existing format of the work becomes obsolete.¹³⁶ Section 108 only allows “isolated and unrelated reproduction or distribution of a single copy” of copyrighted materials for library patrons.¹³⁷ Significantly, a library cannot distribute digital copies or make them available to patrons outside the library premises.¹³⁸ Publishing digitized books over the Internet without restrictions is thus outside the scope of the exception. Similarly, the library exception does not apply to digital archives that exist exclusively on the Internet.¹³⁹ The Library Project is only “borrowing” participating libraries’ books to scan into its digital library, which is available exclusively for online searches. Google’s digital library is not a library in the statutory sense.¹⁴⁰ Nonetheless, an institution that fails to qualify for the §108 library exception may still avoid infringement liability under the general catch-all fair use doctrine.¹⁴¹

IV. THE GOOGLE BOOKS LIBRARY PROJECT CONSTITUTES FAIR USE

By systematically copying protected works, the Library Project potentially infringes copyrights. The complaints against Google allege a *prima facie* case of infringement. The individual plaintiffs in the *Author’s Guild* suit—Herbert Mitgang, Betty Miles, and Daniel Hoffman—allege that they hold copyrights to several fiction and non-fiction works in the University of Michigan library, a Library Project partner.¹⁴² Similarly, plaintiff publishers in the *McGraw-Hill* suit allege that they hold

¹³⁵ *Id.*; see also SCHECHTER & THOMAS, *supra* note 24, at 117 (“Where the work is published . . . [the library] may make up three copies, but only for the purpose of replacing a copy that is damaged, deteriorating, lost or stolen, or if the existing format of the work becomes obsolete . . . ”)(quoting 17 U.S.C. § 108(c)).

¹³⁶ SCHECHTER & THOMAS, *supra* note 24, at 117.

¹³⁷ 17 U.S.C. § 108(g).

¹³⁸ 17 U.S.C. § 108; SCHECHTER & THOMAS, *supra* note 24, at 117. Although the section would not seem to apply to the participating libraries in this case, an in-depth analysis of the issue of whether the libraries are themselves subject to copyright infringement liability is beyond the scope of this Note.

¹³⁹ Elisabeth Hanratty, Note, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 10, ¶ 10 (Apr. 15, 2005) (referring to the Digital Millennium Copyright Act’s legislative history as recorded in S. REP. NO. 105-109 (1998)).

¹⁴⁰ See *id.* at ¶ 10–12; 17 U.S.C. § 108(f)(4).

¹⁴¹ 17 U.S.C. § 108(f)(4).

¹⁴² Complaint at 10–12, *Author’s Guild v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y., filed Sept. 20, 2005).

copyrights to books in the University of Michigan library.¹⁴³ No plaintiffs have authorized Google to copy its copyrighted works at the University of Michigan library. The allegedly infringing activity has two aspects in that first the digital scanning of an entire book violates the authors' reproduction rights, and that second, displaying portions of the text on the Internet violates the authors' public display rights.¹⁴⁴

Google announced that it would resume scanning library books without rights-holders' permission.¹⁴⁵ Although Google states it will honor copyrights through its opt-out policy, opponents, including Association of American Publishers CEO Pat Schroeder, argue that the policy "shifts the responsibility for preventing infringement to the copyright owner rather than the user, turning every principle of copyright law on its ear."¹⁴⁶ Google argues that even if plaintiff authors have a *prima facie* case of copyright infringement, Google's scanning is legal under the fair use exception.¹⁴⁷

If an individual may not systematically copy a library's contents for personal use, and the library itself may not be able to do so, why should Google have the right? From a policy perspective, the answer is that the Project is an innovative contribution to the public's benefit by facilitating research and promoting scholarship—purposes expressly endorsed by the preamble of section 107. The Library Project realistically cannot function without scanning complete copies of books into its database since searching a minimal database is hardly effective. From a legal perspective, the answer depends upon whether the Library Project constitutes fair use under 17 U.S.C. § 108. If the use is not fair, the public may have to wait years for other projects with limited authorization or funds to make Google's vision a reality. If the use is fair, as this Note argues, a

¹⁴³ Complaint at 28, *McGraw-Hill Cos., Inc. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y. filed Oct. 19, 2005).

¹⁴⁴ See Part III.A., *supra*.

¹⁴⁵ See Answer, Jury Demand, and Affirmative Defenses, at 3, 31, *Author's Guild v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y., filed Nov. 30, 2005).

¹⁴⁶ Lessig, *supra* note 74. The *Author's Guild* complaint alleges that an actual controversy exists by reason of Google's announcement that "it will not cease and desist from, or remedy, its wholesale infringement of the Works." Complaint at 52, *Author's Guild v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y., filed Sept. 20, 2005). A district court recently held that a copyright owner's knowing failure to object to a use resulted in a nonexclusive implied license for Google to use the copyrighted material as a "Cached" link in its search results. *Field v. Google, Inc.*, 412 F.Supp.2d 1106, 1116 (D.Nev. 2006); see also 3–10 NIMMER ON COPYRIGHT § 10.03[A][7]. The implied license defense was one of four copyright infringement defenses the court found in favor of Google. *Field*, 412 F.Supp.2d at 1115. The court further held that Google was also entitled to the fair use defense, as well as the defenses of estoppel and under the system cache safe harbor of the Digital Millennium Copyright Act. *Id.* at 1125. The fair use element of the opt-out policy under *Field* will be discussed in Part IV.A., *infra*.

