

THE HALF-FAIRNESS OF GOOGLE'S PLAN TO MAKE THE WORLD'S COLLECTION OF BOOKS SEARCHABLE

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Cite as: Steven Hetcher, *The Half-Fairness of Google's Plan
to Make the World's Collection of Books Searchable*
13 MICH. TELECOMM. TECH. L. REV. 1 (2006),
available at <http://www.mttl.org/volthirteen/hetcher.pdf>

The Library of Alexandria was the first time humanity attempted to bring the sum total of human knowledge together in one place at one time. Our latest attempt? Google.

—Brewster Kahle, founder, *The Internet Archive*

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INTRODUCTION

In the ancient world a seeker of knowledge could journey to Alexandria for its library, which is fabled to have contained all the world's learning. The Library of Alexandria has become a metaphor for a future digital source of all recorded knowledge. Commentators have called for the rebuilding of the Library of Alexandria in cyberspace.¹ Google's latest effort with respect to the digitization of books represents a major step in this direction. Google's major new initiative is to undertake the task of digitizing the world's collection of books so as to make them searchable.² The very idea is audacious, but what is more so is that Google plans to copy without first seeking the permission of the owners of these works.³ Google Print would make available what is, by conventional measures at least, the highest grade of information—books produced by millions of the world's leading scholars. This is in stark contrast to the inconsistent quality spectrum one encounters through other online sources such as peer-to-peer networks and blogs, where there currently exists little mechanism for peer review or other means of quality control. What Google proposes to do is either the largest example of copyright infringement in history or the largest example of fair use in history.

Google knows where to go to find books; it has partnered with six of the best libraries in the English-speaking world and plans to scan digital copies of these massive collections, shelf by shelf, book by book, page by page. These libraries are the New York City Public Library, Oxford University Library, the University of Michigan Library, Harvard University Library, Stanford University Library and most recently, the University of California Library. With the New York and Oxford libraries, Google will only copy works in the public domain, while the domestic university libraries will allow copying of their entire collections.⁴

Why these libraries? One obvious commonality is that they are some of the finest research libraries in the world, containing some of the larg-

1. See Brewster Kahle, founder, The Internet Archive, Speech to the Library of Congress in the Digital Future Series (Dec. 13, 2004), *available at* http://www.archive.org/details/cspan_brewster_kahle (last visited Dec. 7, 2006).

2. Writ large, this is the Google Print Library Project, which is comprised of Google Print for Publishing and Google Print for Libraries. The latter is the concern here. Google appears to be in the process of a name change for the overall program to Google Books. I will here use the term *Google Print Library Project*, or *Google Print* project for short, as this is the name that appears in the formal legal documents.

3. See Complaint at 6, *The Author's Guild v. Google Inc.*, No. 05-CV-8136 (S.D.N.Y. filed Sept. 20, 2005) ("The digital archiving of the Works that are the subject of this lawsuit was undertaken by Google as part of its Google Print Library Project.").

4. See Chris Gaither, *Google Puts Book Copying On Hold*, LOS ANGELES TIMES, August 13, 2005, at C1.

est and best collections of books in existence. Google has said relatively little about its choice of libraries as partners. Basic questions such as will Google copy the same book more than once if it appears in more than one library have been left unanswered. Partnering with world-leading libraries serves Google's purpose of allowing the libraries to perform an editing function. If none of these libraries carries pulp fiction, for instance, then these texts will not be available for searching on Google Print. Thus, despite Google's stated intention to make the entire world's information accessible, it is better said that they are going after a large slice of this information.⁵

Two major lawsuits have been filed against Google. The American Association of University Presses, which represents 125 university presses, has sued Google, seeking a declaration that Google is committing copyright infringement by scanning books and an injunction against Google Print.⁶ A second lawsuit, a class action representing "published authors and The Authors Guild," seeks declaratory and injunctive relief and money damages as well.⁷ The outcome of these lawsuits is far from clear and the stakes are huge.

Given the potential scope of the infringement claims, the Google Print lawsuit creates an important new uncertainty in copyright law. It was only recently that commentators⁸ were cautiously hoping the

5. As will be discussed below, this decision to limit copying to the types of book contained in libraries, especially leading research libraries, is likely to play in Google's favor when it comes to proffering a fair use defense to the lawsuits for copyright infringement. If there is a greater public value for the unauthorized use, then there is a greater likelihood of the court finding the use to be a fair one. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991).

6. See Complaint at 2, *McGraw Hill Cos. v. Google Inc.*, No. 05-CV-8881 (S.D.N.Y. filed Oct. 19, 2005).

7. See Complaint, *The Author's Guild*, *supra* note 3 at 11-13. There may be many library books whose copyrights are not owned by extant publishers. Copyrights in these books may be owned by defunct publishers, or the copyrights may have been retained by the authors and are now controlled either by them or their heirs, who may be either deceased or cannot be found. Works whose owners are difficult to track down are sometimes labeled "orphan works." The Author's Guild lawsuit claims to represent the owners of orphan works. Orphan works increasingly play a role in copyright policy discussions and will play an important role in the following analysis. See Lawrence Lessig, Editorial, *Let a Thousand Googles Bloom; Copyright Reform is Vital to the Spread of Culture and Information*, *LOS ANGELES TIMES*, January 12, 2005, at B11. See generally LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

8. See Timothy R. Holbrook, Symposium Review, *The Intent Element of Induced Infringement*, 22 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 399, 402 (2006) ("Most observers believed that the Supreme Court would use *Grokster* as a vehicle to reassess the scope and continued viability of its reasoning in *Sony*. The Court did implicitly reaffirm the analysis of *Sony* but failed to further clarify it, opting instead to embrace a theory of active inducement in copyright law. The Court reasoned that the staple article of commerce concept in section 271(c) is simply a method used to impute intent of the relevant infringer to facilitate

Supreme Court's recent decision in *MGM v. Grokster*⁹ would help clarify copyright in cyberspace. One might suppose that the new uncertainty added by the Google Print lawsuits raises a completely distinct set of issues from those raised by *Grokster*. If one steps back from a black-letter analysis to a policy level, however, internet search and peer-to-peer networking are related in their ultimate concern for wide public access to a powerful and comprehensive source of knowledge and information, metaphorically, the Library of Alexandria. Nevertheless, there is one crucial difference between search engines and peer-to-peer networks; users of *Grokster*'s software accessed content possessed by other users, whereas, with Google Print, users will access a vast universe of content stored on Google servers. The former model is extraordinarily decentralized while the latter model is extraordinarily centralized when it comes to the treatment of the data made available to users. Google's centralized approach requires vast databases.¹⁰ The alternative between centralization and decentralization of creative content storage determines the central copyright dispute—indirect or secondary liability when the defendant is not a database builder and thus not a direct copier (e.g., Napster, Aimster, Grokster, Streamcast) and direct infringement liability when the defendant is a database builder and thus a direct copier (e.g., Google).

A policy argument proffered by *amici* for defendants in *Grokster* noted that, while the peer-to-peer networks at issue were being used to share pirated music, they also possessed the transformative potential to connect seekers of knowledge with sources of knowledge on a universal scale. In other words, peer-to-peer networks were characterized as a gateway to the digital Library of Alexandria.¹¹ This hopeful vision played an instrumental role in the policy prescriptions of those commentators who argued that the music piracy brought about by the peer-to-peer networks should be tolerated in order to promote the substantial non-infringing uses already in existence, but more importantly, to allow for a technological infrastructure that would support the emergence of the digital Library of Alexandria.

infringement by others. The Court recognized, however, that Sony does not comprise the universe of third-party liability in copyright law").

9. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

10. John Markoff & Saul Hansell, *Google's Not-So-Secret Weapon in Computing Power Wars*, INT'L HERALD TRIBUNE, June 14, 2006, at Finance 16, available at 2006 WLNR 10320289 ("Google has constructed the biggest computer in the world, and it's a hidden asset," quoting Danny Hillis, a supercomputing pioneer and co-founder of Applied Minds, a technology consulting firm).

11. Brief of Media Studies Professors as *Amici Curiae* in Support of Respondents at 9-11, *Grokster*, 125 S. Ct. 2764 (No. 04-480).

With search engines, by contrast, the greatly enhanced access to knowledge is not merely a promise of good things to come in the future.¹² Given the transformative potential of Google Print, courts are likely to be particularly open to policy-based arguments from the litigants and *amici*. Indeed, given that *Campbell v. Acuff-Rose*¹³ is the last Supreme Court case to deal with fair use in a significant manner, and given that this case is from the pre-Internet era, it would not be surprising for the Google Print lawsuits to eventually reach the Court. Whether this occurs will, in large part, depend on whether the district court follows or departs from *Kelly v. Arriba Soft*, the recent, groundbreaking, Ninth Circuit opinion on fair use in the context of search engines.¹⁴ The Google Print lawsuits were filed in the Second Circuit, which tends to take a less permissive approach to fair use than the Ninth Circuit, raising the prospect of a circuit split.

Clearly, the Google Print lawsuits present issues of fundamental importance to copyright law and to core operating assumptions of the information age, as the ultimate issue is the battle for control of the content searched by search engines. Thus, as search engines grow in economic and social importance, so too will the issues surrounding their governance. Accordingly, the policy issues at stake in this matter go far beyond the particular disputants. In fact, given the nature of Google's business model, the policy issues extend beyond the purview of U.S. copyright law. The lawsuits have significant global implications because Google as a business has an extraordinary and growing global reach, and impacts the lives of millions abroad, both end-users who access Google in over one-hundred languages, and foreign copyright owners whose books will end up digitized into Google's database without their permission. Not surprisingly, international reaction to the Google Print project has been strong. Strikingly, French Prime Minister Jacques Chirac reacted to the announcement of Google Print with great alarm, seeing further evidence of American hyper-capitalism bent on destroying European culture. Chirac called for the European Union to respond in kind, threatening to set off a search engine arms race.¹⁵

12. Indeed, one of Justice Ginsburg's main points in her *Grokster* concurrence is that there is great uncertainty as to whether the peer-to-peer networks at issue will ever grow into the great contributors to knowledge imagined by defendants and their supporting amici. *Grokster* 125 S. Ct. at 2764.

13. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

14. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003). An even more recent case dealing with fair use in the context of search engines that is likely to have a bearing on the court's thinking is *Perfect 10 Inc. v. Google Inc.*, 416 F.Supp.2d 828 (C.D. Cal. 2006).

15. See Julie Meyer, *France Searches for its Own Google*, BUS. WEEK ONLINE, March 30, 2006, http://www.businessweek.com/globalbiz/content/mar2006/gb20060330_385311.htm.

While Chirac's rhetoric may be hyperbolic, the issues he raises are serious. An important question raised by the Google Print lawsuits, both domestically and internationally, is whether something as important as the digital Library of Alexandria should be in the control of a private company. In a larger sense, the issue is the future structure of libraries. Previously, it was taken for granted that libraries served the public and were provided by public means. The Google Print project, however, calls this assumption into question, raising the prospect that the universal, digital library of the future will be a private entity driven by the motive of profit maximization.

Moreover, if Google is successful, one can count on its near competitors to act in a similar manner when it comes to unauthorized scanning of book owners' works. The market forces that drove Google to scan the world's books without authorization are not unique to Google. Google's nearest competitors in internet search are Yahoo and Microsoft, both of whom are actively seeking to develop databases to compete with Google Print for libraries.¹⁶ To date, however, each has avoided unauthorized scanning of the sort in which Google has begun to engage. Thus, Google is not unique in its strategic position or sense of business opportunity—just less risk adverse. Should Google prevail, risks will be dramatically decreased and one can expect competitors to rush in. Ultimately, the issue may evolve into one as to whether there will be a fair use exception in copyright law for search engines, or worse, a breakdown in copyright protection for books akin to what has occurred in the music industry over the past decade.¹⁷

In general, Google's business model is to collect as much information as possible. It has the breathtakingly grandiose ambition to organize and make accessible all of the world's information.¹⁸ Thus, it may not only be book publishers that have reason to fear a Google victory on the fair use issue, as Google and its competitors might seek to add unauthorized copies of other types of digital content, such as movies and music,

16. Google conducted 49% of internet searches in 2005, as compared to Yahoo's approximately 23%. Microsoft is a distant third but has recently greatly increased its commitment to internet search and its long awaited new software, Vista, purportedly will provide greatly enhanced search functionality. Kevin J. Delaney, *Google's Net Soars*, WALL ST. J., Oct. 20, 2006, at A3; Leslie Walker, *Google's Goal: A Worldwide Web of Books*, WASHINGTON POST, May 18, 2006, at D1 ("Google is not alone in trying to digitize books. Yahoo, Microsoft and other Internet players have joined a collaborative effort called the Open Content Alliance, which is planning to digitize not only library books, but other types of multimedia, as well, making them all accessible on the web."). Google also faces competition from regional players. For example, Baidu.com is the leading search engine in China.

17. Jonathan Band, *The Google Library Project: Both Sides of the Story*, 10 PLAGIARY, Feb. 3, 2006, at 11–12, http://www.plagiary.org/papers_and_perspectives.htm.

18. See Chris Gaither, *Google Puts Book Copying On Hold*, LOS ANGELES TIMES, August 13, 2005; DAVID A. VISE & MARK MALSEED, *THE GOOGLE STORY* 67, 85 (2005).

to their databases. After all, public libraries loan out DVDs and CDs.¹⁹ With a favorable fair use decision under its belt, there appears to be no reason Google or some other search engine could not start scanning these works with the permission of the libraries but without the permission of the copyright owners.²⁰ Thus, Google fights not just for Google Print for books but for permissive database building generally. Indeed, given that Google has a better fair use defense in the context of academically-oriented works than with more overtly entertainment-oriented content, one might well surmise that its book copying project represents a strategic choice by Google of a favorable initial battleground. This could establish a favorable precedent for future, even more controversial, copying projects in what promises to be a larger, protracted struggle.²¹

Despite the large stakes at play, the Google Print lawsuits may not be destined to settle, as the parties appear far apart on core issues, and settlement will require at least one of the parties to alter its legal position significantly. The publishers must feel as if they have no choice but to sue. They must feel like their peers in the music and film industries felt five or six years ago; not quite believing that someone else's business model calls for the unauthorized copying of hundreds of thousands of their copyrighted works. Nor is it likely that Google will push to settle. Without Google's large appetite for risk and a large war chest to support this appetite, it would not have gotten to this point, as Google undoubtedly has received advice from its lawyers that Google Print presents a serious risk of massive infringement liability. Judging by Google's behavior, it appears to be settling in for a good fight rather than looking to take its marbles off the table. Some of Google's actions can be read as provocative, such as when it gave the publishers a very limited time to respond after making a counter-proposal to the publishers' demand to

19. See, Norman Oder, *The DVD Predicament*, LIBRARY JOURNAL, Nov. 15 2005, at 38. Google has already been sued for its treatment of the image content of others. See *Perfect 10 Inc. v. Google Inc.*, 416 F.Supp.2d 828 (C.D. Cal. 2006).

20. Bob Barr & Pat Schroeder, Commentary, *Reining in Google*, WASHINGTON TIMES, November 3, 2005, at A18. Barr noted:

Authors may be the first targets in Google's drive to make the intellectual property of others a cost-free inventory for delivery of its ad content, but we will hardly be the last. Media companies, engineering firms, software designers, architects, scientists, manufacturers, entertainers and professional services firms all produce products that could easily be considered for "fair use" by Google.

Id. (asserting that the book project will lead to widespread piracy). Bob Barr is a former member of the House Judiciary Committee, and columnist and analyst for CNN; Pat Schroeder is former Congresswoman and presidential candidate.

21. Google's recent acquisition of YouTube is seen by many commentators as an invitation to a whole new wave of copyright infringement suits. See, e.g., Noam Cohen, *YouTube Is Purging Copyrighted Clips*, THE NEW YORK TIMES, Oct. 30, 2006, at C8.

either license their works or cease and desist.²² This action appears needlessly pugnacious. Thus, it is fair to conclude that, while Google may not be spoiling for a fight, the company does not appear especially interested in avoiding one.

Google has some reason for optimism, as its plan appears to have met with some degree of public approval, which may be a harbinger of things to come, given the significant role that evolving public norms regarding internet search might play in the determination of legal outcomes.²³ Librarians and other academics will likely be seen as weighty norm authorities; some have already weighed in strongly in favor of the project. For example, Mary Sue Coleman, President of the University of Michigan, has come out strongly in favor of the Google Print project.²⁴ Google may also take heart in the fact that it has the participating libraries on its side. In some quarters, the response to Google's project has been downright ecstatic.²⁵ Some members of the copyright policy community have been equally emphatic in their support.²⁶ But this response is far from universal, suggesting that the battle for the hearts and minds of the general public will be spirited.²⁷

It is conventional wisdom that companies are risk adverse and will seek to settle.²⁸ The aggressiveness of Google's actions stands in stark

22. See Burt Helm, *Google's Plan Doesn't Scan*, BUSINESS WEEK ONLINE, Aug. 12, 2005, http://www.businessweek.com/technology/content/aug2005/tc20050812_4324_tc119.htm.

23. See generally, STEVEN HETCHER, NORMS IN A WIRED WORLD (2004) (discussing the role of norms in online contexts).

24. See Mary Sue Coleman, Editorial, *Riches We Must Share . . .*, WASHINGTON POST, October 22, 2005, at A21.

25. See, e.g., Stephen H. Wildstrom, *The Web Hits the Stacks: Yahoo! And Google are Pushing to Scan the World's Books*, BUSINESS WEEK, July 25, 2005, at 22. ("Even if I end up having to go to a university library to see the whole book, this still strikes me as a powerful tool that I would have died for in my student days. As useful as the Web is, Google Print shows how much is missing."); Yuki Noguchi, *Google Delays Book Scanning; Copyright Concerns Slow Project*, WASHINGTON POST, Aug. 13, 2005, at D1 (quoting David Sohn of the Center for Democracy and Technology, stating with regard to Google Print that, "It's an example of how the Internet offers a lot of great opportunities for disseminating information, and it is important to resolve those [copyright] issues so we really take advantage of those opportunities.'").

26. See Chris Gaither, *Google Puts Book Copying On Hold*, LOS ANGELES TIMES, Aug. 13, 2005, at C2 (stating that Jonathan Zittrain of the Harvard Law School "said that Google probably would win in court if it ever came to that. Its efforts benefit society by introducing new books to people and it's hard to argue that publishers would lose business because Google lets people read snippets.").

27. See, e.g., Barr & Schroeder, *supra* note 20 ("Not only is Google trying to rewrite copyright law, it is also crushing creativity. If publishers and authors have to spend all their time policing Google for works they have already written, it is hard to create more. Our laws say if you wish to copy someone's work, you must get their permission. Google wants to trash that.").

28. See JOHN S. MURRAY, et al., NEGOTIATION 147 (1996).

contrast to standard models of corporate behavior. Later in the article, I will explore possible explanations for this behavior. Behavioral psychology may help explain Google's behavior. Given the unusual degree of power held by Google's young heads, their current behavior can be seen as an instance of their anchoring onto a high risk/high reward pattern of risk preferences that has served them well in the past.

A second speculative explanation considers whether Google's aggressive posture is simply a rational response to the unusually unregulated situation in which it finds itself. In particular, changes in technology are creating market opportunities for Google on a global scale with rapidity that far outstrips the law's ability to respond. Thus, Google finds itself in a legal free zone and is seeking to do its best to exploit its opportunities. Rather than waiting for the law to adapt, Google is adopting a proactive approach, seeking to create "private law" that stands to be maximally favorable to its interests. Accordingly, Google may discount victory, *per se*, with regard to the narrow legal issues in dispute, but have larger strategic goals in mind. For example, Google may believe that, by engaging in an all-out legal battle, the publishing industry will be forced into submission through a settlement on terms favorable to the Google Print project.

Alternatively, Google may believe that it stands to benefit from the massive media exposure that the litigation is likely to bring. Handled well, the lawsuit could garner a tremendous amount of favorable free publicity for Google Print, as Google may appear as the champion of the little-guy end-user standing up to the media behemoths.²⁹ Considering all these factors, even if Google lost on the fair use argument, it might still come out a winner if it is able to advance its multi-pronged agenda by means of the lawsuit.

