

Google Book Search and Fair Use

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I. INTRODUCTION.

In this paper, I argue that Google Book Search's unlicensed uses of copyrighted works as part of its Library Project are fair uses. Part II explains the relevant factual background. Part III provides a brief explanation of the fair use doctrine itself. Part IV applies the fair use doctrine to Google Book Search's "Snippet View" display method. Part V applies the fair use doctrine to Google Book Search's digital copying of books from its library partners' collections. Part VI summarizes my conclusion that Google Book Search's unlicensed uses of copyrighted works are fair.

II. FACTUAL HISTORY.

In October 2004, Google announced its plan to introduce a new service, then called Google Print, but now known as Google Book Search<sup>1</sup>, that would permit users to search the texts of books online.<sup>2</sup> The service was to display substantial excerpts from the included books.<sup>3</sup> However, the service would include only books for which Google had obtained permission from the copyright holders or their licensees (e.g. publishers).<sup>4</sup> At the time, Google's planned book searching service was substantially similar to Amazon's then-year-old "Search Inside the Book" service.<sup>5</sup> In October 2005, Yahoo!<sup>6</sup> and Microsoft<sup>7</sup> disclosed their intentions to offer similar services.

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1 Jen Grant, *Judging Book Search by its cover*, Google Blog (Nov. 11, 2005), available at <http://googleblog.blogspot.com/2005/11/judging-book-search-by-its-cover.html> (last visited Mar. 16, 2006).

2 Dan Ackman, *Google Print: The Next Big Thing*, Forbes (Oct. 7, 2004), available at [http://www.forbes.com/execpicks/2004/10/07/cx\\_da\\_1007topnews.html](http://www.forbes.com/execpicks/2004/10/07/cx_da_1007topnews.html) (last visited Mar. 16, 2006).

3 *Id.*

4 *Id.*

5 Press Release, Amazon.com, *Amazon.com Launches "Search Inside the Book" Enabling Customers to Discover Books by Searching and Previewing the Text Inside* (Oct. 23, 2003), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-newsArticle&ID=462057&highlight=> (last visited Mar. 16, 2006).

6 Press Release, Yahoo! Inc., *Global Consortium Forms Open Content Alliance To Bring Additional Content Online and Make It Searchable* (Oct. 3, 2005), available at <http://docs.yahoo.com/docs/pr/release1269.html> (last visited Mar. 16, 2006).

7 Press Release, Microsoft Corporation, *MSN Search Announces MSN Book Search* (Oct. 25, 2005), available at

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In December 2004, Google announced it had negotiated with several libraries—the Harvard University Library, the University of Michigan's University Library, the New York Public Library, the University of Oxford's Bodleian Library, and the Stanford University Libraries—to digitally scan and make searchable a significant number of books from their collections.<sup>8</sup> Google intended to scan both public domain works and copyrighted works from the libraries' collections.<sup>9</sup> Moreover, Google intended to scan copyrighted works, regardless of whether the copyright holders implicated had granted Google permission to do so.<sup>10</sup>

Three classes of books are included within Google Book Search: (1) books in the public domain, (2) copyrighted books for which licenses were obtained, and (3) copyrighted books for which it does not have licenses. Google Book Search is the only major service of its kind to include books of the third class; the book search services provided by Amazon, Yahoo!, and Microsoft only includes books from the first two classes.

The way in which Google Book Search displays search results depends upon the status of the book—i.e. whether a book is in the public domain, licensed, or unlicensed. For books in the public domain, Google Book Search provides a "Full Book View," which contains reference information about the book and the book's text in its entirety with the search terms highlighted.<sup>11</sup> For licensed books, Google Book Search provides a "Sample Pages View," which contains reference information and a limited number of pages of the book.<sup>12</sup> For unlicensed books, Google Book Search provides a

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<http://www.microsoft.com/presspass/press/2005/oct05/10-25MSNBookSearchPR.mspx> (last visited Mar. 16, 2006).