¹⁴⁷ See Answer, Jury Demand, and Affirmative Defenses, *Author's Guild v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y. filed Nov. 30, 2005); Edward Wyatt, *Major Publishers Sue Google*, *supra* note 11, at E2.

copyright holder can still maintain control over her work by opting out of the Project.

A. THE PURPOSE AND CHARACTER OF THE USE

In evaluating the first factor, the purpose and character of the allegedly infringing use, courts should evaluate the commercial and transformative nature of the use, as well as the public benefit from that use.¹⁴⁸ A commercial purpose does not automatically make a use unfair, nor does an educational purpose automatically make a use fair.¹⁴⁹ The purposes listed in the statute are examples only; that a particular purpose is not on the list does not mean that it will necessarily weigh against a finding of fair use.¹⁵⁰

Though Google is a commercial corporation, its use of copyrighted works within the context of the Library Project is not commercial. In a closely analogous case, *Kelly v. Arriba Soft Corp.*, an Internet search engine created an electronic database of images by collecting copyrighted images from websites on the Internet. The Ninth Circuit found that the defendant's indisputably commercial character was not dispositive of the fair use issue.¹⁵¹ In that case, once Arriba copied an image from a website, it reduced the image into a lower-resolution "thumbnail" image and deleted the original.¹⁵² Arriba did not obtain prior authorization from copyright holders for such use, and a photographer whose images were collected by the search engine brought suit.¹⁵³ The court found that the commercial nature of the use weighed "only slightly" against the defendant.¹⁵⁴ Minimizing the website's commercial operations, the court found that the use was "more incidental and less exploitative in nature than more traditional types of commercial use" because Arriba did not profit from the image, "neither using [the plaintiff] Kelly's images to directly promote its web site nor trying to profit by selling Kelly's images."¹⁵⁵

Subsequent to the *Kelly* decision, the district court in the Central District of California held in *Perfect 10 v. Google, Inc.* that Google's use of plaintiff's thumbnail images in Google's image search engine was not

¹⁴⁸ See *Campbell v. Acuff-Rose*, 510 U.S. 569, 578, 593 (1994).

¹⁴⁹ See *id.* at 583-84, 585 n.18.

¹⁵⁰ MARY BRANDT JENSEN, DOES YOUR PROJECT HAVE A COPYRIGHT PROBLEM? A DECISION-MAKING GUIDE FOR LIBRARIANS 119 (McFarland & Company, Inc. 1996).

¹⁵¹ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

¹⁵² *Kelly*, 336 F.3d at 815.

¹⁵³ See *id.* at 816.

¹⁵⁴ *Id.* at 818; see also *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 923 (2d Cir. 1995) (holding the link between defendant's commercial gain and its copying was so attenuated that it did not amount to commercial exploitation).

¹⁵⁵ *Kelly*, 336 F.3d at 818.

a fair use.¹⁵⁶ Distinguishing *Kelly*, the court emphasized that using Perfect 10's thumbnail images gives Google a direct commercial benefit through its AdSense advertising program.¹⁵⁷ Though Google prohibited websites from registering in AdSense if the site contained images in Google Image Search results, the court was not convinced that the policy was in fact enforced.¹⁵⁸

The Library Project does not directly profit from displaying snippets of copyrighted works. In contrast to the Google Image Search results in *Perfect 10*, Google does not display advertisements on Snippet View pages. Google only earns advertising revenues in conjunction with the Partner Program. Google does not sell advertisements for the Library Project and does not sell books. Instead, search results direct users to other websites or libraries where users can access the full text of searched books.¹⁵⁹ Google's commercial nature should not preclude the Library Project's non-commercial use.

The first factor inquiry does not end with whether the use is commercial, but continues to evaluate the transformative nature of the use. The relevant question here is whether Google's book scanning "merely superseded the object of the originals or instead added a further purpose or different character."¹⁶⁰ A use is transformative if it alters the original "with new expression, meaning, or message"¹⁶¹ and does not, intentionally or unintentionally, serve the same purpose as the original work.¹⁶² A highly transformative use may make other considerations such as commercialism less important.¹⁶³ The Second Circuit thus held in *Bill Gra-*

¹⁵⁶ *Perfect 10 v. Google, Inc.*, 416 F.Supp. 2d 828, 851 (C.D.Cal. 2006).

¹⁵⁷ *Id.* at 846.

¹⁵⁸ *Id.* at 846–47.