A full explanation of the emergence of the Google Print lawsuits may involve a cultural and ideological dimension. Bay Area *digerati* appear more communistic and less capitalistic than their East Coast counterparts when it comes to respect for the exclusive rights in works in the media and arts. The Bay Area take on creative content is best encapsulated in the venerable expression that information wants to be free. The assimilation of creative works of art into information mentioned earlier is a representative manifestation of this *Zeitgeist*, which may affect general legal culture in the Bay Area. The norm about information wanting to be free continues to define a certain attitude toward technology, innovation, and the role of intellectual property. Google may be giving an ear to theorists who take this view as a normative matter, and

29. Google prides itself on having built a world class brand while spending pennies on advertising. See VISE & MALSEED, *supra* note 18, at 183.

who think that courts might do so as well. Bay Area defendants may thereby have an exaggerated sense of their chances of success in a court of law, at least, outside of the Ninth Circuit.³⁰

Part I of this article will set out the complex set of facts leading up to the filing of the Google Print lawsuit. Part II will examine the legal and doctrinal issues presented by these facts. I will argue that plaintiffs have a solid *prima facie* case for massive copyright infringement on a scale never before seen. Google, however, will be able to counter with a compelling and innovative use of the fair use defense. Part III will begin to develop an economic and policy framework for examining and debating the various policy issues raised by the Google Print project and by internet search engines more generally. This analysis will seek to answer important questions regarding the shape and structure that regulation of internet search engines should take. I will argue that courts seeking to maximize social welfare should adopt a bifurcated approach under which fair use rights are accorded to Google with respect to the copyright holders of orphan works, but not with respect to the holders of non-orphan works. This approach is necessary to deal with the legacy problem presented by orphan works created with non-digital technologies, and thus, associated with a more onerous set of transaction costs attached to their accessibility. On a going-forward basis, however, creators of works will be properly incentivized under the approach developed here to protect their works. Thus, over time, a non-bifurcated regime of regulation will emerge. This will perhaps delay, but not impede, the development of Google Print, or a functional equivalent, and will foster the development of a richer market in books and creative works more generally.

I. EVENTS LEADING UP TO THE GOOGLE PRINT LAWSUIT

A. *Background Facts of Google*

While the story of Google's rise need not be fully replicated, the broad outline and a few of the concrete details will be worth keeping in mind, as they provide insight into otherwise puzzling aspects of Google's behavior. Google, Inc. is a classic Silicon Valley garage start-up story—on steroids. Google can one-up the paradigmatic former Hewlett-Packard in terms of geek-cred, as Google got its start in a graduate

30. Speaking speculatively, this norm perhaps helped produce the strongly pro-defendant Ninth Circuit result in *Grokster*. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 380 F.3d 1154 (9th Cir. 2004). The Ninth Circuit's reasoning was rejected 9-0 upon appeal to the Supreme Court. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 125 S. Ct. 2764 (2005).

school dorm room at Stanford, and only later moved to the relatively more spacious accommodations afforded by a garage.³¹ The earliest history of Google generally speaks well for its founders, not only in terms of their entrepreneurial spirit, but, more relevant to the lawsuits, of their commitment to the public values of education and learning. For each, higher education is a family value. Both Larry Page and Sergey Brin come from academic families in which both parents are highly educated in the sciences.³² From Google's early days, Page and Brin envisioned creating things for the benefit of those engaged in the pursuit of knowledge and the practical ends of science. Page's brother has a Ph.D. from Stanford. Page and Brin were Ph.D. candidates until they became graduate school dropouts. However, long before taking Google public, Page and Brin published a seminal academic work on search engines.³³ The number of academics who use Google everyday in pursuit of their research is legion.³⁴

The Google founders first meeting with a major potential investor came when one of Sun Microsystem's founders, Andy Bechtelshein, visited them at the garage they were renting. They met for a brief period, he heard their idea, watched while they performed a few Google searches, and left them with a check for \$100,000. They did not ask for the money; Bechtelshein simply offered it.³⁵ Next, in raising \$25 million, Page and Brin were able to play two of the most prominent Silicon Valley venture capital firms, Kleiner Perkins and Sequoia Capital, against one another.³⁶ This was both a reflection of Google's market power relative to other tech startups seeking funding, and a factor in how the Google founders have managed to maintain an unusual amount of control over their company.

Another element of this unusual degree of control is evident in the company's corporate governance structure. Almost unheard of in corporate America, the company is overseen by a triumvirate that includes the middle-aged and experienced former CEO of Novell, Eric Schmidt, as CEO and the founders serving as co-presidents and controlling shareholders. Thus, despite being CEO, Schmidt can be outvoted two-to-one by Page and Brin. Apparently, it was the venture capital firms that

31. VISE & MALSEED, *supra* note 18, at 58.

32. *Id.* at 21–31.

33. VISE & MALSEED, *supra* note 18, at 50. *See also* JOHN BATELLE, *THE SEARCH* (Portfolio Hardcover 2005).

34. *Id.* at 291, 296. In addition, Google offers a service called Google Scholar. *See* Daniel Terdiman, *A Tool for Scholars Who Like to Dig Deep*, *THE NEW YORK TIMES*, Nov. 25, 2004, at G6.

35. VISE & MALSEED, *supra* note 18, at 115.

36. *Id.* at 62, 66.

pushed Page and Brin to bring in an experienced person as CEO.³⁷ Reportedly, they balked and delayed the process as long as possible, finally capitulating as Google's initial public offering began to loom large. This is one more example in which Google evinces itself as a highly evolved company that has learned, in a post-Sarbanes-Oxley world, it may be helpful to have an expendable person at the top; a person who signs off on the financials, etc., but who can also be easily induced to walk the plank if crisis strikes, without leaving the organization headless.

It is fair to say that the company has never had serious funding difficulties. This access to cash allowed Google to develop the sort of firm culture that Silicon Valley high flyers were known for prior to the technology bubble bursting. The book on Google by *Washington Post* writer David Vise contains a photo of the founders in a hot tub at the corporate offices doing business on their hands-free phones.³⁸ While it is this sort of "tech-bling" that helped Google capture dollops of media attention, behind the scenes, Google's ready access to cash allowed it the luxury to assume a very aggressive posture in their early business dealings, and the luxury to avoid questionable deals that hard-strapped tech companies sometimes entered into in order to avert short-term crises. Google's aggressiveness is perhaps best seen in the manner in which it stole its business model from GoTo.com, later renamed Overture, Inc.³⁹ Early on, it was by no means assured that Google would become the Google of today. In the mid- to late- 1990s, when Google was getting its start, there were a number of companies working to bring search engines to market, or to enhance search engines contained as part of their larger online-related product offerings. In particular, internet search capabilities were found as part of companies such as AOL, Excite, and Yahoo that were developing what were then widely thought to be the dominant emerging business model for the internet—portals. Among Silicon Valley insiders, Google's technology and their page rank algorithm, in particular, attracted admirers early on, but Google lacked a business model that would allow it to effectively monetize its search technology. In line with conventional thinking at the time, Google thought that the natural progression was to unite their best-of-breed search technology with a more fully developed portal. Google was nearly acquired on the cheap in its early days, so prevalent was the view that internet search was merely one service among many—such as the provision of horoscopes and local weather—that were the province of portals.⁴⁰

37. *Id.* at 105.

38. VISE & MALSEED, *supra* note 18, at 150.

39. *Id.* at 87.

40. Indeed, search was viewed by many as a threat to the portal model, as searching the internet leads users to other websites, while the portal business model depends on keeping

Instead, however, Google adopted the business method of one of its competitors. Overture was one of the companies started by Bill Gross in his well-known Idealab. Overture is credited with developing the most effective method for monetizing search.⁴¹ Google might have licensed this innovative and patented business method from Overture, or it might have developed a competitive means to monetize its own innovative search algorithm, or it might have been acquired by a well-funded portal with a large installed user base, but lacking an adequate search engine. Google, however, chose a course of action different from these more likely scenarios. Instead of licensing the business model of Overture—which would have given Overture leverage over Google—Google simply copied their business model and waited for the complaint from Overture's lawyers to arrive in the mail. Such an aggressive business posture is not unheard of,⁴² but it is a risky and potentially very expensive strategy. The young history of e-commerce is littered with promising business models, which just happened to be illegal. This is true of, for example, mp3.com and each of the “sters”: Napster, Aimster and Grokster.⁴³ Common sense suggests that a solid legal position is especially desirable when the entity whose business model one is attempting to appropriate is one's competitor, with the motivation to use any infraction as a pretext to crush one, if possible. A financially precarious company might not have dared to act in this bold and aggressive manner. Just prior to its IPO, Google settled with Overture for 2.7 million shares.⁴⁴ In a slightly different world, the roles of Overture and Google could have been reversed, but, in fact, Google's venture won the day.

Google has, to this point, displayed great acumen in managing its reputation. To an important extent, Google's cash-rich position allowed it

users within the portal's domain such that they could be peppered with advertisements and product offerings.

41. VISE & MALSEED, *supra* note 18, at 87–89.

42. For example, Microsoft did not ask permission from Apple when it adopted Apple's user interface:

Apple achieved commercial success with its Macintosh personal computer, largely because of its distinctive user friendly graphic user interface operating environment. Apple copyrighted the visual displays in the Macintosh operating system. Microsoft developed a competing graphic user interface, called Windows, for IBM compatible personal computers. In October 1985 Apple informed Microsoft that it thought Windows infringed on its copyrighted visual displays.

Apple Computers, Inc. v. Microsoft Corp. 709 F. Supp. 925, 926 (N.D. Cal. 1989).

43. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (finding that reproduction of an audio CD into computer MP3 format does not transform the work); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

44. VISE & MALSEED, *supra* note 18, at 188.

the luxury to make decisions that burnished its image. Most significantly, its large initial infusion of cash allowed it to be picky about the advertising model it adopted. In particular, Google avoided the Scylla and Charybdis of banner ads on the one hand, and exclusive paid search, on the other hand.⁴⁵ This choice had a significant impact on the emergence of Google's reputation as the search engine that functions in greatest harmony with broader social interests.⁴⁶

Google has demonstrated a willingness to risk this sterling reputation, at least when the stakes are high enough. This is most clearly demonstrated by the launching of Gmail, Google's highly successful, but also highly controversial, free email service. Gmail was greeted by some in the tech media with great fanfare as Google offered users huge amounts of free storage in their email accounts. The tradeoff with users was that Google would run advertisements based on automated text searches of the messages so that the ads would be relevant to the content of the messages. This led to a storm of protest by privacy activists.⁴⁷ In fact, these groups not only went public, but they also took the unusual step of sending a group letter to Google.⁴⁸

Surprisingly, the most active and powerful online rights group, Electronic Frontier Foundation ("EFF"), did not sign the letter. A relevant fact in this regard may be that Brad Templeton, chairman of the Board of EFF, was hired by Google as a consultant.⁴⁹ Setting aside obvious con-

45. *Id.* at 47.

46. *Id.* at 87. *See also* THE SEARCH, *supra* note 33, at 142-3:

Google was credited with being "less evil" than Overture, because it was not allowing advertisers to simply buy their way to the top of the advertising heap. It was yet another example of the Google PR halo at work—Google was the little company that had only the best interests of the users at heart, and by not being evil, it was rewarded with glowing press mentions and increased business from advertisers.

Id. The practical implementation of Google's "Don't Do Evil" motto appears to represent the personal signature of the founders as well, or one of them at any rate. When asked what this motto means, CEO Eric Schmidt said, "Whatever Sergey says it means." VISE & MALSEED, *supra* note 18, at 211. Evil is in the eye of the beholder, it would seem, as Google's corporate policies for proscribing controversial search activities appear to reflect the morality of Bay Area twenty-something males rather than what might be proscribed by other norm entrepreneurs, such as the National Organization for Women. For example, regarding advertising with Google, guns are prohibited but pornography is not. *Id.* at 164-167. Indeed, Google clearly does not display a feminist morality as pornography makes up an important component of its advertising revenues. *Id.*

47. *See* Paula Hane, *Google Gets Flak*, INFO. TODAY, May 1, 2004, at 12.

48. *Id.*

49. VISE & MALSEED, *supra* note 18, at 160; *See* Brad Templeton, Privacy Subtleties of Gmail, <http://www.templetons.com/brad/gmail.html> (last visited Nov. 16, 2006) ("I come to this problem from two sides. One, I'm a fan of Google, and have been friends with Google management since they started the company. I've also consulted for Google on other matters and make surprising revenue from their AdSense program on my web site.").

flict of interest concerns, and focusing on this fact from a business perspective, this represents, to speak euphemistically, an aggressive approach to corporate sponsored norm entrepreneurship. To draw an off-line analogy from a bygone day, this is like General Motors hiring Ralph Nader to consult on safety issues.

Another telling fact about Google is that it went public via a so-called Dutch auction, bypassing the standard Wall Street investment bank route.⁵⁰ A Dutch auction, in theory, avoids an unnecessarily low share price that leaves money on the table, and results instead in the shares going out at their true present value.⁵¹ Thus, its Dutch auction IPO is another strong indication of Google's market muscle and its willingness to use it. This story was spun in the media at the time as another example of Google, the corporate maverick, willing and able to buck the Wall Street juggernaut.⁵² This story naturally has a certain popular appeal, enhanced by two other factors; first, the hostile attitude toward Wall Street in the wake of the corporate scandals of the early new millennial decade, second, the general anti-Wall Street attitude of Bay Area tech culture, which stems from the feeling that tech companies do all the real work, but are forced to pay huge fees to the small tight-knit group of banks that handle all this business.⁵³ While the lion's share of media attention focused on the David and Goliath angle of the story of Google going public, the story is also pregnant with meaning about the financial prowess of the brash young men at the helm of Google. They were used to getting their way and were particularly happy to do so if it meant behaving in an anti-authoritarian manner, such as the Dutch auction represented.

Perhaps the central insight to be gleaned from Google's short yet storied history is that, in the experience of its founders, big sums of money are relatively easy to come by and money can solve corporate problems. This is a company that is run with a personal signature—two in fact—and behavioral economics predict that the founders think their bold gambits are repeatable.⁵⁴ Past success at high risk/high reward gambits—especially in Google's adoption of Overture's business model and their development of Gmail, despite a serious threat of damage to their

50. VISE & MALSEED, *supra* note 18, at 172.

51. See 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 138 (John Eatwell et al. eds., 1987)

52. VISE & MALSEED, *supra* note 18, at 168–180.

53. The extent to which the banks benefit from their interactions with tech companies is not only demonstrated by the huge fees associated with the deals, but is also supplemented by the fact that offerings of highly-valued companies typically rise in early trading, and initial shares go to the banks' favored clients that can unload them in early trading. *Id.* at 171.

54. Edward L. Rubin, *Putting Rational Actors in Their Place: Economics and Phrenology*, 51 VAND. L. REV. 1705 (1998).

reputation within the tech vanguard, might lead Google to overestimate its chances of success in its Google Print endeavor.

B. *Chronology Leading Up To the Lawsuit*

In the Introduction, I noted an advantage to discussing an important lawsuit in its infancy namely, that as the future is yet to be told, there is some chance that analysis and discussion may lead to constructive developments in the actual lawsuit and may give policy makers a chance to change the outcome, rather than merely learn from the outcome. With Google Print, there is a great deal at stake with regard to defining the role of fair use within the context of search engines, and for the online world more broadly. But, there may be disadvantages to studying a lawsuit in its infancy, as well. A simple but significant disadvantage is that much of the information helpful for understanding the issues may not be readily available or open to the public, since the suit has yet to be waged. In the present case, however, this concern does not materialize. This has been a high profile lawsuit for two mutually reinforcing reasons. First, the media generally gives Google a great deal of attention, so media coverage of the events leading up to the lawsuit and of the lawsuit itself has been aggressive. Second, much attention to the issue has been driven by the parties themselves, each serving as quite conscious norm entrepreneurs; Google in a confident and effective manner, and the publishers in an initially flat-footed and halting manner, which has improved. In order to spin the issue in the media, and therefore in the public consciousness, each of the parties has made statements or provided information revealing a good deal about their under girding situations, the complex host of facts, and the basic features of their legal positions.

The level of information provided to the public by each party represents a compromise between conflicting factors. On the one hand, there is good reason to withhold information during a lawsuit; first, such information might be of use to one's opponents and second, one might take positions that could foreclose future litigation strategies. On the other hand, the compelling public nature of the Google Print project creates a strong countervailing tendency to release information about the project to the public sphere so that the releasing party puts itself in a position to control the message, rather than putting itself in a reactive posture by leaving its opponent to control the initial public perception.

Google made sure to secure the initial opportunity to spin public perception by keeping the project a secret from the plaintiffs prior to going public. From the very start, plaintiffs felt wrongfully left in the dark on an issue that materially concerned them, and they let their feelings be known. Once the project became public, however, copyright owners and

Google began behind-the-scenes talks. These talks went nowhere, and the parties increasingly took their cases to the public.

Of particular interest is a six page open letter from Peter Givier, the Executive Director of the Association of American University Presses to Alexander Macgillivray, a senior intellectual property lawyer for Google.⁵⁵ It will be worthwhile to describe the contents of this letter in detail. The letter opens with an introduction to the organization and its membership. Givier notes that the 125 members of the organization are all “non-profit scholarly publishers,” mostly affiliated with universities in the United States and Canada, along with “scholarly societies, museums, and non-degree-granting research institutions.”⁵⁶ This first paragraph establishes that the complainants are not-for-profit organizations involved in scholarship and research. Each of these categories is privileged under U.S. copyright law.⁵⁷ As discussed in greater detail in Part II, under established fair use doctrine a not-for-profit use counts in a defendant’s favor. The publishers highlight the fact that, while defendant Google is for-profit, the publishers are not. The fair use doctrine supports the basic goal of copyright, which is to promote the production and dissemination of creative expression.⁵⁸ Here, the publishers are making it clear they are professionally engaged in support of such creative expression in the form of scholarship and research. They might wish to intimate that, despite the superego fantasies of the Google founders, going public was Google’s pact with the devil, and it is now legally committed to praying at the altar of shareholder value maximization, and any talk of Google’s higher mission is mere puffery.

The next paragraph of the letter raises the claims to the level of outright gloating. Givier notes that the peer-reviewed publications of his organization’s members set the “gold standard for excellence of information,” winning hundreds of prizes yearly for the large number of publications.⁵⁹ The paragraph ends, “Major research libraries in the English-speaking world routinely buy all the books and journals published by AAUP members.”⁶⁰ On the one hand, this statement highlights the high quality of the publishers’ work product; their works are so well regarded that libraries have the confidence to simply buy whole catalogues. In this sense, the plaintiffs set the market for new scholarly

55. Letter from Peter Givier, Executive Director, The Association of American University Presses, to Alexander Macgillivray, Senior Intellectual Property and Product Counsel, Google, Inc. (May 20, 2005).

56. *Id.*

57. 17 U.S.C. § 107.

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

59. *Id.*

60. *Id.*

works worthy of library inclusion. On the other hand, the statement also gives the publishers enhanced moral and legal standing in the lawsuit; since all their books are purchased by libraries, all their back catalogues will be in the sea of books copied by Google's scanning machines.

Next, the letter describes circumstances under which numerous member publishers entered into agreements with Google in the program Google Print for Publishers. This is a separate program from Google Print for Libraries—the program at issue in the lawsuit. Givier notes that many of the publishers thought the program had potential, and they signed up for it with “great enthusiasm.” The letter goes on to describe the member's “confus[ion] and “surprise” at the fact that, at the same time Google was negotiating with them regarding the Publisher project, it was developing the Library project, and yet did not mention anything about it to the publishers, even though the interests of the publishers were clearly implicated. As the letter notes, the confusion grew into concern as the publishers learned more about the Library project, which “appears to involve systematic infringement of copyright on a massive scale.”⁶¹

The letter admits that the prospect that anyone with a computer and internet access will be able to use Google to search the complete collections of four American university libraries plus the public domain material from the New York Public Library and the Bodleian Library at Oxford, is “enormously seductive.”⁶² The letter adds, however, that “in our view it is built on a fundamental, broad-sweeping violation of the Copyright Act, and this large-scale infringement has the potential for serious financial damage” to the organization's members.⁶³ This last point is of critical importance, and the letter spends the next paragraph making out its substance in detail. This is an important point to drive home to the media and general public, as it is not common knowledge how university presses and other not-for-profit publications run their businesses. In light of the fact that university presses are affiliated with universities, one might assume that they are well-funded arms of the universities, like other components of the university. Thus, one might expect that Harvard University Press and Stanford University Press are in good financial shape, not because of the number of books they are selling, but because they are arms of well-endowed universities. The letter notes,

Although they are nonprofits and many of them receive an operating subsidy from their parent institutions, our members still

61. *Id.*

62. *Id.*

63. *Id.*

have payrolls to meet and bills to pay, and in 2003, the most recent year for which we have such data, total university support only averaged about 13% of their operating revenue. Virtually all the rest of the money required to recover costs and stay in business must come from the sale and licensing of their publications, and as in any publishing business, copyright plays an utterly fundamental role in establishing the legal basis on which their business rests.⁶⁴

For emphasis, Givier concludes with a final jab at Google's plans, "For the members of AAUP, most of whom struggle to break even in the best of times, the risk posed is serious indeed."⁶⁵

The letter then lists a series of questions on behalf of its members. The letter implores Google to answer the questions, and concludes ominously that, unless the publishers gain a greater understanding and acceptance of Google's plans, the publishers' alarm and concern about Google Print for Libraries would only grow. The letter then provides sixteen numbered paragraphs containing a *mélange* of questions seeking factual information, questions seeking legal positions or explanations, and statements that can only be described as making rhetorical flourishes. Somewhat tendentiously, the letter references and attaches a document from the publisher's website entitled "Copyright and the Costs of Scholarly Publishing." This is a one-page statement explaining in simple, straightforward language the connection between respect for copyright and the continued production of scholarly works. Since there is no new information for Google in this document, its inclusion is presumably meant to convey a message to the public audience that Google needs to refresh itself on these basic facts of scholarly production. At its most poignant, the statement reads:

Respect for copyright is essential to making this system work. Copyright infringement violates authors' rights and, like any other form of theft, increases the burden on those who abide by the law. It puts pressure on prices, reduces publishing capacity, increases deficits, and shrinks resources needed for change, experimentation, and growth.⁶⁶

After this moral expulsion, the letter ends with a plea for understanding and respect for the complex and important role played by university presses:

64. *Id.*

65. *Id.*

66. *Id.*

AAUP calls on all members of the university community—students, faculty, and administrators—to respect the obligation of university presses to strike a balance between the need for access to the information they publish, and the twin imperatives of protecting the legal rights of their authors and recovering publishing costs.⁶⁷

This last text is particularly poignant, as university presses are at the nexus of competing forces, forced to play a policy role in “balancing” competing interests (in contrast to Google, which does not balance, but instead maximizes one thing, profit).

While not providing answers to the pointed questions posed in the AAUP’s letter, Google has provided information about the Google Print project to win over the public and the participating libraries. The libraries were brought on board before Google went public with the project, and Google may fall back on its contractual understandings with the libraries. Nevertheless, Google must worry that if there is a strong public backlash to the proposed project, the libraries might get cold feet regarding their promised participation. While Google might enforce the terms of its contracts with the participating libraries, if the project becomes a public relations nightmare, it is possible that Google would allow the libraries to back out of participation without legal consequences. Thus, it matters tremendously to Google that what it says to the media and to the public on its website works to convince the public of the desirability of the project, or at the least does not sour the public on the project. The publishers’ open letter succeeded in calling public attention to the lawsuits. Google temporarily put a halt to its scanning in November of 2005 to conduct talks with plaintiffs, but soon resumed its scanning full force.⁶⁸

For its part, Google has used both its website and its various contacts with the media to provide the public with information pertinent to the Google Print project. A good deal of this information on the website is presented as general information to potential participants in the program. Google thinks that its actions are a fair use and in accord with the broader purposes of copyright law.⁶⁹ Moreover, Google arguably has case

67. *Id.*

68. Edward Wyatt, *Google Library Database is Delayed*, N.Y. TIMES, Aug. 13, 2005, at B9.

69. On its website, Google states:

The use Google makes is fully consistent with both the history of fair use under copyright law, and also all the principles underlying copyright law itself. Copyright law has always been about ensuring that authors will continue to write books and publishers continue to sell them. By making books easier to find, buy, and borrow from libraries, Google Book Search helps increase the incentives for authors to

law on its side,⁷⁰ support from universities,⁷¹ and the support of the participating libraries. Google claims that the public interest will be served by greater access to books and that copyright owners will not be harmed, due to an increase in book sales.⁷² In addition, Google claims to be going out of its way to make available the opportunity to opt out of the program.⁷³ Such statements serve two complimentary purposes apart from any useful information conveyed to users. First, they are geared to win over the hearts and minds of the general public regarding the social utility of the Google Print project. Second, the statements set up Google's legal defenses, as discussed below.

II. THE GOOGLE PRINT LAWSUIT

This Part will discuss the Google Print lawsuits from a social scientific perspective. The actual lawsuits are in their early stages, so there is not much to discuss in terms of actual events in the litigation. In lieu of dissecting events that have not yet transpired, the goal will be to predict the likely course of future events and to be in a better position to alter this course. Normative arguments will be reserved for Part III.

The broad structure of the lawsuits is relatively straightforward. Plaintiffs seek damages and an injunction based on a theory of copyright infringement to stop Google from going forward with the Google Print project. Plaintiffs' success will depend on their ability to make out the elements of a prima facie case of infringement and defendant's inability to offer a compelling affirmative defense. For a prima facie showing of infringement by reproduction, plaintiffs must show ownership and

write and publishers to sell books. To achieve that goal, we need to make copies of books, but these copies are permitted under copyright law.

Google Book Search Publisher Questions, http://books.google.com/googlebooks/publisher_library.html (last visited Nov. 15, 2006). *See also* WASH. INTERNET DAILY, January 19, 2006 (“[C]ase law shows Google Book Search as not seeming to break copyright law in letter or spirit The Google Book Search program plainly appears to meet the standards of the ‘fair use doctrine.’” (quoting Nancie Marzulla, president of Defenders of Property Rights)).

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

71. Coleman, *supra* note 24.

72. Stephen Foley, *Google Seeks to Defuse Row Over Copyright*, THE INDEPENDENT (London), October 11, 2006, at 45 (“Google is setting out to mollify critics in the media industry . . . with promises . . . to work with publishers to boost book sales . . .”).

73. *Id.* *See also* ROBIN JEWELER, AM. LAW DIV., THE GOOGLE BOOK SEARCH PROJECT: IS ONLINE INDEXING A FAIR USE UNDER COPYRIGHT LAW? CONG. RES. SERVICE REP. FOR CONG., at CRS-2 (Dec. 28, 2005), available at <http://fpc.state.gov/documents/organization/59028.pdf> (“Google essentially contends that its opt out program negates any infringement liability.”).

copying.⁷⁴ This boiler plate test is more fully spelled out as the need to show ownership, copying in fact, and a sufficient level of copying to constitute a substantial taking.⁷⁵ In the present circumstances, making out the prima facie case is a trivial exercise, at least for the publishers' lawsuit. The ownership interests involved are the copyrights to the library books that are scheduled to be scanned. The university presses hold many of these copyrights, having been assigned them by authors. In the class action brought on behalf of the copyright holders of orphan works, the situation is more complex, as the lawsuit seeks to represent all writers whose books are scanned by Google.⁷⁶

Once ownership is established, plaintiffs must establish copying of the texts by defendants. The question then is: what instances of copying do plaintiffs allege? The popular press suggests that the acts of copying occur during the production of the snippets of text served up to the end users.⁷⁷ The Google Print project involves three discrete types of copying, any of which could create infringement liability for Google's unauthorized users. First, there is the giving of snippets as search results to end users. Crucially, however, this operation involves Google first making whole copies of texts. Thus, the production of whole copies for its database is the second type of copying Google engages in. Finally, Google provides the participating libraries with digital copies of those books supplied by the libraries.⁷⁸

It is highly likely that plaintiffs will seek to establish a prima facie case of infringement for each of these types of copying, at least to the extent that the copying has already occurred. At this point, however, it is not clear how much copying has actually occurred. Scanning of books has occurred at the University of Michigan and, presumably, Google has given digital copies back to the University. But, the lawsuit is about more than the copying that has already occurred. Plaintiffs seek an injunction to stop Google's planned copying and a declaration that such copying is unlawful. Google cannot deny its plans to copy in each of the three ways mentioned above. In the case of the University of Michigan Library, Google cannot deny it has already copied. Instead, Google will seek to justify this copying. Thus, the real controversy will not be the

74. *Arriba Soft*, 336 F.3d at 817.

75. *Id.*

76. *The Author's Guild v. Google Inc.*, No. 05-CV-8136 (S.D.N.Y. filed Sept. 20, 2005).

77. *But see* Wash. Internet Daily, *supra* note 69 ("Google's program is no threat to property rights, since users can view only snippets" (paraphrasing Nancie Marzulla, president of Defenders of Property Rights and an attorney specializing in IP rights protection)).

78. *See* Google Book Search Publisher Questions, *supra* note 69 ("[T]he library will get a digital copy of the book as a part of their collection.").

ability of plaintiffs to make out the prima facie case, but the ability of Google to make out an affirmative defense.

Google will seek to establish a fair use defense.⁷⁹ Another possible defense is *de minimus* use, which means that a use is too insignificant to rise to a level that creates liability, even though the elements of a prima facie case are technically satisfied. Judge Leval, one of the federal bench's most esteemed copyright experts, argues that the *de minimus* defense deserves to play a more pronounced role in copyright jurisprudence than it currently does, suggesting an increased openness to this defense in the courts (or, at least in the Second Circuit).⁸⁰ However, based on its public pronouncements, Google does not plan to offer such a defense.⁸¹ One may aptly apply many labels to a plan to copy millions of books, but *de minimus* is not one of them. Thus, the following discussion will focus on the fair use defense.

A. *Is Google Print a Fair Use?*

A claim of copyright infringement is subject to certain statutory exceptions. The fair use exception "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."⁸² The statute sets out four factors to consider when determining whether a particular use is a fair use.⁸³ The statute provides little detailed guidance as to weighing of the four factors in relation to one another. Fair use is often thought to be an inquiry of uncertain outcome.⁸⁴ One version of legal realism, for instance, would contend that the outcome depends on what the judge has

79. See 17 U.S.C. § 107 (2006).

80. See Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449 (1996–1997). For further development, see Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

81. Answer, McGraw-Hill Cos. v. Google, No. 05-CV-8881 (S.D.N.Y. filed 2006) (JES). In its Answer in the McGraw-Hill lawsuit, Google offers a creatively large number of defenses (thirteen), but *de minimus* use is not one of them.

82. Iowa State Univ. Research Found., Inc. v. American Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980). See generally 17 U.S.C. § 106, 107 (2006).

83. The four factors are:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.

17 U.S.C. § 107 (2006).

84. See ALAN LATMAN & ROBERT A. GORMAN, COPYRIGHT FOR THE EIGHTIES 473–75 (2d ed., Michie Bobbs-Merrill 1985).

for breakfast.⁸⁵ This extreme form of anti-formalism over-emphasizes the amount of discretion in fair use analysis. When considering all of the factors together, however, the courts typically speak in vague terms of the need to balance the four factors. For instance, the Ninth Circuit in *Arriba Soft* says, “We must balance these factors in light of the objectives of copyright law, rather than view them as definitive or determinative tests.”⁸⁶

In the popular press, the legal issues concerning fair use are drastically simplified. Journalists often write as if there is one generic fair use test to apply to Google Print for Libraries.⁸⁷ This treatment has been fostered by Google’s PR campaign, which focuses on the simple perspective of creating an online card catalogue. What could be simpler than that: one card catalogue; one test for fair use. The metaphor of a card catalogue fits within Google’s overall public relations strategy to characterize the project as fundamentally about research and learning. In fact, the court’s treatment of fair use issue will be quite nuanced and complex for a few reasons.

In theory, each putatively wrongful act merits its own infringement analysis and fair use test. There is an inherent tension, however, between the fact specific nature of fair use analysis and a notable feature of the lawsuit, that the class of works in the lawsuit numbers in the thousands, or even the millions. The obvious question is: how is it possible to engage in a fact specific fair use analysis of all of these works? For example, with some works, factor two might favor plaintiffs, while with other works, it might favor defendants. Thus, one could argue that the only sensible approach to the fair use test during litigation is to consider each work separately.

It is likely that the court will reject this argument, however. Many of the most important copyright cases involving large-scale copying of works of a type, such as *Williams & Wilkins*, *Sony*, *Napster*, *Texaco*, and *Grokster*, ignored differences between tokens of the type.⁸⁸ For example, in *Sony*, the type of content was television programs, but within this

85. Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 944 (1995).

86. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

87. Georgia Harper, Google This, <http://www.utsystem.edu/ogc/intellectualproperty/googlethis.htm> (last visited Dec. 19, 2006).

88. In its opinion in *Williams & Wilkins*, the Court of Claims held that massive photocopying efforts by libraries could potentially constitute fair use. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff’d by an equally divided court*, 420 U.S. 376 (1975) (per curiam); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913.

type, works varied from *Mr. Rogers Neighborhood* to *Monday Night Football* to *The Manchurian Candidate*, each of which raised distinctive fair use considerations. Nevertheless, the Supreme Court unified the set of actual and potential uses for the purpose of the fair use analysis.⁸⁹

Fair use calls for a case-specific treatment of the various normative factors. For example, courts are permitted to consider other factors⁹⁰ in addition to the basic four. One of the mantras of fair use analysis is that the test is “equitable” and fact specific.⁹¹ A typical application of the fair use test quotes Congress to the effect that, while the Copyright Act codified the fair use test in section 107, Congress did not intend to wall-off the test from future common law development.⁹² Despite this, because the four factors receive explicit recognition in the Act, the courts’ apply the test with heightened salience, such that many courts are content to apply the four factors without weighing or even mentioning any other possible factors.

In a novel case such as this with so much at stake, one might expect many atypical normative considerations. As already noted, the presence of three distinct sorts of copying distinguishes Google from most infringement suits, which usually involve one type of copying. Not

89. *Sony*, 464 U.S. 417.

90. Latman and Gorman suggested a kind of utilitarian meta-factor. See LATMAN & GORMAN, *supra* note 84, at 473–75 (considering the possibility that a “public interest” factor that outweighs all the others is “arguably bubbling under the surface of cases involving new technology”).

91. “[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.” H.R. REP. NO. 1476, at 65 (1976) [hereinafter cited as House Report] *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

The legislative history of section 107 of the 1976 Copyright Act indicates that Congress intended the doctrine of fair use to continue to be articulated in a common law manner: “The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute . . .” House Report at 66. Courts have noted their freedom in this regard. *See e.g.*, *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.* 626 F.2d 1171, 1174 (5th Cir. 1980) (“Congress made clear that it in no way intended to depart from Court-created principles or to short-circuit further judicial development . . .”). Congress noted that even for those courts that have articulated a fair use doctrine, the factors that have emerged are “in no case definitive or determinative” but instead “provided some gauge [sic] for balancing the equities.” House Report at 65.

Given that the law is being called on to innovate in this case and given that copyright is a tort, one might expect—and hope—that courts would appeal to first principles of tort to illuminate the underlying normative situation. If there is an application, it is not obvious, at least at first glance, however, as fair use has no correlate in typical tort. If a plaintiff makes out a *prima facie* case, a defendant will not be heard to argue that the negligently caused harm to the person is nevertheless not actionable, due to the fact that the injurious action was fair.

92. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994) (“The text employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.” (citations omitted)).

surprisingly, this level of complexity also affects the analysis of fair use, which, despite Google's efforts to characterize itself as a card catalogue enhanced with snippets of text, involves correlatively three-parts as well.

Though there is no precedent analyzing a fair use claim involving three interrelated types of copying, I argue that the best outcome predictors are the cases involving two types of interrelated copying, the "intermediate copying" cases.⁹³ In the few intermediate copying cases litigated to date, the courts performed separate fair use tests on each of the types of copying, and then analyzed the relationship between them.⁹⁴ I will follow this methodology below, beginning with the fair use test applied to snippets.

There is an important conceptual reason to consider each of the three types of copying separately for purposes of fair use analysis; while snippets are intrinsically valuable vis-à-vis the ultimate purposes of copyright, the other two types of copying are instrumental to this intrinsic role of snippets. Thus, an important question arises: whether a search engine could exist as a functional equivalent of Google Print, absent a centralized database containing the searchable content? If so, then Google's construction of a database comprised of whole copies of texts may be viewed as a transaction cost that, as a matter of policy, could be eliminated. Thus, the snippets are intrinsically of interest to copyright, while the other types of copying are only of interest to the extent that current technology or other factors necessitate the copying to make the snippets available to internet searchers.

1. Fair Use of Snippets

As is standard, I will apply each of the four factors of the fair use test in turn to the snippets. Then I will ask whether there are any additional factors that a court will likely take into consideration.

a. First Factor: Purpose and Character of the Use

The first factor considers the purpose and character of the use to which the putatively infringing copy will be put.⁹⁵ In orthodox fair use doctrine, factor one analysis involves two major considerations: whether

93. *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003).

94. *See Sega*, 977 F.2d at 1519 ("Accordingly, we hold that intermediate copying of computer object code may infringe the exclusive rights granted to the copyright owner in section 106 of the Copyright Act regardless of whether the end product of the copying also infringes those rights. If intermediate copying is permissible under the Act, authority for such copying must be found in one of the statutory provisions to which the rights granted in section 106 are subject.").

95. 17 U.S.C. § 107(1).

the use is commercial, as opposed to not-for-profit or educational, and whether the use is “transformative,” as opposed to merely “superseding.”⁹⁶ This orthodoxy cuts across the various federal circuits, despite the fact that this two-part factor one analysis is not required by the statute. This is an example of fair use as an atypically unpredictable legal standard, as mentioned above. The pertinent question is then: what is the purpose or character of the use of a snippet? Google has not yet provided any substantive legal documents to answer this question. The best indication of Google’s likely response is the things they have posted on their website.⁹⁷ Generically, of course, Google claims that Google Print is not commercial, but rather educational and highly transformative. Regarding purpose, Google will undoubtedly argue that its mission is to provide an electronic card catalogue.⁹⁸ Google will likely argue that this purpose is an integral element to their larger goal, providing access to the world’s information.

Factor one looks at the character of the use, not just the purpose of the use.⁹⁹ One obvious question courts never ask is whether or not the notion of character of a use is redundant. If not, in what sense is the character of a use distinct from its purpose? One distinction may lie in normative theory, which holds that some between outcomes are intended, and some outcomes are not intended, yet nevertheless foreseen. For example, Google likely will argue that the publishers stand to profit from the Google Print project.¹⁰⁰ While third party profits are arguably not Google’s direct purpose, they are a foreseeable consequence of material significance and hence, an element of the character of Google Print.

Another potentially material characteristic that Google is likely to point to is that most copyright owners do not object to having their books scanned and thus, the best rule requires owners who object to the scanning to opt out of the Google Print project, rather than requiring

96. Older language distinguished between “intrinsic” uses and “productive” uses. The Ninth Circuit states that fair use only protects users who are productive second users rather than persons who are making ordinary or “intrinsic” uses. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 971 (9th Cir. 1981), cert. granted, 102 S. Ct. 2926 (1982).

97. Google.com, Google Book Search Library Project, <http://books.google.com/googlebooks/library.html> (last visited November 15, 2006)

98. Google has been criticized by Plaintiffs for making more available than just the bibliographical information. Publishers have noted that if Google represents its project as a card catalogue, then why does it make available more information than a card catalogue, namely bibliographical information? The publishers note that if Google stopped there, they would have no problem.

99. 17 U.S.C. § 107(1).

100. See Yuki Noguchi, *Google Delays Book Scanning; Copyright Concerns Slow Project*, Aug. 13, 2005, at D1, WASHINGTON POST (quoting Google Print product manager Adam Smith, “We think this will help more users discover their books, and buy their books.”).

owners who want their books scanned to opt in.¹⁰¹ Finally, based on its website, Google may claim that an important characteristic of snippets is that they are geared to show respect for copyright owners.¹⁰² The following discussion will first look at the issue of commercial use, and then look at the issue of transformative use.

i. Commercial Use

When discussing commercial use, the first issue is the *Sony* presumption. In *Sony*, the Supreme Court established a presumption against fair use when the use is commercial.¹⁰³ This did not matter in *Sony*, as the use of the VCR by consumers was deemed a non-commercial use. Nevertheless, the presumption has been cited in a number of fair use decisions. Subsequent commentators have noted that the presumption did not conform to previous case law and was not justified by the overall purposes of fair use.¹⁰⁴ Nevertheless, numerous cases applied the presumption in the wake of *Sony*. In *Acuff-Rose*, however, the Supreme Court backtracked from their position.¹⁰⁵ While the *Sony* language is still occasionally cited, most courts have adopted the Souter approach to commercial use of *Acuff-Rose*. Thus, there is no longer a presumption against Google's claim of fair use simply because the use is deemed commercial.¹⁰⁶

Commercial use in copyright jurisprudence is a term of art, with a meaning similar to, but not the same as, its ordinary language meaning. Speaking in ordinary language terms, Google's use of snippets is commercial, in as much as Google is a publicly traded company. But, in copyright, this is not enough to count as a commercial use for two reasons.¹⁰⁷ First, Google is arguably a media company like the New York Times, and, although a publicly traded company, nevertheless, it may still be subject to special treatment for First Amendment reasons.¹⁰⁸ Sec-

101. See Google Book Search Publisher Questions, *supra* note 69 ("We're happy to remove your book from our search results at any time").