¹⁵⁹ Google will likely profit indirectly, however, if it succeeds in building a comprehensive database. Google does not sell advertising on Library Project pages, but it does in the Partner Program. A comprehensive database will make the search engine more effective and will likely attract more users to the general Book Search site, potentially increasing the Partner Program advertising revenue stream. Google most probably recognized this indirect revenue potential. This potential is not the primary purpose of the infringing use, however. It is, rather, an effect of the goal to build a search engine which facilitates access to knowledge. The Second Circuit interpreted the first factor "somewhat liberal[ly]" in *Rosemont Enterprises, Inc. v. Random House, Inc.*, where it found that whether publication was motivated in part by a desire for commercial gain had not bearing on whether a "public benefit" may be derived from such a work. 366 F.2d 303, 307–08 (1966).

¹⁶⁰ *Kelly*, 336 F.3d at 818 (citing *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994)); see also *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006) (citing *Kelly*) ("[Plaintiff] significantly reduced the size of reproductions [of defendant's images]. While the small size is sufficient to permit readers to recognize the historical significance of the posters, it is inadequate to offer more than a glimpse of their expressive value." (internal citations omitted)).

¹⁶¹ *Campbell*, 510 U.S. at 579.

¹⁶² See *Kelly*, 336 F.3d at 819.

¹⁶³ *Id.* at 818 (citing *Campbell*, 510 U.S. at 579).

ham Archives v. Dorling Kindersley Ltd. that defendant's transformative use of reduced-size reproductions of copyrighted images in a book chronicling the cultural history of the Grateful Dead was fair use.¹⁶⁴

One of Google's challenges will accordingly be to convince the court that by adding functionality to the digitized works—the ability to search and retrieve relevant snippets—the Library Project transforms the original work. Transformative use often involves artistically creative transformation in the same medium, such as parody, for example.¹⁶⁵ Uses that merely change the medium of a protected work are not transformative.¹⁶⁶ Applying fundamental copyright policy in the context of technological transformation, the *Kelly* court interpreted the policy liberally and found that Arriba's thumbnail images did not hinder copyright goals, and in fact furthered them.¹⁶⁷ Arriba's thumbnail images did not supersede the original images and therefore did “not stifle artistic creativity.”¹⁶⁸ The thumbnails served the transformative purpose of “improving access to information on the internet,” in contrast to Kelly's full-size images' purpose of “artistic expression.”¹⁶⁹ More recently, in *Field v. Google*, the district court of Nevada held the Google Internet search engine could store and display archival snapshots of copyrighted web pages (“Cached” links) under the fair use doctrine.¹⁷⁰ The court found the “Cached” link serves several transformative purposes which add value to the copyrighted work.¹⁷¹ For example, the “Cached” link allows users to access otherwise inaccessible content, see changes to websites over time, and highlights search terms on the cached page.¹⁷²

The similarities between the Library Project and the search engines in *Kelly* and *Field* support a finding of fair use. Like Arriba's search

¹⁶⁴ *Bill Graham Archives*, 448 F.3d at 611-12.

¹⁶⁵ See *Campbell*, 510 U.S. at 569-70, 579; see also Hanratty, *supra* note 139, at ¶ 18, ¶ 21 (citing *Campbell* and *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108, 109 (2d Cir. 1998)).

¹⁶⁶ See *Kelly*, 336 F.3d at 819 (observing judicial “reluctance to find [transformative] fair use” in the latter situation, citing cases involving retransmission of radio broadcast over telephone lines, reproduction of audio CD into computer MP3 format, and reproducing news footage without editing the footage); see also *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 144 (S.D.N.Y. 1968). The rationale for this view is that copyrights protect the substance of a literary work instead of the form which embodies it. See SCHECHTER & THOMAS, *supra* note 24, at 40.

¹⁶⁷ See *Kelly*, 336 F.3d at 819-20.

¹⁶⁸ *Id.* at 820.

¹⁶⁹ *Id.* at 819.

¹⁷⁰ *Field v. Google, Inc.*, 412 F.Supp. 2d 1106, 1123 (D. Nev. 2006).

¹⁷¹ *Id.* at 1118-19.

¹⁷² *Id.* The court also reasoned that the “Cached” link did not supersede the original website because the link made clear the cached page was not a “substitute for a visit to the original page,” and though the link could be disabled by website owners, “[t]he fact that the owners of billions of Web pages choose to permit these links to remain is further evidence that they do not view Google's cache as a substitute for their own pages.” *Id.* at 1119.

engine, the Library Project's purpose is to guide users to the original works, not to supersede the original work. The Library Project cannot replace an original copyrighted work as a whole, since it only displays snippets of text. The additional log-in security feature protects against the possibility that a user will perform multiple searches to access the entire work, a few snippets at a time. Like the "Cached" links in *Field*, Snippet View enhances users' understanding of the copyrighted work by highlighting search terms and displaying related links. The Library Project uses copyrighted works for a different purpose than artistic expression—to transform printed readable works into a searchable catalog of snippets. Google thus changes the medium of protected works by converting them to digital format, but also adds new functionality to the digitized works as well—the purpose is not merely to create a digital replacement but to create a digital research tool.