102. See Google Book Search Library Project, *supra* note 97 ("The Library Project's aim is simple: make it easier for people to find relevant books—specifically books they wouldn't find any other way such as those that are out of print—while carefully respecting authors' and publishers' copyrights.").

103. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

104. Leval, *supra* note 80.

105. The Supreme Court has rejected the proposition that a commercial use of the copyrighted material ends the inquiry under factor one. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

106. See *id.* at 585 ("Rather, as we explained in *Harper & Row*, Sony stands for the proposition that the 'fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.'")

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

108. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 592 (1985).

ond, although Google uses content owned by others, it does not sell or trade the copies it makes. Some courts have been open to countenancing such uses, deeming them not directly commercial.¹⁰⁹ Let us explore these two factors in greater detail.

The first question is whether Google stands to benefit from First Amendment considerations. Numerous cases have privileged otherwise commercial companies due to their status as media companies. In *Harper & Row*, the Court noted that the bare fact that a media company was commercial was not dispositive; it is typical of companies that stand to benefit from First Amendment norms that they are commercial.¹¹⁰ This is true, for example, of newspapers and television stations. The question then is whether or not Google is a media company. In the past, Google denied this appellation, but, either to reflect a changing reality or due to proactive lawyering, it now accepts the designation.¹¹¹

Google has certain features of a news organization, such as a news service, but there is an important difference between Google and, for example, the New York Times; Google does not provide original content, but is a content aggregator.¹¹² Google also has other features of a media company, such as an advertising-driven revenue model, and, as noted in Part I, a corporate goal to organize the world's information. Trafficking in information is a feature of media companies. Finally, Google has a dual-class stock ownership structure for a purpose akin to that of some media companies, such as the *Washington Post*.¹¹³

Google is unlike a newspaper in a crucial respect, however. Arguably, commentary and criticism are contrary to, or at least in tension with, Google's core mission. Their mission is to organize the world's information, an objective task. On first impression, one would expect Google to go about this task in an objective, asocial, and scientific manner that does not inject the company's commentary or criticism. It is worth highlighting that Google trumpets the fact that its searches are objective.¹¹⁴ If Google wanted to, it could do more filtering or selecting of content, which is still a milder level of subjective engagement with the material and an intermediate step for commentary and criticism. Thus, Google's

109. Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003).

110. Harper & Row, 471 U.S. at 592 (noting that many of the privileged uses explicitly mentioned in 17 U.S.C. § 107, such as comment and criticism, are, in our commercial society, predominantly the domain of for-profit companies such as newspapers and television networks).

111. See THE SEARCH, *supra* note 33, at 3.

112. Interview by Maria Bartaromo with Eric Schmidt, CNBC (May 22, 2006).

113. VISE & MALSEED, *supra* note 18, at 176.

114. Leslie Taylor, *Media Morph: Google Death Penalty*, 77 ADVERTISING AGE 9 (2006) ("Google says: 'We cannot tolerate Web sites trying to manipulate search results as we aim to provide users with relevant and objective search results'").

best argument does not depend on an appeal to the importance of free and independent political expression in a public context. Yet Google, with the availability of Google Print, serves the ends of comment and criticism in a significant manner by aiding journalists, academics, and others in their efforts. This cannot be taken for granted, as the opposite situation is more prevalent—journalist’s significant investigative endeavors are powerfully hampered by the practical limitations of scarce resources.¹¹⁵

Second, Google is likely to argue that its use of Plaintiff’s works in the production of the snippets is not commercial in the relevant sense, or at any rate, not very commercial, because Google is not in the business of selling snippets. Google will point to cases in which courts have been willing to downplay the commercial role of some use under the rubric that the use was not directly commercial. For example, in *Arriba Soft*, a case discussed in greater detail in the next section, the Ninth Circuit wrote, “As the district court found, while such use of Kelly’s images was commercial, it was more accidental and less exploitative in nature than more traditional types of commercial use. Arriba was neither using Kelly’s images to promote its web site nor trying to profit by selling Kelly’s images.”¹¹⁶ Instead, Kelly’s images were among thousands of images in Arriba’s search engine database. Because the use of Kelly’s images was not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use.¹¹⁷ Similarly, a court might well find that Google’s production of snippets, while commercial, is nevertheless not directly commercial, and so will only weigh slightly against a finding of fair use.

The publishers will take issue with the characterization of Google as deserving special treatment as a member of the media. For when a newspaper or television station uses someone’s copyright protected content, it is typically on a one-off basis, that is, today it is an unauthorized photo of some artist’s daring new work and tomorrow its an unauthorized quote from some politician’s written statement on some hot button issue. Whereas, the opposite is true of Google’s planned use of plaintiffs’ works, where snippets from some popular book like the *DaVinci Code* might be produced hundreds or even thousands of times a day. Thus,

115. See, e.g., Katharine Q. Seelye, *Richard Stengel is Chosen to Be Top Editor at Time*, N.Y. TIMES, May 18, 2006, at C1.

116. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

117. *Id.* at 819. A good case for plaintiffs on this issue is *American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1994). The defendants argued that Texaco’s use of copies of journal articles was educational rather than commercial. The Second Circuit rejected this argument, however, noting that the copies were a factor in Texaco’s overall production process. *Id.* at 921.

plaintiffs will argue that in a relevant sense Google is indeed trafficking in snippets in a direct manner as it uses snippets in order to attract users to their site in order to do searches.¹¹⁸ Once Google has this captive audience, it can then run advertisements by them.¹¹⁹ Thus, the real market is in selling advertising space and snippets are a factor of production in this end product.

It matters not only whether the use is non-commercial but also whether the use is educational or not. Educational uses are given greater protection. Educational use is indeed explicitly mentioned in the preambular language to section 107.¹²⁰ It will matter whether and to what extent Google's use is found to be educational. Google will undoubtedly argue that it is highly educational; what could be more educational than a digital library, and a search function that can bring responsive snippets from this library to anyone, anywhere in the world? After all, Google is copying books from some of the top libraries in the world. As noted in Part I, these libraries have made statements in support of their participation that clearly indicate their view that the project supports core educational values.¹²¹ We are perhaps giving some advance indication of the tone of the amicus briefs on behalf of the libraries we are likely to see, based on an open letter to the editor by the President of the University of Michigan mentioned earlier.¹²²

What will publishers reply regarding educational use? It seems highly unlikely that they would simply deny outright that Google Print will have important educational uses. These are the same plaintiffs who in their open letter emphasize that they represent a large number of university presses and have as their goal the promotion of knowledge and learning. Nevertheless, publishers do have responses open to them. First, they might argue that a huge share of searches are unlikely to have any real connection to truly educational uses, and that unlike a real public library, or even a media outlet like the *Nation*, Google is only interested to maximize shareholder value.

It is likely, however, that a court would find this a weak response, for given the nature of the database—books from research libraries—it will be implausible to deny that the knowledge contained in these books will thereby be spread. Furthermore, the fact that perhaps this database serves

118. See Author's Guild complaint, *supra* note 3, ¶ 1.

119. Google has two advertising programs: AdSense and AdWords. Through AdWords, advertisers purchase placement for ads on Google's pages, including on search results pages and Google's Gmail web-based email service. Google's AdSense program allows pages on third party sites to carry Google-sponsored ads and share revenue from the advertising displays.

120. See 17 U.S.C. § 107 (1976).

121. Coleman, *supra* note 24.

122. *Id.*

as the grist for queries not overtly or intentionally educational may be all to the good in as much as slackers doing internet searches for no overtly worthwhile purpose might thereby accidentally get introduced to educational materials simply because these results are delivered along with some set of search results that are perhaps more directly responsive to their slacker queries. Metaphorically, one can see this as giving knowledge legs to seek out the person rather than merely sitting back passively in some traditional brick and mortar library waiting to be accessed by a seeker of knowledge.

The publishers may in addition fall back on the response that the uses do not promote education because in the long run the market for educational books will be destroyed by the activity.¹²³ This argument will be quickly, dismissed, however, as based on confusion about the nature of factor one analysis. The query is not whether the use supports the educational enterprise (or fails to) in some instrumental sense. Rather, the inquiry is a more direct one that looks at the actual usage of the unauthorized copy of plaintiff's work to see whether this use is itself educational. For example, one cannot make DVD copies of the movie *Titanic* to sell in order to raise funds for a school no matter how worthwhile the school's mission. This would not count as an educational use despite the fact that education might in fact be instrumentally served in some noble way. What counts as the use is the actual use of the DVD copy of *Titanic* by the people who get the unauthorized copies. If they simply watch the DVD for enjoyment in the usual manner then this will count as a non-educational use. So too for Google Print in the opposite direction. What will matter is whether the actual use of some particular piece of copyright protected content is an educational use, not the fact that this educational use serves the instrumental goal of maximizing shareholder value for Google.

On balance, a court is likely to find that Google Print, taken as a whole, is an important educational use that promises to profoundly promote the pursuit of knowledge. This strongly educational use will count correspondingly strongly in Google's favor. A court is also likely, however, to find Google Print to be a commercial use, although not a direct one. Based on what we now know, the intended use would not be directly commercial but nevertheless would be a factor of production in a commercial enterprise.¹²⁴ As already noted, in such circumstances, courts have said that this sort of indirect commercial use counts against defen-

123. See Givler, *supra* note 55.

124. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) ("There is no dispute that Arriba operates its web site for commercial purposes:").

dant but weakly so.¹²⁵ Before inquiring into how a court is likely to balance these countervailing considerations of commercial use versus educational use, it is necessary to first consider the most important factor one consideration, that of transformative use.

2. Transformative Use

The second major consideration in analyzing factor one is whether the unauthorized use in question is “transformative.”¹²⁶ While the test for transformative use is one of two crucial considerations in contemporary fair use doctrine, the explicit term itself is of relatively recent vintage.¹²⁷ The term is meant to capture an idea that according to Leval, goes back to the old notion of a superseding use as found in fair use’s seminal case, *Folsom v. Marsh*.¹²⁸ A transformative use is one that is not merely “superseding.”¹²⁹ The test for the notion of a use that is transformative per se was picked up by the Supreme Court in *Campbell v. Acuff-Rose*, and in numerous subsequent cases.¹³⁰

In *Campbell v. Acuff-Rose*, Justice Souter spends a good deal of effort discussing elements of fair use that are not directly before the court in an effort to clear up what the court sees as confusions engendered by *Sony*.¹³¹ One of these efforts is to return the fair use test to the form it had taken before *Sony* in terms of the importance of factor one. *Sony* had stressed the importance of the fourth factor. Souter noted that factor four need be no more important than factor one and indeed factor one is more important.¹³² This position is on a par with that taken by Judge Leval.¹³³ Perhaps unsurprisingly, in his follow-up article, written subsequent to *Campbell*, Leval gives high praise to Souter’s fair use analysis.¹³⁴ The notion of a transformative use has been championed by Judge Leval, who claims the term “transformative” is synonymous with the older notion of a use that is “productive.”¹³⁵

It seems likely that the Second Circuit will follow the general logic of first giving priority to factor one over factor four and emphasizing the

125. *Id.* at 818.

126. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

127. *See* Leval, *supra* note 80, at 1111.

128. *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4901).

129. *Id.* at 344–45.

130. *Arriba Soft*, 336 F.3d at 818.

131. In general, Souter provides an historical account of fair use. For each of the four factors, he traces the correlative language in *Folsom v. Marsh*.

132. *Acuff-Rose*, 510 U.S. at 591 (“But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”).

133. *See* Leval, *supra* note 80.

134. *Id.* at 1464.

135. *Id.* at 1456.

importance of the concept of transformative use. If the Second Circuit follows the *Campbell* approach over the *Sony* approach, this is likely to favor Google, as the arguably transformative use of the snippets is likely to be the most important single factor in Google's favor. To understanding why Google has a strong case for transformative use requires a better understanding of how snippets are produced.

A snippet appears on the computer screen of the Google Print user in response to a search request. This use is arguably highly transformative in that thanks to Google Print, an algorithm can process a query and search through a vast database in order to find an answer. Transformative use is opposed to a superseding use which is an unauthorized use that merely replaces the unauthorized copy as a substitute for the original. Google can argue that clearly the snippet does not merely substitute for the original as the snippet is only produced as the result of a complex, patented secret process that depends on a complex array of factors uniquely under Google's control.¹³⁶ As the publishers do not engage in marketing snippets, Google's snippets will not replace or supersede snippets that were formerly provided by publishers.

The snippet is a piece of text from the original work. So in this way, it is a direct taking. But it has a transformative feature: snippets are personalized in that they satisfy a particular user's needs in a very forceful way. Another means of getting at the notion of transformativeness is to compare the function of a snippet with the function of a book. Unlike a book, which provides the same big block of text to each and every comer, the snippet serves a different purpose, which is to provide a focused response to a particular query. Indeed, in the future Google will increasingly serve up personalized search results that vary from person to person, depending on the information that Google has stored up on its repeat users.¹³⁷ The more that Google adds to personalize the search result, the better its position to claim that its use of snippets does not merely substitute or supersede an equivalent item that could be provided by plaintiffs.

Google can draw on its sterling reputation in terms of trust and consumer confidence in order to argue that it has developed a reputation for objective search results.¹³⁸ This fits into Google's factor one argument because it can argue that not only is the snippet unique due to Google's "secret sauce," but it is uniquely desirable due to Google's commitment to objective results.

136. VISE & MALSEED, *supra* note 18 at 47–50 (on the complexity of search algorithms).

137. BATELLE, *supra* note 33, at 258–61.

138. Barbara Quint, *Old Lessons for the New Knowledge Pipeline*, INFORMATION TODAY, July 1, 2003, at 7.

Publishers have a colorable response, however. They will argue that snippets are not transformative in the manner that, for example, taking an artist's photograph and turning it into a thumbnail image is transformative.¹³⁹ By contrast, a snippet is just a chunk out of a book. The transformative technology is the search algorithm but that is not the snippet. The algorithm is the means to get the snippet from the book to the user, but the snippet is still just a chunk of text from a book.

This position mischaracterizes the nature of the test for transformative uses, however. It is not the copyright owner's work, per se, that must be transformed, although this sometimes is the case, as in *Campbell*, where the rap music group 2 Live Crew altered the lyrics and beats of Roy Orbison's signature song, *Pretty Woman*. What matters is that the use of the owner's work is transformative, not that the work, qua content of a certain sort, is itself transformed.

In analyzing the issue of whether Google Print promises to be transformative, a court will likely pay great attention to the small number of copyright infringement cases that have arisen in the past few years involving internet search engines. Most important is likely to be *Kelly v. Arriba Soft Corp.*¹⁴⁰ Accordingly, it will be worth looking at this case in detail. The plaintiff in *Arriba Soft*, Leslie Kelly, was a professional photographer who had copyrighted many of his images of the American West. Some of these images were located on his web site or other web sites with which Kelly had a license agreement. The defendant, Arriba Soft, operated an internet search engine that displayed its results in the form of small images rather than the more usual form of text. Arriba obtained its database of pictures by copying images from other web sites.¹⁴¹ Arriba has a computer program that "crawls" the web looking for images to index. The crawler downloads full-sized copies of the images onto Arriba's server. The program then uses these copies to generate smaller, lower-resolution thumbnails of the images. Once the thumbnails are created, the program deletes the full-sized originals from the server. Although a user could copy these thumbnails to her computer, she cannot increase the resolution of the thumbnail as any enlargement would result in a loss of clarity.¹⁴²

While subsequent discussion of this case has focused on the thumbnails, larger copies of plaintiff's pictures were involved as well. By clicking on one of the thumbnails, the user could then view a larger

139. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–19 (9th Cir. 2003). *But see* Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006) (granting an injunction against Google's use of thumbnail images of pictures of "natural" models).

140. *Arriba Soft*, 336 F.3d at 815.

141. *Id.*

142. *Id.*

version of that same picture within the context of the Arriba web page. When Kelly discovered that his photographs were part of Arriba's search engine database, he brought a claim against Arriba for copyright infringement.

The district court found that Kelly had established a prima facie case of copyright infringement based on Arriba's unauthorized reproduction and display of Kelly's works, but that this reproduction and display constituted a non-infringing "fair use" under section 107 of the Copyright Act.¹⁴³ Kelly appealed that decision and the Ninth Circuit affirmed in part and reversed in part, finding that the creation and use of the thumbnails in the search engine was a fair use but holding further that the district court should not have decided whether the display of the larger image was a violation of Kelly's exclusive right to publicly display his works. This was in contrast to the lower court, which had decided that both the thumbnails and the larger images were a fair use.¹⁴⁴

While there are significant factual differences between the Google Print project and the facts of *Arriba Soft*, nevertheless, the case provides important support for Google's position. Most important is the analysis of the factor one consideration of transformative use. The Ninth Circuit wrote,

This involves more than merely a retransmission of Kelly's images in a different medium. Arriba's use of the images serves a different function than Kelly's use—improving access to information on the internet versus artistic expression. Furthermore, it would be unlikely that anyone would use Arriba's thumbnails for illustrative or aesthetic purposes because enlarging them sacrifices their clarity. Because Arriba's use is not superseding Kelly's use but, rather, has created a different purpose for the images, Arriba's use is transformative.¹⁴⁵

Google can use this language to good effect in the present case. The court here is using a test of the function of the use. It says "Arriba's use of the images serves a different function than Kelly's use—improving access to information on the internet versus artistic expression." The question then is whether Google Print serves a different purpose than books usually serve. Clearly Google can claim that just as with Arriba, it too "improves access to information on the internet versus artistic expression." Clearly the first part is true, that Google improves access to information. The Ninth Circuit does not explain what it means by saying

143. *Id.* at 817.

144. *Id.*

145. *Id.* at 819.

“versus artistic expression.” The idea seems to be that when Kelly offers up his pictures, it is as artistic objects—he is a professional photographer after all. With Arriba the images are not offered up as artistic expression, but rather as thumbnail size search results. The court seems to suggest that the images are of low resolution and so they are not being viewed for their aesthetic qualities but rather simply to supply information.¹⁴⁶

How does this apply to Google? There is the difference in facts that Arriba involves images while Google Print involves text. Does this matter? It may matter in that it makes sense that a photograph could not be enjoyed aesthetically online in thumbnail form to the same extent as it could in an enhanced form. But can an equivalent argument be made for books? Texts are unlike images in that they do not suffer from quality degradation in the same way. Presumably the text in the Google snippet will be just as high quality of resolution as text from an owner's own personal digital version of the book. Still, Google has a good argument that the functions are different. The snippet has the function of providing a search result to an internet searcher. This is clearly a distinctive function from what the copyright owners do, which is to sell books. Arguably the parallel is that just as the thumbnail is a diminished version of the original, so too is the snippet a diminished version of the larger text—it is just that it is diminished temporally in that one cannot consume a whole book at one time but only a snippet of the whole. A more precise parallel then would be if Arriba made a copy of a portion of the overall photograph—a snippet of the photo. Nevertheless, this is the language and the similarity of fact pattern on which Google will stake its claim. Both the Ninth Circuit opinion and the district court opinion contain language that in general shows an inclination to value search engines.¹⁴⁷ Despite some difference, then, the basic parallel between these two fact patterns withstands scrutiny. Google's proposed database of books serves the function of a search engine, just as Arriba's thumbnails served a related, similar function of a search engine. The Ninth Circuit notes that the District Court found Arriba's use “significantly transformative” and the Ninth Circuit seems to as well.¹⁴⁸

After engaging in an analysis of the various issues concerning transformative use just discussed, a court will then consider them in light of the previously discussed factors of the commercial nature or the educational nature of the use. Overall, the factor one test reveals the following

146. Arriba Soft did have a function on its web site whereby users could link to the original images. In *Perfect Ten v. Google*, the court found that Google's use was unlikely to be a fair use because it directly takes the market for cell phone thumbnails of Perfect Ten's copyrighted content. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 829 (C.D. Cal. 2006).

147. See *Arriba Soft*, 336 F.3d at 811, 819–20.

148. *Id.* at 817, 819–20.

results. First, we saw that Google's use of snippets is commercial but not directly so. Thus, this consideration will weigh in the publishers' favor but only weakly. While these uses are weakly commercial, they are, taken as a group, likely to strongly promote education and research and accordingly will count strongly in favor of Google. Most important for purposes of the factor one analysis, however, will be the extent to which a court finds Google snippets to be a transformative use. Part of the orthodoxy of transformative use is: "The more transformative the new work, the less important the other factors, including commercialism, become."¹⁴⁹ In other words, it matters not only whether a use is transformative but how transformative it is. The more transformative, the less other factors will matter.¹⁵⁰ Plaintiffs are in no position to produce snippets that connect a query to an original work via an algorithm, and thus Google's use represents a transformation from the traditional and typical uses of written texts in a book format. Weighing all these considerations, it is likely that most courts would find that factor one of the fair use test favors Google.

b. Second Factor: Nature of the Work

The second factor in the fair use test is the "nature of the work" that is claimed by the plaintiff to be infringed upon.¹⁵¹ The orthodox first distinction to consider is that between whether a work is "fact" or "fiction," or, as an alternative formulation would have it, the distinction between "informational" versus "creative" works.¹⁵² The academic publishers who figure prominently in the Google Print lawsuit publish more works of non-fiction than works of fiction or fantasy. Works of fiction are protected more heavily than works of non-fiction. Factual or functional works get "thinner" protection.¹⁵³ The idea behind this distinction is usually taken to be that there is less creativity involved in producing works of non-fiction. This rule is often seen as implied in the constitutional

149. *Id.* at 818 (following *Acuff-Rose*).

150. *Id.*

151. 17 U.S.C. § 107(2).

152. "Works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (citing *Acuff-Rose*) (internal quotation marks omitted).

153. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348–49 (1991). The court explained:

In *Harper & Row*, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, but that he could prevent others from copying his "subjective descriptions and portraits of public figures. . . . This inevitably means that the copyright in a factual compilation is thin.

Id.

norm that copyright should promote originality.¹⁵⁴ Since information, as such, is not original but rather factual, it merits no protection under copyright.¹⁵⁵ With purely informational works, the protection is not for the information, *per se*, but rather for its selection and arrangement.¹⁵⁶ With purely informational works, the precise nature of the work will of course vary from work to work.

The fact that a work is published or unpublished also is a critical element of its nature.¹⁵⁷ Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred. For instance, in *Arriba Soft*, the court noted that Kelly's images had already appeared on the internet before Arriba used them in its search image.¹⁵⁸

It is worth noting at the outset that the notion that some items are to be distinguished from others due to the nature of their content is foreign to the mindset at Google. As the saying goes, when you are a hammer, everything looks like a nail. When you are a search engine, everything looks like simple, searchable information. One of the grounding values for Google is that its processes be scalable to the greatest extent possible.¹⁵⁹ Search is maximally scalable to all data when there is no distinction between protected and unprotected content. Google, then, can be seen as implicitly supporting a norm that might aptly be labeled "content reductionism." This norm is diametrically opposed to the very nature of copyright law, which says that there is not one relevant category of content—information—but rather two relevant categories—creative content on the one hand and non-creative content on the other hand.¹⁶⁰ Note that whatever normative reason Google's prime movers may have for subscribing to the content reductionism norm, Google clearly has economic reasons as well, for notice the conclusion that follows when one combines the content reductionism norm with the information wants to be free norm discussed earlier.

Content is information

Information wants to be free

Therefore, content wants to be free

154. *Id.* at 348 ("As one pair of commentators succinctly puts it: 'The originality requirement is *constitutionally mandated* for all works.'").

155. *Id.* ("'No one may claim originality as to facts.' This is because facts do not owe their origin to an act of authorship.").

156. *Id.*

157. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 554 (1985).

158. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–20 (9th Cir. 2003).

159. VISE & MALSEED, *supra* note 18, at 138.

160. Within the category of creative content, there are the subcategories of protected creative content and unprotected creative content.

Accordingly, Googlers can be freedom fighters and have grist for their search operations at the same time.

Returning to fair use factor two analysis, the question is how does doctrine apply to the facts of Google? Even within the world of academic publishing, the nature of the published works varies considerably. While publishers' works are by and large creative works in as much as they are not merely names in a phone book, nevertheless, these are not highly creative works of fiction or fantasy but instead many are, for better or worse, dry, scholarly works.¹⁶¹ But even academic presses publish some works of pure fiction such as collections of poetry, and factually-oriented works such as historical works will receive some amount of protection.¹⁶²

The publishers may argue that their works are not typical non-fiction works. Rather, the publishers will note that their reputation is of such a sterling nature that the world's finest research libraries purchase their new publications, often purchasing the entire catalogue. Presumably publishers make this claim to emphasize the overwhelming market value of their works and thus by implication the significant potential harm publishers will suffer if this market is destroyed. The fact of the sterling value of plaintiffs' works in their market cuts both ways, however, in factor two analysis. On the one hand, the fact that libraries would buy entire catalogues shows academic publishers' importance to the world of scholarly research and cultural progress, and thus the tremendous loss to these endeavors that might occur should the economic survival of these publishers be threatened. On the other hand, however, the fact that these works are of foremost research and scholarly interest also means that Google Print's ability to make these works more accessible and searchable is all the more important. On the whole, however, the second factor of the fair use test is likely to favor Google in that the works are by and large non-fiction.

c. Third Factor: Amount and Substantiality of Portion Taken

The third test looks at the amount and substantiality of the portion taken.¹⁶³ In general, the more taken the less likely a use will be found to be fair. The question then is what is the amount and substantiality of a snippet? Plaintiffs have accused Google of demurring on this important factual issue but in fact Google has noted on its website that a snippet is

161. Even non-fiction works such as historical works receive some degree of copyright protection. *See, e.g.,* *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

162. *See id.* at 978.

163. 17 U.S.C. § 107(3).

a few lines on either side of a queried text.¹⁶⁴ Thus, the most salient fact regarding the amount of the portion used when it comes to the snippets is that it is a relatively small amount. Most books contain thousands of sentences and yet Google will provide only a few of them in response to any given search query. While there is no hard and fast rule when it comes to minimum limits for factor three analysis, a few sentences out of thousands, that is, less than 1/10th of 1% seems the sort of low limit a court will likely find to weigh in favor of Google. In *Harper & Row v. Nations Enterprises*, for example, the copied text was a small percent of ex-President Ford's memoir, yet was found not to be a fair use.¹⁶⁵ In the present context as well, the brief length of the snippets should count significantly in Google's favor. The modern trend in factor three analysis is to avoid attempts to determine an absolute minimum. In its place is a test promoted by the *Campbell* court that the amount and substantiality of the portion must be considered in light of the purpose and character of the use.¹⁶⁶ If, for example, whole copying is justified given the transformative use of the work, then the fact that there is a whole copy will not of itself disqualify the use as fair. In other words, what matters is whether the amount copied is reasonable in light of the use in question.¹⁶⁷

Applying Souter's interpretation in the present context, Google will argue that given that the use is for a search engine which is highly transformative, the amount copied is highly appropriate, indeed minimal, as Google is only making brief snippets of text available despite the fact that the user's query may reference a large text. Google notes that in making only snippets available, it is paying respect to copyright holders.¹⁶⁸ Google can here present compelling evidence that it is indeed restraining its behavior due to the copyright protected status of plaintiffs' works. The evidence is that Google allows the accessing of whole books for works in the public domain. Thus, the implicit claim is that Google would make full copies of plaintiffs' works available were it not for Google's desire to show respect for plaintiffs' copyrights.

In fact, *Arriba Soft* contains favorable language on the factor three test that suggests that Google might be able to make a plausible case for

164. See Google Library Project, <http://print.google.com/googleprint/library.html> (last visited Nov. 22, 2006).

165. See *Harper & Row, Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 566 (1985) ("In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the 'magazine took a meager, indeed an infinitesimal amount of Ford's original language.'").

166. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586-87 (1994).

167. Leval, *supra* note 80.

168. See *supra* text accompanying note 91.

copying amounts of text larger than snippets. With regard to factor three, the Ninth Circuit wrote:

It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site. If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine.¹⁶⁹

Google can argue that so too its search engine could be rendered more “useful” were it to provide larger snippets or perhaps full texts.

Opposing this position, plaintiffs will argue that contrary to the apparent brevity of snippets, they in fact represent a very substantial amount of copying when one considers their length in light of Google’s stated purpose. Publishers will argue that as Google says it is interested to provide an online card catalogue, it should be content to supply the materials customarily contained in a card catalogue which did not provide snippets of text of the works catalogued.¹⁷⁰ While this point has a nice rhetorical appeal, nevertheless, it is unlikely to convince a court, as anyone who takes the notion of an *online* card catalogue at all seriously will not be wedded to the limits on functionality of such search tools in a traditional off-line world but instead will be interested in how an online, digital version may bring new and improved functionality. In other words, a forward-thinking court will be inclined to view those features particular to traditional offline card catalogues as limitations rather than elements of their essential nature.

As noted above, the factor three test looks not only to quantity of the materials copied, but to the “substantiality” of what is taken as well. In particular, courts will look at whether the portion taken constitutes the “heart” of the work.¹⁷¹ The pertinent question then is whether Google uses the heart of the books in its database when it offers up its snippets. The answer will depend on the particular Google search performed. For example, one could query in such a manner that the snippet produced was from the impeachment discussion between President Ford and Al Haig in Ford’s memoir. Here the snippet would be the heart of the work for the simple reason that this bit of text is the key passage in the memoir

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

170. See *Further Obstacles to Google’s Library Plans*, GUARDIAN UNLIMITED, Oct. 20, 2005 (noting that Pat Schroeder has stated that Google’s plan to have libraries scan the full text of books goes far beyond the analogy of creating a digital version of a card catalogue, pointing out that “If Google wants a card catalogue they can scan the book’s front page for full bibliographic data.”).

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

of Ford's time in the White House.¹⁷² But there is no reason to think that this will be the typical situation. For one thing, for the average scholarly work of the sort that will be scanned from the university libraries, it is doubtfully the case that there are some few snippets of text that are obviously the heart of the work. Google will likely argue that snippets represent the opposite of the heart of the work. Instead, what is taken is whatever bit of text happens to be responsive to a search. Google Print would presumably deliver snippets from any part of the book—the heart, but also the lungs, ears, nose and throat.¹⁷³

Publishers have a sharp retort, however, which is to observe that in a different sense, snippets are indeed substantial parts of works; they are substantial in relation to the particular subjectivities of particular searchers. In one sense, Google gives more limited access as only snippets of copyrighted text will be made available. Yet because of the technology Google brings to the table, access is dramatically improved along another dimension. Simply having full texts available may be too much information. One of the staple litigators' tricks is to respond to a document request by the opposing party with a so-called document dump, in which as many colorably responsive documents as possible are turned over *en masse* in an effort to bury the opposition in paper, with the hope that with luck some material documents may be passed over, or at the least, raise the cost to the opposition both in terms of money and time. Similarly, simply providing complete works such as occurs in the peer-to-peer world may be less valuable in its inability to proffer content precisely responsive to the greatest extent possible. By contrast, Google provides focused results in the form of brief bits of text specific to search requests. Thus, this can be seen as providing improved access to more focused sets of results.

Overall, it is likely that a court will find that the amount and substantiality of the snippets is a factor that favors Google, given that in general users will be copying only a few sentences out of books that contain thousands of sentences. While searchers may be expected to submit queries that sometimes result in the copying of the heart of a work, there is better reason to expect that this will not systematically be the case. Thus, to the extent that a court is interested in producing a policy-oriented decision that tries to provide a solution for the most prevalent type of

172. *Id.*

173. Although Google does not discuss it in detail, the fear is that a person could copy a whole work one snippet at a time. Google appears to have put in place some safeguards to stop the copying of too much text, based on comments it has made on its website. In these remarks, Google is using the need to respect copyright as its justification for collecting personal data of its users. Thus, on a going-forward basis, it would be wise to check to confirm that indeed Google is being vigilant in this regard.

situation, it will decide its factor three outcome by paying most attention to the brief length of all snippets rather than the highly substantial nature of a relatively small number of them or their substantial nature relative to their particular subjectivities.

d. Market Harm

In the previous discussion, we saw that *Sony* set fair use analysis on a false path for factors one and three. The same is true with factor four.¹⁷⁴ And once again, it is *Campbell* that reorients the court. Under *Sony* factor four analysis, if a use is commercial, then the burden falls on defendant to show lack of injury.¹⁷⁵ A second *Sony* doctrine is that the fourth factor is the most important.¹⁷⁶ There is a good chance that the Second Circuit will follow *Campbell* in rejecting each of these propositions. At least this is likely to be the decided preference of Judge Leval, who strongly praised Souter's claim that factor four analysis is conceptually posterior to factor one analysis.¹⁷⁷ It may matter a great deal to the outcome of the lawsuit whether the court thinks either factor four is more important, factor one is more important, or they are equal in importance. As noted earlier, Google has a strong case for the importance of Google Print under factor one transformative use analysis. Thus, a fair use test that favors factor one will favor Google. Plaintiffs will argue that they are likely to suffer serious market harm and that this consideration trumps the consideration of transformative use, even were they to grant for the sake of argument that the consideration of transformative use favors Google. Accordingly, plaintiffs will be benefited by a fair use test that favors factor four.

Factor four considers whether plaintiffs suffer market harm from defendants' unauthorized copying. This harm may be actual or potential.¹⁷⁸ While the notion of harm to potential markets is a test that may be difficult to administer with much certainty, courts from across federal jurisdictions have held fast to this test. There are a few distinct arguments that plaintiffs might make to support their claim of harm. The claim that has received attention thus far concerns the issue of harm to plaintiffs' market in selling copies of its books. Jonathan Zittrain for example appears to think publishers' sales will actually increase and that

174. 17 U.S.C. § 107(4).

175. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981). *See also Am. Geophysical Union v. Texaco Inc.*, 516 U.S. 1005 (1995).

176. *Sony*, 659 F.2d 963.

177. Leval, *supra* note 80.

178. 17 U.S.C. § 107(4) (1976).

this fact should be dispositive.¹⁷⁹ The debate over the impact on book sales is a good place to start factor four analysis as this is plaintiffs' current actual market. Following this discussion, the issue of harm to plaintiffs' potential market in snippet licenses will be considered.

First, consider the sort of injury plaintiffs do not suffer. The publishers do not suffer a direct injury of a sort such as in a classic case like *Shapiro*¹⁸⁰ in which the direct infringer had set up a record bootlegging operation and was then selling the illicit albums as a concessionaire in a department store chain. With Google, the parallel would be if Google were creating copies of plaintiffs' books and then began selling them either as digital downloads or in physical copies. Instead, Google delivers snippets of text, not whole texts, and it does so for free. Thus, a key factor in Google's favor for factor four analysis is that it does not directly compete in the marketplace by supplying superseding copies to end users. Thus, Google is open to argue that it does not harm plaintiffs' market. The publishers' response will be that the harm to their market will occur in a different manner, specifically, demand for plaintiffs' texts will be diminished because snippets will to an important extent serve as a substitute in the market, because users may be satisfied with snippets as a replacement for the purchase of a book.¹⁸¹

At this point, either parties' claims with regard to book sales are speculative. Neither side has provided much by way of support for their claims. Google does make a number of comments on its website that give the best indication of how Google envisions the market for books working under a legal regime in which Google Print is allowed to exist as a fair use. Google contends that its program will increase book sales because it will raise the exposure of the book to a whole new world of potential purchasers who otherwise might never have learned of the existence of the book.¹⁸²

While speculative, it does seem very plausible that many new sales could result through the means Google suggests, at least for those owners whose books are still in print, such that they have something to sell. Moreover, it is open to Google to argue as well that even when a book is out of print, such that Google cannot provide a link to the current

179. See, Chris Gaither, *Google Puts Book Copying On Hold*, L.A. TIMES, Aug. 13, 2005, at C1 (stating that Jonathan Zittrain "said that Google probably would win in court if it ever came to that. Its efforts benefit society by introducing new books to people and it's hard to argue that publishers would lose business because Google lets people read snippets.")

180. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).

181. Michelle Kessler, *Google Library Project Runs Into Resistance*, U.S.A. TODAY, Aug. 15, 2005, at 5B (stating that publishers fear Google Print will make their works vulnerable to piracy and hurt sales).

182. Yoki Noguchi, *Google Delays Book Scanning: Copyright Concerns Slow Project*, WASH. POST, Aug. 13, 2005, at D1.

publisher of the book, yet the end user member of the general public stands to benefit as Google promises to direct them to any copies that may be available in used book stores or in nearby public libraries.¹⁸³

Note, however, that this last argument can be seized on by plaintiffs to argue that indeed people may avail themselves of these alternative outlets even when the book in question is still in print, thereby leading to a loss of sales. Thus, each party to the dispute has a prima facie plausible causal story to tell regarding the impact of Google's provision of snippets on book sales. While somewhat speculative, it is probably a best guess that Google has the better argument on this issue. The market harm analysis does not end here, however. Next, consider whether plaintiffs suffer harm to any potential markets, for, as noted, it is clearly established doctrine that the harm to markets is a test about not just actual markets but also potential markets. Courts have had difficulty determining what counts as a potential market. In some theoretical sense, any use by a defendant could be potentially licensable by this defendant from the owner and thus any use is a harm to this sort of potential market. Courts tend to look for some element of a pragmatically possible market beyond such mere possibilities, however. The famous case showing this is *American Geophysical v. Texaco*.¹⁸⁴ An important earlier case, *Williams & Wilkins* had found fair use even in the face of systematic copying of whole articles from medical journals.¹⁸⁵ Asked to consider facts similar in important ways, the Second Circuit in *Texaco* found that photocopying was not a fair use in main part because since the decision in *Williams & Wilkins*, the Copyright Clearinghouse ("CCC") had emerged in order to license uses of the sort at issue in *Texaco*. This outcome was in line with what might be predicted by an economic account. The emergence of the CCC created a situation in which the parties were in a position to bargain over the use of the works because the transactions costs associated with doing so were lowered. Consider this issue of transactions costs in the context of Google.

While publishers have not to this point enunciated the position, presumably it is open to them to argue that their potential market in snippets is harmed by Google. The argument is parallel to the argument made by

183. Google.com, About Google Book Search, <http://books.google.com/intl/lem/googlebooks/about.html> (last visited Dec. 19, 2006).

184. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 928–29 (2d. Cir. 1994).

185. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (per curiam). The Court of Claims held that massive photocopying efforts by libraries could in some circumstances constitute fair use. An analogous situation arguably exists for Google. A finding of fair use might indeed be a maximizing violation of copyright by lights of extant doctrine yet the prospect of an utility gain is so substantial to outweigh the social cost. The importance of *Williams & Wilkins* is that it arguably establishes that courts are willing to go far beyond existing doctrine when the social welfare gain of doing so promises to make the gambit a good bet.

the music labels in *Napster*. The labels argued that they clearly had a potential market in digital downloads and that because defendant Napster's actions contributed toward massive unauthorized file sharing, the legitimate market that the music industry was seeking to foster would never come about because the copyright owners had to compete with Napster, which gave the music away for free. Since the music cost Napster nothing to produce, it could give the music away. The copyright owners, however, must expend resources to produce the content, such that they could not give the music away if they were to recoup their costs. Thus, there would never be a space for the music labels to develop a legitimate market, as this would involve costs in terms of providing the content and so the legitimate owners would be at a competitive disadvantage in comparison to the peer-to-peer services that had almost no cost for content provision. Plaintiffs can argue that similarly Google can give away the snippets because they are free for it to acquire. Thus, Google's entry into the snippet market will make it impossible for the plaintiffs to enter this vast potential market for snippets as it will be equally impossible for them to compete with free.