If the transformative nature of scanning books into a searchable digital database tips the balance, the potential public benefit pushes it further towards fair use.¹⁷³ Though public benefit or importance is insufficient by itself to constitute fair use, public benefit as a result of a transformative use weighs in favor of fair use.¹⁷⁴ In *Harper & Row*, the magazine impermissibly infringed copyrights when it printed verbatim key passages from President Ford's soon-to-be-released memoir.¹⁷⁵ The quoted passages described the events leading up to the pardon of President Nixon, and were certainly of interest if not "of possible public importance."¹⁷⁶ The Supreme Court found the infringement was not fair use because the magazine intentionally usurped plaintiff's right of first publication and merely superseded the original.¹⁷⁷ In contrast, Arriba's thumbnail images was fair use where it enhanced "information-gathering techniques on the Internet."¹⁷⁸ Similarly, the purpose and character of copying video game software code was fair where it "led to an increase in the number of independently designed video game programs" and thus furthered the basic purpose of copyright law to foster creative expression.¹⁷⁹ Google Book Search has the potential to provide huge public benefits by creating an electronic book search that is unprecedented in scope.

Lastly, the Library Project's opt-out policy illustrates Google's good faith effort to balance copyright rights and fair use, though the rele-

¹⁷³ See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1995).

¹⁷⁴ See *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1993); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985).

¹⁷⁵ *Harper & Row*, 471 U.S. at 569.

¹⁷⁶ *Id.* at 558.

¹⁷⁷ *Id.* at 562.

¹⁷⁸ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003).

¹⁷⁹ *Sega Enters.*, 977 F.2d at 1523.

vance of good or bad faith in the fair use analysis is disputed.¹⁸⁰ In the Second Circuit, a defendant's alleged good or bad faith is relevant but not dispositive.¹⁸¹ In *Field*, the court found Google provided instructions on how to use the widely accepted industry standard "no-archive" meta-tag which informed search engines not to display cached links to the site.¹⁸² Field was aware he could incorporate the meta-tag into his website to prevent caching but did not do so.¹⁸³ The court weighed the defendant's good faith and the plaintiff's bad faith in favor of fair use.¹⁸⁴ The Library Project opt-out policy is hardly as "widely recognized and well-publicized" as the "no-archive" meta-tag.¹⁸⁵ The policy is nevertheless analogous to the meta-tag policy in that Google similarly instructs copyright holders concerned with the Library Project how to remove their works from the Project. However, even if the court views the opt-out policy favorably, Second Circuit precedent will likely minimize the effect it would have in the final balance.¹⁸⁶

In sum, the Library Project search engine provides the valuable service of "improving access to information," and serves an entirely different function from a printed book.¹⁸⁷ The public benefit of Google's book

¹⁸⁰ See *NXIVM Corp. v. The Ross Inst.*, 364 F.3d 471, 477, 479 n.2 (2d Cir. 2004) (comparing the Supreme Court's treatment of good faith in *Harper & Row* and *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994)); see also *Field v. Google, Inc.*, 412 F.Supp. 2d 1106, 1122-23 (D. Nev. 2006); 4-13 NIMMER ON COPYRIGHT § 13.05[A][1][d]. Good faith has also been considered as a fifth, unenumerated factor.

¹⁸¹ *NXIVM*, 364 F.3d at 477, 479. In *NXIVM*, the court held that a defendant's critical analysis of plaintiff's work using unauthorized quotations from the work was a highly transformative use that did not usurp plaintiff's market, and was fair use. *Id.* at 477, 482. The majority found that bad faith is not "itself conclusive of the fair use question, or even of the first factor." *Id.* at 479 (quoting *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F.Supp. 1231, 1244 n.14 (N.D. Cal. 1995)). The dissent goes further and argues good or bad faith of the secondary user should not have any bearing in the fair use analysis. *Id.* at 483 (Jacobs, J., concurring). The Honorable Pierre N. Leval of the Second Circuit also argues against considering good faith, arguing it is:

[A] false factor[] that divert[s] the inquiry from the goals of copyright. [False factors might] have bearing on the appropriate remedy, or on the availability of another cause of action to vindicate a wrong, but not on the fair use defense . . . It produces anomalies that conflict with the goals of copyright and adds to the confusion surrounding the doctrine. Copyright seeks to maximize the creation and publication of socially useful material. Copyright is not a privilege reserved for the well-behaved The inquiry should focus not on the morality of the secondary user, but on whether her creation claiming the benefits of the doctrine is of the type that should receive those benefits

Leval, *supra* note 120, at 1125-26, 1128.

¹⁸² *Field*, 412 F.Supp. 2d at 1122.

¹⁸³ *Id.* at 1116.

¹⁸⁴ *Id.* at 1122-23.

¹⁸⁵ *Id.* at 1112.

¹⁸⁶ See also Cameron W. Westin, *Is Kelly Shifting Under Google's Feet? New Ninth Circuit Impact on the Google Library Project Litigation*, 2007 Duke L. & Tech. Rev. 2, ¶ 55 (2007).

¹⁸⁷ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003).

search engine therefore outweighs Google's commercial status and the "minimal loss of integrity" to printed material given copyright holders' option to opt out of the project. Combining the public benefit with the transformative nature of the use, the purpose and character of the use weighs in favor of Google.¹⁸⁸

B. THE NATURE OF THE COPYRIGHTED WORK

In evaluating the nature of the copyrighted work at issue, courts will examine its inherent creativity and general availability. Copyright law rewards creation and innovation. It protects particular expressions of facts, but not the facts themselves. It logically follows that the scope of fair use corresponds to the work's degree of creativity.¹⁸⁹ The degree of protection the law affords consequently varies along the spectrum of creative expression, providing the least protection to highly factual works and the most protection to highly creative works "closer to the core of intended copyright protection."¹⁹⁰ Additionally, published works are more likely to qualify as fair use than unpublished works.¹⁹¹ Published works are accorded less protection because the creator has already exercised her right of first publication, introducing the work in the manner she sees fit.¹⁹² An out-of-print work may be more likely to qualify as fair use than a published work if it is "unavailable for purchase through normal channels."¹⁹³

The Library Project includes entire library collections that, as a whole, are inherently creative but are not necessarily generally accessible. The Library Project only scans according to a work's copyright status—whether it is copyright-protected or in the public domain.¹⁹⁴ It would not be to Google's advantage even if it further distinguished between fiction and non-fiction because both fiction and non-fiction works are creative arrangements of words protected by copyright.¹⁹⁵ However, the Library Project only scans published works that have reached partner-libraries' shelves and will not interfere with the right of first publication. The focus on scanning out-of-print titles may further justify fair

¹⁸⁸ *Id.* at 820; see also Hanratty, *supra* note 139, at ¶ 20.

¹⁸⁹ See SCHECHTER & THOMAS, *supra* note 24, at 224.

¹⁹⁰ *Campbell v. Acuff-Rose*, 510 U.S. 569, 586 (1994).

¹⁹¹ *Kelly*, 336 F.3d at 820.

¹⁹² See *id.*

¹⁹³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 553 (1985) (quoting S. REP. NO. 94-473, at 64 (1975)).

¹⁹⁴ See Complaint at 27, *McGraw-Hill Cos., Inc. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y. filed Oct. 19, 2005); Quint, *supra* note 3; Hafner, *At Harvard, a Man, a Plan, and a Scanner*, *supra* note 3; Delaney & Trachtenberg, *supra* note 5, at B1.

¹⁹⁵ See Complaint at 27, *McGraw-Hill Companies, Inc. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y. filed Oct. 19, 2005); Quint, *supra* note 3; Hafner, *At Harvard, a Man, a Plan and a Scanner*, *supra* note 3; Delaney & Trachtenberg, *supra* note 5, at B1.

use.¹⁹⁶ As in *Kelly*, where the court balanced the creative and published nature of the copied work, this second factor, the nature of the copyrighted work, weighs only slightly in favor of the plaintiffs.¹⁹⁷

C. THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

The third factor—the amount and substantiality of the defendant’s use of the copyrighted work—requires both quantitative (amount) and qualitative (substantiality) analyses.¹⁹⁸ As a general rule, “the more of a work a defendant takes, the more likely the use is to undermine the plaintiff’s markets” and the less likely a court will find fair use.¹⁹⁹ Even relatively minimal copying can also weigh against fair use if it involves copying the heart of the work.²⁰⁰ For example, the Supreme Court found that copying only 300 out of the total 200,000 words in President Ford’s memoir was nevertheless substantial when the 300 words in question were those most likely to draw readers.²⁰¹ Copying only as is reasonable in relation to the copier’s purpose will weigh towards fair use however, and copying the entire work may still be a fair use if it is necessary to use the entire work.²⁰²

The Library Project scans entire copyrighted works in order to produce its snippets, which weighs in the plaintiffs’ favor. However, scanning entire works is not only reasonable but necessary in relation to Google’s purpose of indexing the world’s books. Therefore, the third factor weighs in favor of neither party so far.²⁰³ The *Kelly* court ended its analysis there, after finding that lower-resolution thumbnail images

¹⁹⁶ See *Harper & Row*, 471 U.S. at 553 (quoting S. REP. NO. 94-473, at 64 (1975)); Delaney & Trachtenberg, *supra* note 5, at B1.

¹⁹⁷ See *Kelly*, 336 F.3d at 820. See also *Harper & Row*, 471 U.S. at 564 (where the Court found that the second factor weighed against defendant because the unpublished nature of the copied work was “critical.”); *Bill Graham Archives v. Doring Kindersey Ltd.*, 448 F.3d 605, 612–13 (2d. Cir. 2006) (“the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose Accordingly, we hold that even though [plaintiff’s] images are creative works, which are a core concern of copyright protection, the second factor has limited weight in our analysis because the purpose of DK’s use was to emphasize the images’ historical rather than creative value.”).