Google will argue that there is no market harm regarding snippets as plaintiffs do not market snippets, nor is this a likely or reasonable potential market for them. Texaco argued that it did not harm the market for new subscriptions as most of the uses of the defendant, Dr. Chickering, would not have resulted in a new journal subscription.¹⁸⁶ So too for Google, but more so, as there is no market for snippets at all, so plaintiffs are losing no sales. Snippets are of transformative value when combined with related search results that Google but not plaintiffs can provide. There is a synergistic effect in the value of search results. The value of the search engine comes from the breadth of the database and other features of Google's extraordinarily sophisticated infrastructure that cannot be replicated by plaintiffs.¹⁸⁷

Google has a strong argument, then, that there is no reasonable potential market that plaintiffs have for snippets. I predict that in the overall analysis, a court will be likely to say that there is not a significant market

186. Am. Geophysical, 60 F.3d at 928-9.

187. Plaintiffs may in addition claim harm due to an argument that rings of unjust enrichment, as they argue that Google will benefit tremendously in financial terms and this will not be shared with plaintiffs. See, Edward Wyatt, *Google Library Database is Delayed*, N.Y. TIMES, Aug. 13, 2005, at B9 (quoting Patricia Schroeder of the American Association of Publishers as stating, "That is really turning it [copyright law] on its head How is an author even supposed to know that his or her work is being copied?" and reporting that "some publishers have said they were concerned that Google might begin to sell advertising related to the results of searches of copyrighted material without sharing the revenues with the copyright owners.").

harm. Plaintiffs are booksellers after all, not snippet sellers, and cannot practically become snippet sellers.

e. Aggregate Fair Use Analysis

After running through all four factors, a court will then consider all four together and ask whether any other factors need to be considered. We first saw that factor one, purpose and character of the use is likely to count strongly in Google's favor. Google Print snippets are a highly transformative, highly educational and weakly commercial use of plaintiffs' copyrighted works. With regard to the second factor, the nature of the copied work, we saw that the nature of the work counts in Google's favor as most works will be non-fictional, factual works of a sort especially useful to those who perform scientific and humanistic research and thus within the core of the fair use rationale. We saw that factor three, amount and substantiality of the copying, also counts in Google's favor as snippets are quantitatively a small part of the underlying text and qualitatively will not in the typical case constitute the heart of the work. Finally, regarding factor four, harm to plaintiff's actual or potential market, I argued that the test for actual harm to plaintiffs' market for book sales is speculative but that it is more likely that plaintiffs would not suffer a substantial harm to their market for book sales and might even experience an increase in book sales. With regard to plaintiffs' potential market for licensing snippets, I argued that it is likely that a court would find that plaintiffs had no realistic prospect of marketing snippets of the sort Google is capable of marketing and hence a court will not find a harm to a potential market in snippets.

In the typical fair use analysis, there is a split such that each of the parties has one or more factors that are determined by the court to count in its favor. In such situations, a court must weigh all the factors together in one grand weighing and come up with an outcome. In situations such as the present, however, the court has an easier time as it need not weigh among competing factors since all four could support Google. Thus, plaintiffs' only hope is to argue that there is some fifth factor that outweighs the other four.¹⁸⁸ It is not obvious that there is such a fifth factor in the present context. To this point, plaintiffs have not argued for the existence of some compelling policy considerations that are not already factored in under the four-factor test. Even if such a fifth factor can be articulated, it is unlikely that a court would find that it outweighed all four of the main factors. At any rate, there appears to be no previous case that has done so.

188. Blake A. Field v. Google, Inc., 412 F. Supp. 2d 1106, 1122–23 (D. Nev. 2006).

2. Whole Copies of Plaintiffs' Works for Google's Database

Its production of snippets is the most important type of unauthorized copying engaged in by Google, but Google's snippet production is only possible because of Google's prior copying of entire books owned by plaintiffs. This Section considers whether these whole copies are likely to be found to be a fair use.

a. Purpose and Character of the Use

Google will argue that it is necessary to make these full copies in order for Google Print to function. Thus, the use is really identical to that of the snippets, which is to provide an electronic card catalogue. More narrowly, the function is to make the system operate by allowing Google to have full copies of texts on its own proprietary database so that these databases can be searched in response to user queries. Both Google and outside commentators have compared Google's use of whole copies to the use of whole copies in the usual functioning of Google's search engine.¹⁸⁹ The comparison is inapt in one important respect, however. In the usual functioning of Google's regular search engine, because it has copies of web pages in its system, Google does not have to go search the internet in order to be able to apply its algorithm. Instead it is applied to cached copies in the database. Thus, the purpose is to make Google Print operate more efficiently. Note how this is different from the Google Print project where copies of text are not already available on the internet. To the contrary, many of plaintiffs' copies did not even exist in digital form. Thus, the copies in the database are not needed to make the system run more efficiently but to run at all. Because the lawsuit is at such an early stage, it is not certain how the plaintiffs will reply to this argument. Presumably, if litigated to its fullest, plaintiffs would hire experts to determine as a technical matter whether indeed Google needs to create databases for Google Print to function, as appears to be the case.

One route for Google to take is to argue that these are "intermediate copies." Intermediate copying is a term that has arisen out of a small set of cases, most of which have involved reverse engineering.¹⁹⁰ This is a promising strategy because it allows Google to not have to pass the test for this copying understood on its own terms but rather as a step in a larger process, with the larger process arguably serving as the appropriate subject of the fair use test.

Treating whole copying as an intermediate use does not per se help Google as not all intermediate uses are fair uses. Nevertheless, with

189. Band, *supra* note 17.

190. See *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3rd Cir. 2003).

intermediate uses, courts may be more inclined to pay greater attention to the final use. Thus, if the final use, the use of snippets to have an electronic card catalogue is a fair use, then it may help Google in the fair use test of the whole copies.

Nevertheless, a court is likely to do a separate analysis as well, as was the case in the intermediate copying cases. The court will still ask if the purpose of the use is commercial. Just as was the case with the snippets, the use of whole copies is not commercial in the strong sense that the whole copies are sold to the public or in any way supersede copies of books that plaintiffs sell to the public. The whole copies will be used solely by Google.

The second part of the factor one test is the question of whether the making of whole copies is transformative. Here is where it will matter if defendants are successful in arguing intermediate use; that snippets are highly transformative and whole copies are an essential element to these snippets and so they are themselves transformative as well. It is hard to know what a court will say to this argument. There have been relatively few intermediate use cases. Many of them have dealt with reverse engineering. Arguably this factual context is sufficiently different from that of Google such that it may not be predictive. The reason is that with reverse engineering, the case also involves the issue of access to unprotected aspects of works.¹⁹¹ This is not present in Google. Another place where intermediate use comes up is with sampling, in which the sampler makes a whole copy as an intermediate step toward the ultimate goal of producing a musical work which may not itself be substantially similar to the protected work.¹⁹² These cases are closer to Google in that they do not involve the issue of accessing unprotected elements of works. Here courts have tended to treat the whole copy on its own terms. In other words, simply because the final product is not an infringement does not mean that the intermediate copy might not be one.

b. Nature of the Copyrighted Work

The whole works Google plans to copy will tend to be non-fiction, factual works of potentially great research and academic value. There is a potentially important difference between the snippets considered above and the whole copies. The snippets are constructed by Google by applying their search algorithm to unauthorized copies of plaintiffs' works that Google has on its servers. By contrast the whole copies are produced by working with research libraries to make copies of books that these libraries have purchased from the publishers. This raises the issue as to

191. *Sega*, 977 F.2d at 1514.

192. *See* *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

whether libraries have rights that make it legal for them to make digital copies. This will require an examination of what privileges are accorded to libraries under section 108 of the Copyright Act.¹⁹³ This issue will be deferred as the present concern is over whether fair use doctrine can support the Google Print project. If the libraries were charged with infringement for themselves making digital copies, clearly it would count in their favor that they are rightful owners of the books in question, and that they are in general engaged in the promotion of scholarship and research. The libraries, however, are not the defendants. Whatever privilege the libraries may or may not have to make digital copies of plaintiffs' books, say for archival purposes, is unlikely to extend to Google, which is not a purchaser and doubtfully falls under the protection of section 108.

The plaintiffs will argue that it is not a right the library has to let someone else make such a copy. Google might perhaps argue that it is working as the library's agent. This would not be plausible, however, given that Google has control over the copies made from scanning. Thus, regarding the nature of the copied works, the fact that they tend to be informational, scholarly works will count in Google's favor but the fact that Google copies library copies will not provide any additional support for their fair use claim.

c. Amount and Substantiality of the Work

Whereas the snippets considered in the previous section passed the factor three test with flying colors due to their brevity, the copies made for the Google database are more problematic as they are whole copies. Making copies of complete works is frowned upon, though not prohibited under the factor three analysis. The following remark is representative. "While wholesale copying does not preclude fair use per se, copying an entire work militates against a finding of fair use."¹⁹⁴ Fortunately for Google, the Second Circuit is likely to reject the language of earlier cases stating that whole copies can not be a fair use in favor of language that says that unauthorized whole copying is not dispositive against fair use.¹⁹⁵ Rather, the amount of copying must be appropriate in light of the purpose and character of the copying. If the court is inclined to think this purpose is fair—presumably in light of the overarching social value of snippet searches—then it may change its evaluation in light of the making of a whole copy, given this language from *Campbell*.

193. 17 U.S.C. § 108 (2006).

194. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000) (internal quotation marks omitted).

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

Thus, if the court is sufficiently impressed with the importance of the transformative nature of the use, it might find these whole copies justified.

d. Market Harm

Google will likely rely again on the intermediate use argument to claim that there is no market harm because the whole copies are only used to produce snippets and, as discussed above, Google has a strong argument that these snippets cause no market harm because plaintiffs do not sell snippets, and could not possibly do so as snippets are a unique result of applying Google's proprietary algorithm to its database, only part of which is constituted by plaintiffs' works.

The publishers have a good response to this argument, however, which is to point out that the analysis at hand concerns the unauthorized full copies Google has made and plans to make of plaintiffs' works and not the snippets. Publishers will likely argue that the intermediate use cases are clear that the intermediate use must receive its own four-factor analysis.¹⁹⁶ Looking at the market effect, publishers will argue that they are clearly injured because Google uses whole copies and these directly supersede copies that could be made available by publishers, many of whom are already in the market for licensing of digital copies.

Not only will publishers' actual market be harmed but so will their potential market. The publishers have been adamant that if Google wins, the end result will be a search engine exception to copyright. This claim has great plausibility in that the other major search engines are currently refraining from making copies of copyright protected content but surely they would feel strong competitive pressure to follow suit if Google is given the green light from a favorable fair use decision. They would be at a disadvantage if their database did not contain the universe of copyright protected books but Google's search engine did. Not only that, but we could expect newcomers into the search engine business. Thus, there will develop a thriving market for search engines that use publishers' works in the process of producing their end product. Publishers will face even more difficulty marketing licenses of their texts if a whole industry of search engines develops that can use them for free. The bottom line would appear inescapably to be that Google's making whole copies of texts significantly hurts their market for licensing copies of their proffered works.

Thus, the question turns back to that of the doctrine of intermediate use. What have courts said about the relationship between intermediate uses and final uses that is relevant? The *Sega* rule is instructive. The

196. *Id.*

court took the position that there was no per se rule of the sort argued by defendants to the effect that the intermediate use was a fair use if it was not substantially similar to the final use. Instead the court held that the issues are logically separate; that there is no per se rule of the sort argued by defendants, in other words, it could be the case that a final use was transformative and yet the intermediate step is an infringement.¹⁹⁷

Considering all four factors together, we first saw that Google's making of whole copies served the important purpose of making snippets available to millions of users. The problem, however, is that making these copies is not itself a transformative act as these copies merely supersede or replace copies of works that Google might just as soon license from the publishers. Thus, factor one will favor the publishers. Factor two favors Google as the works are largely non-fiction, research-oriented works. Factor three will favor publishers as copying of whole works is involved. Finally, factor four will favor the publishers as they suffer a clear market harm due to the loss of licensing revenue they might otherwise receive from Google. On balance, the publishers will likely win on three of the four factors, including the two most important factors, one and four, and thus Google will likely lose the fair use test for whole copies used in the database.

3. Whole Copies to Give Back to Libraries

As noted, Google Print involves three distinct acts of copying involving plaintiffs' works. In addition to the whole copying just discussed, Google plans to make whole copies of each work copied from the six libraries in order to give the digital copy back to the library that supplied the original copy. Once again, we must perform a fair use analysis.

a. Purpose and Character of the Use

Similar to the above, Google will argue that their purpose with regard to the whole copies for libraries is intermediate to its larger purpose to supply an electronic card catalogue to the world. Google has pledged its allegiance to the project of digitizing the world's information and giving research libraries digital copies serves this purpose as the libraries can then use their copies in new ways to increase access.

Plaintiffs will likely take a contrary position, arguing that giving digital copies to the libraries is in no way required as part of the process of producing snippets. In the case of the Google Print database, the whole copies of plaintiffs' works considered in the previous section were

197. See *Sega Enters. V. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

required, at least under current technology, in order for Google to be able to deliver up snippets. But in the case of the copies made to give to the libraries there is no such necessary connection between the important transformative purpose served by snippets and the whole copies given to libraries. Indeed, the publishers might ask the rhetorical question; if the libraries are such strong believers in the Google Print project, then why do they ask for something in return for their participation?

The publishers will argue that Google uses these copies as “consideration” for the benefit done for them by the libraries in making their books available for scanning.¹⁹⁸ From the use of the language of consideration, plaintiffs appear to be further setting themselves up for an argument based on defendants’ commercial use of plaintiffs’ works.

Plaintiffs’ complaint emphasizes the commercial nature of Google’s activities. The appeal to consideration adds one more commercial feature to the list. Not only does defendant not pay for the copies it makes and uses as factors of production but it adds insult to injury by going so far as to actually use its purloined copy to generate still more copies in order to use them as currency in the marketplace. It is not clear to what purpose these copies will be put. At least in the case of the University of Michigan, the library says it will put the copy in an archive. Publishers may fairly wonder, however, to what uses these works might conceivably be put in the future. The libraries might consider themselves to possess an especially wide degree of latitude in light of the fact that Google has contractually obligated itself to indemnify libraries for any legal liabilities. It is hard to think of what the libraries could do—short of selling copies of their copies—that could out do Google in terms of a sweeping use of plaintiffs’ works. Thus, it would seem that whatever they do will be a fair use if Google Print is a fair use.

Google is receiving value from plaintiffs’ works as witnessed by their practice of systematically providing unauthorized copies to third parties in return for cooperation from them. Worse yet, publishers will argue that what Google receives from the libraries is not some random consideration, but none other than other copies of plaintiffs’ works. Thus, Google can be seen as inducing libraries to infringe plaintiffs’ rights. Google and the six libraries engage in a value-maximizing transaction in which each receives something of value or else would not engage in the exchange. Libraries trade away the temporary use of the hard copies of their books and receive in exchange digital copies of the same books. The libraries make out well as it costs them next to nothing to let Google scan their books but they receive something very valuable in return; digital copies of their books. That the libraries place a high

198. See Author’s Guild Complaint, *supra* note 3, ¶ 1.

value on these digital copies can be seen from the fact that prior to the Google print project, major libraries had been engaged in efforts to digitize their collections. Apparently these efforts have come to a standstill. Presumably this is due to the fact that libraries have discovered a cheaper source of digital copies than either making them themselves, or leasing them from publishers, namely to get them from Google, practically for free.¹⁹⁹ Looking at the exchange in the other direction, Google also receives something valuable—hard copies of books to digitize from a research library with its attendant potential fair use protections in exchange for something that it will be nearly costless for it to provide to the libraries, digital copies of the works in question. Given that Google is already making digital copies for its own purposes, the marginal cost of providing an extra copy is basically zero. Thus, we see the powerful economic force behind the exchange between Google and the libraries in that each receives something it values highly in exchange for something that is nearly costless for it to provide. The only fly in the ointment in this otherwise happy model of economic exchange comes from the publishers' perspective; they are providing the legal tender, as it were, for these exchanges and yet they receive nothing in return while all the other parties benefit.

For purposes of factor one analysis, the question will be whether making these extra digital copies to give to the publishers is a commercial use versus a non-commercial, educational use, and whether the copies are used in a transformative manner. For parallel reasons to those discussed above with regard to the first two types of copying, this use is likely to be found to be commercial as Google is a commercial enterprise. But this use is also likely to be found to be highly educational in that the copies will redound to the benefit of world class, not-for-profit research institutions. Most important, however, will be the consideration of whether the use is transformative. Google will argue that the use is an intermediate step toward the production of something truly transformative, the search engine capable of producing snippets. As seen in the last section, however, the mere fact that a use is intermediate does not make the first use transformative. The publishers will argue that Google's intermediate use is clearly a superseding use rather than a transformative one because Google might just as well take out a license from the copyright owner that would allow it to provide a digital copy to the libraries. Google's possible reply here is that their use is not merely superseding,

199. Google has taken an important additional step to lower the cost to the libraries, which is to contractually promise to indemnify them for any potential legal liability. Burt Helm, *A New Page in Google's Books Fight*, BUSINESS WEEK ONLINE, June 22, 2005, http://www.businessweek.com/technology/content/jun2005/tc20050622_4076_tc119.htm.

as by and large the millions of books they have copied or plan to copy are not possessed by the publishers in digital format, for the obvious reason that most were published in a pre-digital era. Thus, the digital copies Google gives to the libraries do not merely substitute for those of the publishers. The publishers have a winning response to this argument, however, as courts have been clear that a mere change in format does not make a use transformative.²⁰⁰ A court is likely to find this argument compelling.

Google might, however, be able to offer a novel argument for the transformative use of the whole copies it provides to the libraries. They could argue that this is a practical means to reduce the chances of Google's being able to monopolize the market for these digital works. Indeed, it may be a very good thing from a public policy perspective that the libraries be given these copies. For presumably this will lead to new uses of these copies by the libraries. If one thinks that Google Print is in general a fair use due to the argument above based on the transformative value of snippets (apart from this third type of copying), then it may actually make sense to prefer this third type of copying in addition, as a means to lessen Google's de facto short term monopoly on the contents of its digital database. This outcome seems inherent in the logic of finding a fair use for the first type of copying. If one thinks the ability to provide snippets is sufficiently important to give Google a fair use privilege with respect to that copying, then why not increase the likelihood that other similar entities will be able to engage in the same sort of activities, so as to increase the same benefits and stop Google from being in a position to have monopoly control.

Once the libraries in question possess digital copies of their works, they can then allow other search engine providers such as Yahoo and Microsoft to use these copies. This would allow these companies to more effectively compete with Google, as they would not have to first engage in the huge expense of digitizing millions of books in order to do so. In addition, the libraries will prefer this method of spurring competition in snippets to the one in which each snippet provider makes its own digital copies as it will cut down on the wear and tear on the physical books.

b. Nature of the Copyrighted Work

The second factor for the third type of copying does not raise novel issues. The works copied are the same full copies of largely non-fictional, educational works as discussed in the previous Section. Just as was the case there, it works in Google's favor for fair use purposes that the typical copy will be a factual work of an academic nature.

200. *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998).

c. Amount and Substantiality of the Portion Used

As was the case in the last section, the third factor *prima facie* cuts against defendants as whole texts will be copied. As noted there, post-*Campbell*, the relevant test will be whether the otherwise large amount of copying is justified in light of the nature and purpose of defendants' use. To the extent a court takes seriously the notion that it is good anti-monopolistic practice to give libraries a copy, it will be inclined to think a whole copy is more justified than any lesser part as it is only the whole copy that would put the libraries on a par with Google in terms of the comprehensiveness of the work and thus in terms of a competitor's ability to compete with Google in the nascent marketplace for snippets. Thus, the making of a whole copy as compared to some lesser part will not count against Google, at least to the extent that a court takes seriously the monopoly argument.

d. Market Harm

Google will argue that there is no harm to the publishers' market for whole digital copies of their works. Google is merely supplying the libraries with a digital copy of a book that the library already owns. These libraries possess the right to make such digital copies on their own.²⁰¹ Thus, if Google could not do so more effectively, these libraries would make digital copies, as indeed the library consortium was engaged in the process of doing before Google Print came along. Thus, there is no harm to the publishers' market for whole copies.

The publishers' reply will be that as many of the publishers already offer digital versions of their works, they suffer a direct harm to their market for these works, as libraries that get their digital copies from Google will not have a need to get them from the publishers. It must be kept in mind that the test for market harm is a test of potential as well as actual markets. While most of the publishers' past works may not have been digitized by them, on a going forward basis, publishers will increasingly produce digital copies of works. Indeed, it will be nearly costless to do so as digitization has become the standard in the publishing industry for the production of the hard copy of books. Thus, a by-product of the production of the hard copy is that publishers will possess digital copies of all new works. Accordingly, they are well positioned to be providers to a nascent market in digital copies. This is clearly a viable potential market for publishers. Hence, a court is likely to find that the factor four test for market harm favors the publishers over Google.

201. 17 U.S.C. § 108 (2004).