¹⁹⁸ See NIMMER ON COPYRIGHT, § 13.03[A][3] (2006).

¹⁹⁹ *SCHUCHTER & THOMAS*, *supra* note 24, at 226; see also *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) (defendant’s mere retransmission of radio broadcasts over the telephone was not fair use).

²⁰⁰ See *SCHUCHTER & THOMAS*, *supra* note 24, at 226–27.

²⁰¹ See *id.*

²⁰² *Bill Graham Archives*, 448 F.3d at 613; see *Campbell v. Acuff-Rose*, 510 U.S. 569, 586 (1994).

²⁰³ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003). See also *Bill Graham Archives*, 448 F.3d at 613 (“Neither our court nor any of our sister circuits has ever ruled that the copying of an entire work favors fair use. At the same time, however, courts have concluded that such copying does not necessarily weigh against fair use. . . .”).

were not the heart of a work.²⁰⁴ The Ford memoir case, in contrast, involved the very heart of a work, and there was no fair use.²⁰⁵ The Library Project falls somewhere in the middle. While Google copies entire works, the resulting database is secure and users will not be able to access the entire work unless the copyright holder has given permission or the work is not protected.²⁰⁶ Depending on user variability in types of searches and the technical aspects of the search engine, it is conceivable that a user will “luck out” and stumble upon the heart of a work. Assuming three sets of two sentences in sets of two from a book could in some instances constitute the heart of an entire book, this factor may slightly favor the plaintiffs.

D. THE EFFECT OF THE USE UPON THE POTENTIAL MARKET FOR OR VALUE OF THE COPYRIGHTED WORK

The fourth and final factor protects copyright’s financial incentives for creativity.²⁰⁷ In this case, it is also the factor most affected by the uncertainty arising from rapidly developing technology and the novelty of book digitization projects. Courts must consider actual effects of the defendant’s infringing activity, as well as potential effects on potential markets if the activity were to become widespread among other actors.²⁰⁸ Relevant potential markets include markets for derivative works.²⁰⁹ The transformative use analysis is again significant, and helps define the relevant market. Transformative use is less likely to adversely impact the market for the original work since it does more than supersede the copyrighted work.²¹⁰ Whether this factor will weigh for or against Google will depend on how expansively or narrowly the court defines the potential market.

²⁰⁴ *Id.*

²⁰⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

²⁰⁶ *Cf. Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998) (finding the amount and substantiality of defendant’s use was not justified where the service “permits essentially unlimited access to radio broadcasts . . . and there is thus the potential for retransmission of entire copyrighted programs”).

²⁰⁷ At one time, the Supreme Court had declared that the fourth factor was “undoubtedly” the most important in determining fair use. *Harper & Row*, 471 U.S. at 566. However the Court’s subsequent fair use opinions indicate a change toward equal weight among the four factors, which are to be viewed “together, in light of the purposes of copyright.” *Am. Geophysical Union*, 60 F.3d at 926 (citing *Campbell*).

²⁰⁸ *Harper & Row*, 471 U.S. at 568 (citing *Sony*, 464 U.S. at 451).

²⁰⁹ *Id.* “The reason for this rule relates to a central concern of copyright law that unfair copying undercuts demand for the original work and, as an inevitable consequence, chills creation of such works. Hence the inquiry considers not only harm to the market for the original photograph, but also harm to the market for derivative works.” *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992).

²¹⁰ *Kelly*, 336 F.3d at 821.

Case law limits the scope of “potential,” defining “potential markets” as only those that are “traditional, reasonable, or likely to be developed,”²¹¹ as opposed to merely theoretically possible. The fair use doctrine would otherwise be meaningless, as every use of a copyrighted work creates a new market.²¹² While the availability of a licensing arrangement is significant, the fact that a copyright holder has previously secured licenses does not by itself make a given market “traditional, reasonable, or likely to be developed.”²¹³ Conversely, the development of a licensing market may weigh against fair use even if it develops after the allegedly infringing activity occurs.²¹⁴ The heart of the inquiry is the relationship of the potential market to the original market, not the actual existence, or non-existence, of the market. Copyright owners may not preempt fair use “transformative markets” by developing them themselves and then attempting to prevent others from entering.²¹⁵ Accordingly, unauthorized use of copyrighted images in a transformative market is fair use, while a substantially similar use in a traditional market is not.²¹⁶ Another proposed formulation, which accounts for growing markets and technological change, is a functional test which emphasizes the challenged use’s different functionality, regardless of the medium or whether the use comprises substantially similar material.²¹⁷ The Second Circuit has stated that this factor’s analysis sometimes also requires balancing the potential personal gain to the copyright owner against the potential public benefit of the use.²¹⁸ In short, copyrights are not unlimited monopoly rights, and the ability to collect revenue does not automatically grant copyright holders the right to do so.²¹⁹

²¹¹ *Am. Geophysical Union*, 60 F.3d at 930.

²¹² See 4-13 NIMMER ON COPYRIGHT § 13.05[A][4].

²¹³ *Id.*; see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

²¹⁴ *Westin*, *supra* note 186, at ¶ 59; see also *Perfect 10 v. Google, Inc.*, 416 F.Supp. 2d 828, 849 (C.D. Cal. 2006). In *Perfect 10*, after filing suit against Google, Perfect 10 licensed a third party to sell downloadable thumbnails over the Internet. Because users could download thumbnails from Google Image Search for free, Google’s thumbnails were interchangeable with plaintiff’s product.

²¹⁵ *Castle Rock Entm’t, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998).

²¹⁶ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614-15 (2d Cir. 2006) (distinguishing plaintiff’s use in a transformative market to the substantially similar use in *Am. Geophysical Union*).

²¹⁷ SCHECHTER & THOMAS, *supra* note 24, at 229 (citing NIMMER ON COPYRIGHT, §13.03 [B] (2002)).

²¹⁸ 4-13 NIMMER ON COPYRIGHT §13.05[A][4] (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)).

²¹⁹ See SCHECHTER & THOMAS, *supra* note 24, at 228, 230 (claiming, “In cases of this sort the fair use dispute is really about whether the plaintiff should be guaranteed the exclusive right to exploit that market in question despite the fact that the market opportunity was not generally recognized or appreciated until the defendant came along.”). During the recent debate at the New York Public Library on the Library Project, Professor Lawrence Lessig rebuked Library Project opponents: “What you want to do is to get a kind of revenue that right

Given limited user access and the non-commercial nature of the Library Project, it is difficult to see how the Library Project will divert customers from the market for the full text of books, whether in print or digital format. Google does not sell books. It does not even sell parts of books, in contrast to the pay structure models described in Part II. It would be entirely speculative to assert that an individual who planned to buy a book will view three snippets on Google Book Search, be satisfied, and as a result not purchase a copy.²²⁰ If the individual was either going to borrow the source from a library or simply never intended to buy it, then there will be no effect on the market.

Even assuming partial-text retail models of other book digitization projects such as Amazon Pages were “likely to be developed”²²¹ markets in the legal sense, it is still difficult to see how the Project will divert customers. The Library Project complements copyright holders’ markets, rather than competing with them. As discussed in part A, Google Book Search transforms the text through its search and display function. Google Book Search’s main potential benefit is not merely digitization, but allowing users to search capability “the full text of all the world’s books.” Similar book digitization projects do not have the same comprehensive scope as they are either limited to particular books within a publisher’s catalog, or books for which the copyright holder has previously expressly agreed to include.²²² The ability to browse or search within a particular book is most helpful only after the reader knows which book to browse or search. Google Book Search is a search engine that helps readers identify books they wish to read. Once a user identifies a Library Project book, he will have to go to another site to purchase or browse through the book in more detail. If a user wanted to link to or download digital portions of the text, she will have to go to another site because Google does not allow users to copy, save, or print protected content.

Finally, though the effects on potential markets remain unclear, the Library Project’s effect on the value of the copyrighted work is more

now you don’t get at all So it’s about taking part of the value that’s created here [by Google] not about protecting yourself against losses as produced by this new technology.” See Edward Wyatt, *Googling Literature: The Debate Goes Public*, N.Y. TIMES, Nov. 19, 2005, at B16.

²²⁰ See *Perfect 10 v. Google, Inc.*, 416 F.Supp. 2d 828, 850 (C.D. Cal. 2006) (holding defendant’s thumbnail images would “not likely . . . affect the market for full-size images”); Wyatt, *Googling Literature*, *supra* note 219, at B16 (“Mr. Adler said Google’s contention that its search program might somehow increase sales of books was speculation at best. ‘When people make inquiries using Google’s search engine and they come up with references to books, they are just as likely to come to this fine institution [the New York Public Library] to look up those references as they are to buy them,’ he said[.] To which Google’s Mr. Drummond replied, ‘Horrors.’”).

²²¹ *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2d Cir. 1994).

²²² See Random House, Inc., *How to Use Browse & Search*, <http://www.randomhouse.com/about/insight/> (last visited Apr. 8, 2007).

clear. Google claims the Library Project will result in increased exposure of literary works, which could in turn lead to increased sales.²²³ The Authors Guild admits midlist and backlist titles stand to benefit from the Project, and fiction is “not likely to be threatened.”²²⁴ As emphasized above, the Library Project is not designed to replace a trip to the library or the bookstore. On the other hand, authors will benefit in instances where the service leads to increased sales, and this last factor weighs in favor of Google.²²⁵

In summary, Google has a slight edge over the plaintiff publishers and authors under the four factor test. Two factors favor Google while two factors only slightly favor plaintiffs. The first factor weighs in favor of fair use because the Library Project is a highly transformative use that is not directly commercial. Moreover, it may easily be avoided by opting out. The second factor weighs only slightly against fair use because the works are protected works that have already been published. The third factor weighs slightly against fair use because, even though it is necessary to achieve its purpose, Google copies entire works and displays creative expression which may constitute the heart of a work. The fourth factor weighs in favor of fair use because the Library Project’s transformative use complements, rather than competes with traditional and derivative markets for print works. Thus, the Google Books Library Project constitutes fair use of copyrighted works.