Google may also argue that there is no market harm as few extra sales of copies would have occurred, as libraries are already buying the physical books and would scan them themselves before paying the owners. The owners can argue with more plausibility, however, that the opposite is true, that libraries would buy digital copies as this would surely be cheaper than going to all the bother of scanning them themselves.

e. Aggregate Weighing of Fair Use Factors

Weighing all the factors, we saw that the publishers will probably win the first factor test as the whole copies given to the libraries by Google merely supersede copies that Google might have procured from publishers in order to offer back digital copies to the libraries. The second factor favors Google as the copies get thin protection as factual works. Factor three again favors plaintiffs as whole copies are made for a purpose that is merely superseding. Regarding factor four, plaintiffs suffer both actual and potential harm to their market for digital licensing of their works. Thus, winning on three of the four factors including factors one and four, plaintiffs should win the fair use test for the third type of copying in which Google plans to engage.

4. Overall Fair Use Test

Above, we looked at three distinct fair use tests that arise regarding plaintiffs' claims of infringement against Google. We saw that Google should win the first one while plaintiffs should win the later two. The larger question of course is how do these three tests balance out *in toto*. As noted earlier, there appears to be no case involving this fact pattern and the closest cases are the intermediate copying cases.²⁰² The question, then, is what guidance do they give for a situation with three types of copying? The answer in brief is, not a lot. They tell us that there is no per se rule but instead the uses must be judged separately. In the present circumstances, doing so indicates that a court is likely to find the use of snippets a fair use but separately it is likely to find that maintaining a database of all plaintiffs' works and giving digital copies of these works to libraries are not fair uses. Thus, Google wins one and loses two. We must reach the conclusion, then, that, overall, Google Print is unlikely to be found to be a fair use. Importantly, however, the analysis shows that if Google is somehow able to disaggregate its production of snippets from the other types of copying, the situation will change, such that Google will be likely to prevail in its defense to the infringement actions it faces.

202. See *supra* note 86 and accompanying text.

III. ECONOMIC INTERPRETATION OF THE GOOGLE PRINT PROJECT

The previous Part examined the doctrinal arguments for and against the fair use defense to the Google Print project. We saw that as a matter of prediction, courts will most likely find that Google Print is not a fair use. Apart from what is likely to be the case, this Part considers what should be the case, at least from one particular normative perspective, that of economics. First, I will briefly discuss the general issue of the application of the economic approach to fair use in Section A. In Section B, I will look at the economic bona fides of the Google Print project from this perspective. There are colorable economic arguments both pro and con Google Print. I will first set out what I take to be the strongest economic argument in favor of Google Print. This is an intuitively attractive argument that a number of commentators have found compelling. I will argue that while this argument in favor of Google Print as a fair use is initially attractive, in the end it fails. The failure is not due to any inherent difficulty in the economic approach to fair use. Quite the opposite, I will argue that even if one begins with an economic normative premise, one must still conclude that an alternative array of institutional and informal arrangements stands a better chance of delivering a superior return in terms of social welfare.

Should Google Print be a fair use? Either a yes or no answer asserts a normative proposition. "Should" statements of this sort are the essence of the linguistic expression of normativity. Such propositions are, logically speaking, conclusions to arguments, arguments that of necessity contain at least one normative premise. Often in policy discourse normative premises are left implicit. This is true for a variety of reasons. The premise may be so widely shared—either within a discipline, or a particular journal's readership, that it can be taken for granted, either as a matter of shared epistemic commitment or as convention. Alternatively, a policy advocate might strategically decide to leave a premise implicit precisely because it is not taken for granted, but is instead controversial and thus better left unstated, so as to attract less attention. For present purposes, however, it is better to be explicit, particularly in light of the earlier stated goal of drawing as bright of a line as possible between social scientific and normative projects, for unwittingly, or not, these projects are easily conflated, and thus making normative premises explicit will serve the policy neutral goal of transparency.²⁰³

203. In a common law system, positive and normative theses are not logically distinct. If the run of cases on a particular doctrinal issue displays a certain normative bent, say by overtly promoting social welfare, then a judge may feel an increased prerogative, and possibly sense of duty as well, to dispose of a current case in the same normative vein. Knowing this to

As analytic normative theory is divided into consequentialist and non-consequentialist approaches, so too one would expect that major normative premises in copyright would be correlatively bifurcated. In the following discussion, I will assume as a normative premise the familiar welfarist or utilitarian desiderata that the sole ultimate justification for policy actions is to maximize social welfare. In making this assumption, I do not mean to either implicitly endorse or single out for criticism this assumption, qua normative assumption. My goal is to not engage in normative theory but rather in positive theory that encompasses normativity to the extent to which it is, or is premised to be, social scientific fact. In Kantian terms, I intend not to proffer categorical imperatives but rather hypothetical imperatives and ones in which I expressly disavow any endorsement of the normative hypotheticals. This is done so as to constrain the discussion of normativity within the bounds of social science, albeit a behaviorally complex social science that looks to those elements of normativity of which there may be empirical evidence. The task in this Part, then, is to develop an economic account of the Google Print project, but one which treats the core normative premise as a positive or descriptive assumption regarding a particular community or set of actors.

It might be objected that a welfarist positive assumption is unwarranted given that this area of the law is statutory, and public choice theory argues more strongly in favor of a regime of statutes that serve the cohesive interest groups that are able to drive their enactment rather than the public interest.²⁰⁴ After all Posner and Landes themselves in the Introduction to their book on the economics of intellectual property go out of their way to say that we should not expect that this area of the law would be as systematically suited to serve general welfare, for public choice sorts of reasons.²⁰⁵ Yet, contrary to this general drift, they argue that copyright law has a strong common law component and that this is true of fair use in particular.²⁰⁶ The explanation for the anomaly, according to Landes and Posner, is the strong influence of the courts and

be a fact of legal practice, those legal commentators with a particular normative axe to grind may perform ostensibly descriptive analysis through their favored normative lens—either consciously or unconsciously—in order to promote the favored normative project by making it appear to be a descriptive fact of legal practice in some particular area. Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 865–67 (2001).

204. Landes and Posner argue that much of copyright law is common law. See WILLIAM LANDES & RICHARD POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* (2004).

205. *Id.*

206. *Id.*

common law processes. Landes and Posner hold that judges are less subject to interest group pressures than are legislatures.²⁰⁷

There are a few reasons why the economic normative premise is worth exploring in the present context irregardless of one's personal normative proclivities. First, the clause in the constitution empowering Congress to provide federal copyright protection is arguably overtly consequentialist in structure, such that one who did not espouse a descriptive economic thesis overall might nevertheless concur on this particular legal interpretation in this particular corner of the law.²⁰⁸ Moreover, apart from whatever textual interpretation ultimately proves most compelling, there is an undeniable prevalence of expressly consequentialist language in leading copyright opinions from leading courts that interpret Article I, section 8. These cases note that the goal of giving exclusive right in works of arts and science is to incentivize the production of such works in order that they may eventually come to be widely disseminated for the general benefit of the public.²⁰⁹

Another reason to give the economic premise a thorough hearing is that Google's strongest argument is consequentialist. In the analysis in the previous two Parts, we saw that Google will face an uphill battle in seeking to establish fair use for two of the three types of copying. Google's best chance is with a court that decides cases based on an economic normative assumption. For it will take such motivation to cause a court to override the outcome against Google that would otherwise result from legal reasoning based on a within-the-box application of established

207. By application of standard principles of economic analysis, Landes and Posner conclude that copyright and especially fair use are more likely to be efficient. *Id.* at 25.

208. "The Congress shall have power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8.

209. *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The court stated:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and Useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Id. See also *United States v. Paramount Pictures, Inc.*, 334 U.S. 131,158 (1948). The court explained:

The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.

Id.

doctrinal factors. If the economic assumption is correct as a descriptive matter—and we are here assuming that it is—then courts will be willing to step outside established doctrine if necessary in order to serve the higher order normative demand built into the theory.

A final reason to take up an economic approach to the topic is that this approach is the best place to begin normative analysis when one is employing a bottom/up methodology from factual context to pure normative theory.²¹⁰ This is because economic analysis takes entitlements as given and then considers how market processes, when working efficiently, will lead those rational actors entitled to these entitlements to trade them in the marketplace such that they will flow to their most highly valued uses thereby producing efficient social outcomes.²¹¹ Thus, the traditional economic approach assumes the status quo, even if only for the sake of argument in order to establish a starting point for the trading of property. In contrast to the role played by the status quo in the economic model, the role of the status quo is not referenced in the same way in either the more general utilitarian argument, or in leading non-consequentialist approaches such as social contractarian approaches. Each of these approaches routinely seeks to question the entitlements themselves; the utilitarian asking whether another set might be welfare maximizing and the social contractarians asking whether another set might better satisfy the criteria for a normatively justified social contract. While both top/down and bottom/up approaches have their purposes, and indeed purposes complementary to one another, a bottom/up approach better suits the present project, which seeks to make the normative in-

210. See generally JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIC APPROACH TO LEGAL THEORY* (2001).

211. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1613 (1982). Gordon explains:

[C]opiers of creative works ordinarily can identify and bargain with copyright owners. If copies are made without permission, the court will not use a “reasonableness” test to second guess whether the copier’s production was in the public interest. In the ordinary copyright case, the court assumes that the defense could have, and therefore should have, proceeded through the market.

Id. at 1613. See also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 8 (2003). The authors note:

When market transaction costs are low, as is generally the case when one person thinks he can use another’s property more efficiently than the owner can, efficiency requires remedies that coerce the would-be user into negotiating with the owner rather than just taking the owner’s property subject to a court’s determining what price (damages) he shall be forced to pay for it—a less efficient method of resource allocation.

Id.

quiry subsidiary to social scientific inquiry.²¹² Bottom/up approaches begin with the set of instantiated rules and institutions, whether these are justified or not, and build the analysis from there.

A. *The Economics of Fairness*

The above points notwithstanding, there is one obvious objection to making the economic assumption, at least in the present context. While one might plausibly argue that certain core cases have undeniable consequentialist language and reasoning, this is not so clearly the case with the concept of fair use. The same plain text approach to interpretation that may lend credence to a consequentialist reading of Article I, section 8 of the U.S. Constitution, would just as plainly militate against a consequentialist reading of the fair use defense. As noted in Part I, courts emphasize that fair use is meant to be a fact specific equitable test. Equity by its nature is open to a variety of normative impulses that may characterize a population.²¹³ Arguably, this variety is expressed in the four-factor test, which brings into play a number of normative considerations and then seeks to balance these in an equitable manner rather than looking exclusively to the social welfare.²¹⁴ Such variety is anathema to the unitary normative impulse that constitutes the utilitarian underpinnings of the economic approach.

The economic approach has a decisive response to this objection, however. Overtly non-consequentialist normative desiderata can never come into conflict with utilitarian desiderata because, under the theory, the non-consequentialist norms are ultimately to be understood in terms of their relation to social welfare. In the classic debate in moral and political philosophy, it is rights that are sought to be reconciled with social welfare. In the present context, it is the fair uses of others' copyrighted content that might be reconciled with social welfare. Indeed, the reconciliation is possible under a weaker mixed normative conception that holds that some rights may be fundamental while others are created to promote certain consequentialist outcomes. Under the mixed conception, rights given to creators of content are not fundamental rights in the sense that for example the right to free speech may be, but rather rights that are

212. See Coleman, *supra* note 210.

213. E.g., Gordon, *supra* note 211, at 1642 ("A fair use holding here also respects the reliance interests that equity concepts of fairness have long recognized.").

214. The apparent disjunction between fairness and consequentialism appears at the level of normative high theory as well, as fairness-based approaches are typically contrasted with, rather than reconciled to, consequentialist approaches. For example, in the most important critique of the economic approach and utilitarianism more generally in the last half century, John Rawls analyzes justice as fairness and attacks a utilitarian account of justice. JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press 1971).

by design meant to be fluid in order to adjudicate the tradeoff between incentives and access in order to maximally promote the arts and sciences in the context of rapid technological change.²¹⁵ Support for this flexible instrumentalist approach to rights is seen in the familiar refrain of courts that the protections afforded by the Copyright Act are to be interpreted in light of the twin goals of the production and dissemination of creative works.²¹⁶

In consequentialist theory, such putatively non-consequentialist normative factors such as rights or fair use factors are treated as “rules of thumb.” Versions of this approach have been labeled as “rule utilitarianism,” “indirect utilitarianism” or “institutional utilitarianism.”²¹⁷ The classic understanding of this indirect approach was laid out in Mill’s *On Liberty*, where he argued that liberty is best understood as a value that should be directly promoted in order that social welfare would thereby be indirectly promoted.²¹⁸ An important feature of this conception of consequentialism is that the goal of welfare maximization may be best served when some of the various participants in the social practice are not in a position to seek to maximize social welfare directly. The classic modern statement of this fundamental point is found in John Rawls’s article “Two Concepts of Rules.”²¹⁹ In one of his illustrative and highly plausible examples, Rawls argues that a welfare-maximizing judicial system will not allow for police officers to attempt to be direct welfare maximizers. The general lesson from the example is that it may best maximize welfare when not all participants are seeking to maximize welfare. A parallel logic applies to fair use. A copyright regime that sought to maximize social welfare by means of incorporating a fair use rule might nevertheless not seek to encourage all judges to attempt to maximize welfare by seeking explicitly to do so on each occasion. In the context of fair use, the rules of thumb are presumably the four factors in the doctrinal test for fair use.

The question raised by the positive economic assumption is whether the four-factor test is plausibly interpreted as indirectly promoting social welfare. Adherents to the economic approach have by and large interpreted the fair use test as if it is. In the most cited article on fair use, Wendy Gordon argues that fair use case law is best understood in eco-

215. See generally, Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970). See also Gordon, *supra* note 211, at 1601–02 (claiming that her model will be predictive of fair use results that emerge with developing technologies).

216. *Gilliam v. Am. Broad. Co.*, 538 F. 2d 14, 23 (2d Cir. 1976); *Mazer v. Stein*, 347 U.S. 201 (1954).

217. J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM; FOR AND AGAINST* (1973).

218. See, e.g., JOHN STUART MILL, *ON LIBERTY* (George Routledge & Sons 1869) (compatibilist account of utility and liberty).

219. John Rawls, *Two Concepts of Rules*, 64 THE PHIL. REV. 3, 32 (1955).

conomic terms as serving to respond to market failures.²²⁰ Gordon argues that the four-factor test is only a proxy, one that sometimes fails to take account of the key role that market failure may play in affecting the utility calculation.²²¹ She argues that courts are best understood as applying a three-part test.²²² In other words, Gordon's claim can be interpreted in utilitarian terms as the claim that the doctrinal set of rules serve to indirectly promote social welfare. Thus, an account such as Gordon's leads to the conclusion that there is no fundamental conceptual difficulty in seeking to provide an economic interpretation of fair use. Whether in fact this economic interpretation of fair use doctrine is the best descriptive account is of course a separate matter. With the concern regarding a fundamental incompatibility between fair use and the economic approach resolved, the next Section considers the economic thesis on its merits, understood as a descriptive or positive thesis.

B. *Google Print as Builder of the Digital Library of Alexandria*

The most compelling utilitarian argument in favor of Google Print is ultimately based on the normative claim regarding the important social purpose it appears capable of serving. The pursuit of knowledge is a very widely shared goal and there is a very strong argument that Google Print would promote learning to an extraordinary degree as it would provide what its proponents describe as an enhanced electronic card catalogue of almost unbelievable power. This in turn would lead to online access to

220. Gordon, *supra* note 211, at 1601 ("On a more fundamental level, the Article will illustrate how the courts and Congress have employed fair use to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market.")

221. *See id.* at 1604.

222. *See id.* at 1601. The author states:

Specifically, it will be argued that fair use doctrine, though sometimes called an "equitable rule of reason" for which no definition is possible[citing the House Report], has at bottom three straightforward concerns. Where (1) defendant could not appropriately purchase the desired use through the market; (2) transferring control over the use to defendant would serve the public interest; and (3) the copyright owner's incentives would not be substantially impaired by allowing the user to proceed, courts have in the past considered, and should in the future consider defendant's use "fair."

Id. Note Gordon's remark that courts and Congress "have in the past" and "should in the future" apply this test. In other words, Gordon is being explicit that she is making a positive social scientific as well as a normative claim. If the model is in fact descriptive, one would expect it to be predictive as well, other things equal. Indeed, Gordon claims that it is. She writes, "Overall, by unifying the various traditional fair use factors into one economic model, the Article aims to serve as an aid to predicting fair use results and as a guide to future development of the doctrine." *Id.* at 1602. In the present context, then, we will want to see if Gordon's approach does provide a guide to future development of fair use doctrine in the context of Google Print and search engines more generally.

literally millions of the best books in the world. Clearly it is this potentiality that has caused the most stir among Google Print's supporters. Given this huge potential boon to social welfare via increased access to knowledge, there is, other things equal, clearly a very strong argument in favor of Google Print on social welfare grounds.

Note in addition that Google Print provides more than the services of a card catalogue. For it is not that often that one would get enough information simply from looking at a card such that one would not need to then go find the book. An example might be where one was looking for the year of publication of a book, which could be found on the card without actually getting the book off the shelf. By contrast, snippets will provide much more information than merely bibliographical information and hence will be of potentially greater value. Access to snippets of text will be of tremendous value to users such that often they will have no further need to track down the entire text of the book. Thus, Google Print's proponents may be unduly modest as it is more accurate to say that Google Print is much more than a card catalogue. Indeed, it is more accurate to say that the database of complete copies of millions of works is not the card catalogue but instead is the collection of works, that is, the library itself. Google Print is a nascent version of the Library of Alexandria in cyberspace.²²³

Setting aside for the moment any countervailing considerations of harm to plaintiffs, this is undoubtedly a tremendous benefit to users. While book owners may complain, the fact that Google Print is not really just a card catalogue may be a big point in its favor. It might indeed be the case that the use of snippets proved to be so useful that millions and millions of searchers queried for snippets and were sufficiently satisfied that they did not buy books at issue but this could be a good thing from a utilitarian perspective, so long as incentives to produce new works were not overly dampened.

In addition, Google will be able to argue that those social benefits may be achieved with a minimum of harm to book owners due to the design of this program and in particular the manner in which it effectively incorporates an opt out provision.²²⁴ In fact, some have argued that

223. Google is making serious headway toward this achievement, which would be not only a great contribution to human knowledge but a personal achievement of the founders, given their pro-higher-education values. The irony is that they have to deny the very existence of the revolutionary edifice they are creating, because the Library is a physical embodiment and thus suspect under copyright law. It is a physical embodiment because Google copies all relevant content into computer server farms. See John Markoff & Saul Hansell, *Hiding in Plain Sight, Google Seeks an Expansion of Power*, N.Y. TIMES, June 14, 2006, at A1.

224. See Michelle Kessler, *Google Library Project Runs into Resistance*, USA TODAY, Aug. 15, 2005, at 5B (noting that free speech advocates say that Google should not give publishers the choice of opting out, because copying the books for searches is fair use). “The

book owners will be benefited instead of harmed, due to the prospect of increased book sales. As noted in Part I, Google has stated that it will as a matter of policy allow the copyright owners that do not wish to participate in Google Print to opt out. Google claims that most owners will prefer to take part in the Google Print project.²²⁵ Thus, it makes more sense as a matter of minimizing transactions costs for those who do not wish to participate to opt out. As they are probably relatively few firms who will opt out, it will lower social transactions costs to have this smaller number take the trouble to opt out than for a much larger number to take the trouble to opt in. Thus, Google Print advocates will argue, there is a significant efficiency gain to adopting opt-out, as this single move promises to dramatically reduce transaction costs.

For example, Jonathan Band's argument is that opt-out makes sense as most websites will want to be included in Google Print, so it is more efficient to have the few that want to opt out explicitly do so. Band argues that there is an implied license. This argument is fallacious, however. It conflates books with websites in which there is indeed a good argument for an implied license given that the websites are open to the public. The opposite is true of the files containing the content of publishers, which they make an effort to keep from general availability to the public.

As noted in Part I, the response of plaintiffs has been well put by Pat Schroeder when she said in regard to this opt out provision and Google Print generally, that it turned copyright on its ear because it gives initial control of the works to Google to use for its purposes and then put the onus on plaintiffs to take an action to opt out to protect their works.²²⁶ The economic response refuses to accept the need to preference the status quo as the metaphor of standing something on its head does. To the remark that Google Print turns copyright on its head the economic response is: "So what?" If the moral demands of social welfare

point of copyright law is not to give people absolute control over everything they write,' says Jason Schultz, a lawyer for the Electronic Frontier Foundation, 'it is to compensate artists and authors for the works that they create.'" *Id.* Google's library won't take away from book sales, and could even increase them. *Id.*

225. "The project is very similar to web search. In order to electronically index a webpage, you need to make a copy of it. In order to electronically index a book, we have to make a digital copy of the book. As with web search, the copies we make are used to direct people to the books. Our experience with web search is that many people ask to have their web pages included in our search results and very few ask to be excluded." Google Website, *supra* note 69.

226. See Helm, *supra* note 22 (quoting American Association of Publishers CEO Patricia Schroeder as stating, "Google's procedure shifts the responsibility for preventing infringement to the copyright owner rather than the user, turning every principle of copyright law on its ear.").

maximization call for an upending of traditional doctrine, then it is all to the good that this shift occur, and as soon as possible.

The fact that Google Print may dramatically enhance the utility of its users does not lead to any direct normative conclusion, however. This is true for a couple of reasons, the first of which is obvious: Google Print may cause significant costs as well as benefits and these must be factored into the social welfare calculation. The means to argue for the contrary position that Google Print is not a fair use would be to identify a countervailing economic harm that outweighed the aforementioned benefit. The harm stressed by publishers is that they depend on the revenue stream from book sales to sustain their economic viability.²²⁷ The implication of their claim is that Google Print may provide a stimulus to social welfare on a static analysis, but in equilibrium it will lead to the decline of the book publishing business and thus kill the goose that lays the golden egg.

This tradeoff is an instantiation of the more general tradeoff at the core of the economic analysis of copyright between “incentives” and “access.” Google is claiming that it will promote social welfare to increase user *access* to snippets by finding Google Print a fair use, while the publishers claim that this will in fact decrease social welfare by destroying the market for academic books, and thus ultimately the *incentives* of writers to write.²²⁸

The publishers’ damage claim poses a bit of a puzzle. Why do publishers focus on the damage claim from lost sales when it is the loss of licensing revenues that appears most significant? One possible explanation is that they worry that the licensing argument is more a question of who gets more rents from the activity. For the economist, it will not matter which group benefits more so long as the aggregate is maximized. Thus, the claim by publishers of unjust enrichment by Google at their expense is in danger of being met with the response, “So what,” if it turns out that social welfare is best served when Google is able to deliver snippets (and all that entails, without first seeking permission).

The owners of orphan works cannot make this claim, however, as there is no extant business to destroy. Their claim to harm is instead that

227. It is unlikely that Google Print would kill the academic book business. This is not the main fear that should compel rejection of the Google Print project on utilitarian grounds. So the issue is not one of survival of the academic publishing industry. Nevertheless, I conclude that social welfare is likely to be better promoted in a world where owners keep control of their exclusive rights regarding licensing of digital copies of their works. The reason is that there is a chance that there is a close possible world in which Google Print or something materially equivalent to it, will come about through bargaining with publishers, and that this would be a preferable world on utilitarian grounds.

228. An inconvenient fact for plaintiffs is that academics’ main incentives to publish have little to do with book sales.

they do not get something they are entitled to, revenues they are due as owners of the works. While it is understandable that plaintiffs focus on the harms to themselves for economic analysis it is necessary to inquire as well as to whether there are harms to third parties. Plaintiffs do not say much about third-party harms. This may mean a few things; that they think there are no such harms, or no colorable arguments to be made for such harms, or they do not think the court would care, which, if true, would appear to militate against the descriptive economic account, as a welfare-maximizing court should care.

The second reason is based on the need for consequentialist analysis generally to take account of relevant counterfactual situations. Seemingly the question is just that of which outcome is more productive of social welfare; a world in which Google Print is found to be a fair use or a world where it is not. If the relevant court wants to promote welfare, it will simply choose accordingly. Despite the seeming straightforwardness of this line of reasoning, things are more complicated. It may be the case that a world with Google Print is better than a world without it, yet this does not entail that Google Print should be found to be a fair use. There may be other means of getting to the outcome in which Google Print, or something substantially like it, exists and yet where content owners retain rights over their works of the sort they currently enjoy, such that no exception need be made to the usual provision of exclusive rights, which stands as presumptively justified due to its explicit provisions in the Constitution and the Copyright Act. In other words, a close possible world with the benefits, or perhaps most of them, but without the costs, or less of them, such that overall, the situation is preferable.

The policy problem presented here is tremendous. What mechanism or regulatory structure is there that is competent to make such a complex determination? It is one thing to place decision-making authority in some entity such as a governing body or a court, it is quite another thing to claim that the output of this authority is capable of producing competent results. If Congress were deciding the issue as a matter of federal law, it might hold hearings, call witnesses and experts and perhaps commission a formal cost/benefit analysis. In reality, however, the policy choice will be presented in the context of civil litigation and thus will be determined by those limited means available to courts. As a practical matter, this will mean no formal cost/benefit analysis but instead a more intuitive application by the court.²²⁹ The conventional view is that courts appreciate their shaky ability to reliably determine social welfare and accordingly look to the presence or absence of bargaining between the parties as the best indicator of whether the resources at issue are being

229. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 14 (5th ed. 1998).

put to their most economically efficient use.²³⁰ If a use has its highest social value in the hands of a non-owner, then this party will contract with the owner in order to secure usage. Thus, if Google is in a position to make a welfare-maximizing use of the copies of plaintiffs' texts, then it will be in a position to bargain with plaintiffs for its usage. Accordingly, courts will look to whether or not Google has bargained with plaintiffs for use of the texts.²³¹ In fact, Google and the publishers initiated such discussions but they failed to result in any agreement. This would appear to indicate that Google is not the most efficient user of the resource. Before reaching this conclusion, however, there is one crucial consideration that a welfare maximizing court will seek to determine, namely, whether there are any "market failures" that preclude efficient bargaining from occurring.²³²

For example, in the classic explication of the market failure approach to fair use, Wendy Gordon argues that the leading early case, *Williams & Wilkins* is best understood as a situation in which the court found a fair use because of the practical inability of the large numbers of individual medical journal copiers to negotiate an agreement with the owners of the copyrights in the articles.²³³ Because of this practical inability of all the individual owners of medical articles to cost-effectively negotiate separately, bargaining did not occur. But the reason bargains are not struck is due to high transaction costs. In general, where transaction costs are high, a court on the economic account seeks to mimic what the market outcome would be if high transaction costs were not determining the outcome.²³⁴ Thus, in *Williams*, it is not enough to consider plaintiffs' harm because the determinative consideration is whether a market failure is preventing an efficient outcome in the marketplace that exists for photocopies of articles. The conceptual importance of this argument is fundamental as it provides a criterion for determining fair use outcomes that goes beyond the test for harm to plaintiffs as crucially contained in the doctrinal account. The market failure argument applies

230. See Gordon, *supra* note 211.

231. In general, the economic approach has looked more fondly on courts as efficiency maximizers in comparison to legislatures. This is because legislators are more open to lobbying influences of the sort studied by public choice analysis. This idea is at the core of Landes and Posner's explanation as to why intellectual property law may not be susceptible to the sort of systematic efficiency analysis of the sort found in their analysis of tort law. Landes and Posner, however, argue that certain doctrines may be best understood as strongly of common law influence despite their formal origins in statutes. This is an important claim because it led Landes and Posner to conclude that it is therefore more likely that the fair use doctrine will be efficient. See Landes & Posner, *supra* note 204, at 45.

232. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–16 (1960).

233. Gordon, *supra* note 211.

234. Landes & Posner, *supra* note 211, at 32–33.

an alternative criterion such that a particular use might be harmful to the plaintiff but nevertheless fair because high transactions costs prevent the parties from bargaining to an efficient result.

Gordon argues that in *Williams & Wilkins* it was recognition of this economic fact that led the court to find fair use.²³⁵ Thus, the economic approach would prescribe that we look for structural features in the Google Print facts that might plausibly lead to a conclusion that a market failure is present. First, consider whether there is a holdout problem that might hamper bargaining.

There does not appear to be a holdout problem. It is not a situation in which one publisher could stop Google Print from going forward. One publisher's decision to refrain from licensing use of its content could stop Google Print from being complete, but unlike a small parcel of land in the middle of an urban block in which possession of the whole block is needed to erect a large building, Google Print does not need to be complete in order to be of great value. Note that this is true of traditional libraries.²³⁶ Presumably, this includes the Library of Alexandria as well, for while it was fabled to contain all the world's knowledge, this is surely a fable. Thus, there appears to be no reason that Google could not build out a library by incrementally adding to its database over time. As a result, there is no holdout problem precluding efficient bargaining from proceeding.²³⁷

Next, consider whether there may exist a situation parallel to *Williams & Wilkins* such that large numbers of potential bargainers preclude the occurrence of efficient bargaining. This consideration appears to depend on which plaintiffs are being considered. If we consider the publishers first, the issue is unclear. There are 125 plaintiffs. Is this too large a number so as to permit bargaining? Seemingly not, as each publisher will be owner of a large number of books, such that a publisher

235. Gordon, *supra* 211, at 1647–52.

236. *Id.* at 1670.

237. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1095 (1972) (discussing the means by which legal decision makers may deal with the potential for a market failure due to the hold out problem, and suggesting that fair use should be awarded if the typical person is likely to consent); Gordon, *supra* note 211, at 1629–30. This formulation is problematic in the context of Google Print, however, as there is no typical person's action apart from the extant conventional structure. Contrary to Google's suggestion, whether owners will wish to opt in cannot be determined apart from background conditions. If the law were that Google Print was a fair use and many publishers were choosing not to opt out, then it might make sense for an individual to act the same. Yet she may prefer a situation in which all had ownership and control and were able to license the use. This is a collective action problem. The more time Google has to ensconce the practice in the relative absence of external regulation as currently exists, the more it will be in the interest of any particular owner to participate.

plays a role as an aggregator for bargaining purposes, somewhat similar to the performing rights organizations.²³⁸

In addition, the publishers are represented by a trade association that is potentially capable of discussing the Google Print project with Google. Further, Google will be able to easily find the corporate offices of the publishers, complete with legal departments staffed by lawyers whose business it is to draft and negotiate contracts. In sum, potential transaction costs appear well contained and bargaining between Google and the publishers appears imminently possible.

In stark contrast to the case against market failure for non-orphan works just considered, there is a plausible argument based on transactions costs for concluding that Google Print should be a fair use with respect to its unauthorized use of orphan works. It is clear that social welfare would be served by Google being able to offer snippets from the books of these authors yet it may not be practical for Google to negotiate for such rights from the owners due to the potentially great cost of locating each defunct company and determining who owns the rights to books these companies published years earlier. In addition, because these are defunct companies, it does not harm them in the direct way it harms ongoing concerns. The foregoing analysis appears to bring us to an important conclusion—a welfare-maximizing regime should not find fair use for published books but should find fair use for orphan works. In the case of the orphan works, there appears to be a structural situation of market failure that precludes efficient bargaining between Google and the owners of the texts in question from occurring. Thus, Google is in a better position to win a fair use argument against the random publishers as compared to the publisher plaintiffs.

The relative ease of contracting with publishers raises a bit of a puzzle. If Google Print is of such great potential social value and if Google is good at extracting revenues from its search model, and if Google and copyright owners are in a situation in which contracting can be done relatively inexpensively, then why has bargaining not occurred? One might think that the obvious answer to this question is that Google is simply adopting the aggressive position that why should it pay for something that it might get for free? If it can win on fair use, then the use is free and there is no need for bargaining. But this is only partially true as the fair use route is clearly not costless, as is evident in the fact that it has landed Google in the present lawsuit.

It is my supposition that the answer may have to do with the importance Google places on the goal that its projects scale. It is worth a moment to discuss the topic of scalability, in the sense it can be said to

238. LANDES & POSNER, *supra* note 211, at 9 n.30.

be a value for Google. In particular, it matters to Google that its projects scale so that automation may be facilitated.²³⁹ For example, Google searches scale to the internet such that as Google adds new pages to its database, these become searchable in the same manner as those pages in the pre-existing content of the database. Presumably, Google wants the Google Print project to scale as well. It will not do so if Google needs to engage in clearing rights for each of the millions of works it would like to have in its database. This raises the question, however, that if the concern is scalability, then Google would appear to be well advised to treat the two types of works differently in order to reflect differences in the extent to which each type may scale. In particular, if the publishers serve as content aggregators who, like ASCAP,²⁴⁰ etc., serve to lower transaction costs, then it may be possible to transact with this group and thus a project involving these works might scale. Owners of orphan works could then be dealt with as a distinct matter.

My supposition, however, is that Google would not find this to be an attractive solution as these two categories of works may not be so easily separable. There are legal reasons why Google might be well advised to align its strategy toward those two types of works. By entering into negotiations with publishers, Google arguably makes it more difficult for itself when it comes to mounting a defense against the owners of orphan works, for how can Google say it has a fair use right to these works when it has implicitly conceded that it has no such right to publishers' works (which it arguably would concede by the act of entering into negotiations with publishers).

Perhaps then we can discern Google's overall strategy. It is to be able to get access to the works of the odd and sundry owners whose works are not affiliated with any extant publishers. Thus, the real fear for Google is not that they will have to license with publishers but that this may have negative implications as to whether Google must legally seek to license orphan works as well, or in the absence of a licensing arrangement, forego including these works in its database.²⁴¹

239. See Batelle, *supra* note 33, at 129.

240. ASCAP is the American Society of Composers, Authors and Publishers, which is a performance rights organization that promotes bulk licensing of performance rights. ASCAP, About ASCAP, <http://www.ascap.com/about/> (last visited Dec. 19, 2006).

241. This is an important issue for the utilitarian analysis of Google Print as the issue of whether or not these works end up included in the database available to researchers for searches represents a significant concern, as a database that is more comprehensive is better than one that is not. Surely it is a core value of copyright that the tools available for researching are as comprehensive and hence objective and truth producing as possible.

*C. Save the Orphans: Why the Economic Account
Must Be Superseded*

The previous Part provided an economic account of the Google Print project. We determined that a court functioning in an economic manner will be likely to find fair use for one set of works but not another, namely, for orphaned works but not for those owned by extant publishers. We can view a court's fair use determination as an instance of its heeding its own policy prescription—making the normative descriptive—by working through a practical syllogism containing the economic desiderata as a minor premise, and combining it with particular propositions drawn from the facts of Google, in order to arrive at an action-guiding practical conclusion to treat the two classes of texts differently according to the divergent levels of transaction costs associated with each.

In this section, this practical conclusion will be evaluated. I conclude that the result, while a perfectly sensible piece of common law reasoning, is nevertheless flawed in that it deals with the legacy problem of orphan works but provides poor guidance on a going forward basis for moving to a regulatory regime for a world where the orphan works problem may be ameliorated such that creative works across the board may be treated in a unified manner, making them more scalable and thus more likely to be subject to the efficiency promoting influence of automation of the sort that leading internet players such as Google are demonstrating themselves to be greatly skilled in exploiting.

Once it is acknowledged that it would be preferable to treat all works under the same fair use rule, there are two options: treat orphans like non-orphans or vice versa. Some argue that we should treat non-orphans like orphans, for the reason that otherwise orphans will be underutilized.²⁴² I will argue in the opposite direction that we should treat orphans like non-orphans, as much as possible. By this I mean that we should seek to reduce the transaction costs involved in orphan works such that they will naturally call out to be treated like other works.

My policy recommendation is that we recognize that orphan works should be treated as a legacy problem and we should work to reduce the transaction costs so that exclusive rights may do what they are assigned to do. Orphan works owners' best argument is the *Texaco* argument that even if fair use made sense prior to the ability to solve the transaction cost problem, once it becomes possible to solve it, then the assumed economic desiderata calls for this. It follows that fair use should be de-

242. This is essentially the position of those who have taken the pro-commons position in the central debate in contemporary copyright between those who oppose further enclosure and those who favor it. See generally LESSIG, *supra* note 7.

nied if market failure could be cured.²⁴³ In the case of the publishers, it can be plausibly argued that there is no market failure. Google is simply choosing to violate rights instead of negotiating. Undoubtedly, the owners of orphan works, will argue that their market failure could be cured as well. The important question, then, is what would such a cure look like? Whether the market failure of the orphan works can be solved and at what cost is thus the important question with which to come to terms.

My criticism of the conventional framework as entailed in Landes and Posner's account is that it takes high transaction costs as given, when we need instead to view these costs as prime suspects for a forward thinking policy effort directed at seeking to discover whether and how transactions costs associated with orphaned copyrightable works may be reduced.²⁴⁴ Transaction costs are at the root of the fair use finding for orphan works. If it were to be possible to reduce the transaction costs that result in orphan works, then these works may merit different treatment.²⁴⁵ For example, one means of becoming an orphan work is to be

243. See Gordon, *supra* note 211, at 1627.

244. Landes and Posner argue that the inherently higher transaction costs of intellectual property dictate that the level of intellectual property protection, "proPERTIZATION" in their words, should correspondingly be lower. The logic of this claim may be flipped around, however, such that the implication of Landes and Posner's analysis is that as transaction costs are lowered, proPERTIZATION should go up. At the extreme, we will want to explore whether if transaction costs are lowered monumentally, should proPERTIZATION go up monumentally as well. See, LANDES & POSNER, *supra* note 211, at 7-8, 13.

Some of Landes and Posner's remarks suggest that there is a sort of immutable relationship that obtains regarding transaction costs vis-à-vis physical property as compared with intellectual property. I would suggest that we treat this question as completely open. Surely it is worth asking whether there is some barrier that may be permeated such that the transaction costs of intellectual property not only come down but come down dramatically such that they pale in comparison to those from physical property. In the present context, it will be worth exploring whether the transaction costs associated with orphan works may be significantly reduced. The manner in which traditional fair use doctrine treated out-of-print books suggests that a court is likely to see implications for fair use analysis if orphan works become less prevalent due to a reduction in transaction costs due to technological advance. The consideration of whether a work is out of print is a traditional doctrinal consideration that may have particular relevance in the context of Google Print. See Gordon, *supra* note 211, at 1627. The doctrine is readily explainable in economic terms, as Gordon does. When it comes to digital copies, it no longer makes sense for works to go out of print. Conceivably, the transaction costs for delivering works could be reduced dramatically. Thus, the out-of print rationale for fair use may be removed by new technologies that dramatically decrease transaction costs.

245. Note that the policy concern is not solely that of the minimization of transaction costs. After all, transactions costs are inherent in the notion of property—to own is to be able to seek the law's aid in creating a big transaction cost for anyone who would seek to exert their own freedom in a way that would impede on one's property. There can be no ownership of digital content if there is no ability to stop unauthorized persons from violating one's section 106 rights. Thus, the economic goal is not to minimize transactions costs but to optimize them or minimize unnecessary ones. Google must incur transactions costs if content owners' rights in their content are to be accorded exclusive domain of the sort contemplated under current copyright law.

out of print. Fair use doctrine has historically been more lenient toward works that are out of print when it comes to finding an unauthorized use to be fair. This doctrine is sensible from an economic perspective as works that are out of print have much higher transaction costs associated with them. There are value-maximizing transactions to be had if only the parties could come together. But it will be a better world where these books are not out of print because it will be easier for potential users to track them down. This is what needs to happen for orphan works; they need to become more available. The problem with many of the ones that exist is that they are pre-digital. Back when they were published, presses had to set plates, etc. In a digital world, however, storage of the texts for distribution and sales is dramatically reduced. Landes and Posner fail to see the important degree to which the transaction costs associated with intellectual property are flexible. There is perhaps no better example than Google itself. It has dramatically lowered the cost of bringing highly desirable content to users. Thus, the challenge is to lower the transaction costs associated with the sorts of works that have formerly become orphans. The end goal would be that all works are treated the same, authors' exclusive rights are respected, and the functional equivalent of Google Print exists.

CONCLUSION

This article has studied the Google Print project and the lawsuits it has spawned. We first looked in detail at the project itself in order to fully grasp its monumental importance. Next, we began a detailed doctrinal analysis in order to better predict future outcomes. This analysis was conducted first under existing doctrine and then under the economic assumption that courts are social welfare maximizers in their activities involving fair use. While some have suggested that such an analysis would support a finding of fair use across the board, I argue instead that the major category of works owned by publishers should not be a fair use. I argue, however, that the same transaction cost argument that argued against fair use in the context of the publisher texts would support it in the context of orphan works. I argue further that this created the right sort of incentive for owners to not let their works, their creative progeny, become orphans.