CONCLUSION

With the growing number of print-book digitization projects, it is increasingly clear that the world of books is poised to join the digital age in earnest. In the end, both parties agree that Google’s vision of a searchable, digital world library is a worthy end goal. The controversy centers on the means of achieving such a world library and Google’s perceived disrespect of copyrights. The warring interests in the Google Books Library Project suit disagree on the issue of control. A Library

²²³ See generally Google Book Search: News & Views, <http://books.google.com/google/books/newsviews/> (last visited Sept. 29, 2006) (quoting people who believe that Google helps remedy lack of exposure); see also Google Makes Thousands of Books Available in Full Text, http://www.authorsguild.org/news/google_launches_browse.htm (last visited Sept. 29, 2006) (asserting that Google’s service will likely help promote certain books).

²²⁴ Google Makes Thousands of Books Available in Full Text, http://www.authorsguild.org/news/google_launches_browse.htm (last visited Sept. 29, 2006).

²²⁵ See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614, n.5 (2d Cir. 2006). (“To the contrary, had the book been commercially successful—which it was not—it might have garnered interest in the original images in full size because the reduced images have such minimal expressive impact. An aficionado might seek more than a ‘peek.’”); see also *Jeweler*, *supra* note 129, at CRS-4 (“Google makes a strong argument that its indexing and text searching capability has the potential to greatly enhance the market for sales for books that might otherwise be relegated to obscurity.”).

Project opponent asserts: "Look, people should be able to search all this stuff, but it should be the author's choice and not Google's You can't have a corporation just come in and say, 'We're going to do this and it's good for you.'" ²²⁶ Another derides Google's "renegade notion of eminent domain: Google decides what's good for us and seizes private property to get it done." ²²⁷ Yet, a copyright holder who disagrees with Google's methods can opt to keep her works out of the Project altogether. Moreover, the intended ultimate beneficiary of copyright law is the public, and if it is in fact "good," the Library Project remains within the policy for protecting copyrights. As a Library Project supporter described, the claims against Google are "the biggest land grab in the history of the Internet," potentially "chill[ing] a wide range of innovation" if the claims "are taken seriously." ²²⁸

At this time, the suit against Google is pending and it remains to be seen whether the issue will settle out of court. A compromise appears unlikely given the firm stances of each side. ²²⁹ Lawrence Lessig, believing that Google should maintain its stance for the public good, argues:

A rich and rational (and publicly traded) company [with duties to its shareholders] may be tempted to compromise—to pay for the 'right' that it and others should get for free, just to avoid the insane cost of defending that right But if Google gives in, the loss to the Internet will be far more than the amount it will pay publishers. It will be a bad compromise for everyone working to make the Internet more useful—and for everyone who will ultimately use it. ²³⁰

Google may not have purely altruistic motives. It may anticipate future revenues from selling digital literary content online. The comprehensive database of digital books it is now building will certainly position Google to make that leap. However, if Google makes that leap to straightforward commercialism, the fair use analysis would change and would likely require express permission from copyright holders. ²³¹ The

²²⁶ Hafner, *At Harvard, a Man, a Plan and a Scanner*, *supra* note 3 (quoting Patricia Schroeder, president and chief executive of the Association of American Publishers).

²²⁷ Nick Taylor, Op-Ed, *Google and the Authors*, N.Y. TIMES, Oct. 2, 2005, at 4.11.

²²⁸ Lessig, *supra* note 74.

²²⁹ At one point, Google was discussing joining the Open Content Alliance. Hafner, *Microsoft to Offer Online Book-Content Searches*, *supra* note 99. Brewster Kahle, a key figure of the Open Content Alliance, has repeatedly stated that "one of his greatest hopes" is that Google will join the Alliance. *Id.* Although a Google spokesman confirmed communication between the two projects, Google subsequently resumed scanning copyrighted works. *See id.*; Delaney & Trachtenberg, *supra* note 5, at B1.

²³⁰ Lessig, *supra* note 74.

²³¹ *See* Westin, *supra* note 186, at ¶ 57–58 (noting that "any benefit more direct than merely increased traffic can add weight to the commercial nature of the use"). While selling

suit may simply be premature and copyright holders may one day have a clear case for copyright infringement. The Library Project as it stands today, however, is protected under fair use. Google copies copyrighted works, but those copies serve a different purpose than the original works. Instead of usurping potential revenues, Google directs readers to the copyrighted works, potentially increasing rightsholders' revenues. Most importantly, the added functionality supports the very purpose of the copyright law—to increase creativity and access to knowledge. Google is clearly challenging the bounds of technology and the law. And as copyright law has adapted to technological innovation in the past, it again has a chance to adapt—to refine “fair use” in the Digital Age.

content through the Partner Program may do no more than “merely increase[] traffic” selling Snippets would weigh the fourth factor for plaintiffs. *See Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828, 851 (C.D. Cal. 2006).