8 Press Release, Google Inc., *Google Checks Out Library Books* (Dec. 14, 2004), available at [http://www.google.com/press/pressrel/print\\_library.html](http://www.google.com/press/pressrel/print_library.html) (last visited Mar. 16, 2006).

9 *Id.*

10 Susan Wojcicki, *Google Print and the Author's Guild*, Official Google Blog (Sept. 20, 2005), available at <http://googleblog.blogspot.com/2005/09/google-print-and-authors-guild.html> (last visited Mar. 17, 2006).

11 Google Book Search, "What you'll see when you search on Google Book Search," available at <http://books.google.com/intl/en/googlebooks/screenshots.html> (last visited Mar. 16, 2006).

12 *Id.*

"Snippet View," which contains reference information and a "few sentences" of text.<sup>13</sup>

To illustrate: when a user enters a search term—say, the phrase "pioneer life"—Google Book Search returns references to a number of books containing that phrase. Some of the results—here, seven of the first ten—provide a "Sample Pages View," with the front cover, the copyright page, the table of contents, the back cover, and three to five pages of the body of the text displayed prominently. The "Sample Pages View" also contains links to booksellers and libraries, reference information (e.g. the ISBN, the author's name, the date published, the number of pages), and the publisher who agreed to this display. Some of the results—here, two of the first ten—provide a "Full Book View," with every page of the text displayed. The "Full Book View" also contains links to booksellers and libraries, and reference information. And some of the results—here, one of the first ten—provide a "Snippet View," with up to three snippets of text per book. The snippets range in length, but seem to comprise no more than four lines of text, and may contain no more than a few words. And, again, the "Snippet View" provides the same sorts of links and reference information as do the "Sample Pages View" and the "Full Book View."

In order to make a book searchable and display portions of the book, Google needs a complete digital copy of the book on its servers. Google Book Search obtains digital copies of books employed in its service in one of three ways. A copyright holder or her licensee may provide a digital copy to Google directly.<sup>14</sup> A copyright holder or her licensee may provide a physical copy to Google, from which Google creates a digital copy.<sup>15</sup> Or a library may provide a physical copy to Google, from which Google creates a digital copy.<sup>16</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> Google Book Search, Partner Program description, *available at* <http://books.google.com/googlebooks/publisher.html> (last visited Mar. 16, 2006).

<sup>15</sup> *Id.*

<sup>16</sup> Google Book Search, Library Project description, *available at* <http://books.google.com/googlebooks/library.html> (last visited Mar. 17, 2006).

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Two lawsuits complaining about Google Book Search are currently pending against Google. On September 20, 2005, The Author's Guild filed a class action lawsuit for direct copyright infringement, on behalf of its members who hold copyrights in works that are on deposit with the University of Michigan's University Library.<sup>17</sup> On October 19, 2005, five major book publishers—The McGraw Hill Companies, Inc.; Pearson Education, Inc.; Penguin Group (USA) Inc.; Simon & Schuster, Inc.; and John Wiley & Sons, Inc.—filed a similar complaint.<sup>18</sup> The plaintiffs object to Google's creation of a digital copies from library-provided copyrighted books and to Google's use of the "Snippet View" display method.<sup>19</sup> Google believes both are protected by the fair use doctrine.<sup>20</sup> However, Google does permit copyright holders and their licensees to "opt-out" of Google Book Search.<sup>21</sup> In doing so, Google is attempting to demonstrate the reasonableness of its behavior, and thereby tip the equitable balance in its favor.<sup>22</sup>

### III. FAIR USE.

"Copyright protection...subsists in original works of authorship fixed in any tangible medium."

<sup>23</sup> The protection provided by the Copyright Act is not complete control over all possible uses of her work.<sup>24</sup> With respect to a literary work, the copyright holder has the exclusive rights to authorize (1)

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17 Pl.'s Compl., *Author's Guild v. Google Inc.*, No. 05-cv-8136 (S.D.N.Y. Sept. 20, 2005), available at <http://files.findlaw.com/news.findlaw.com/hdocs/docs/google/aggoog92005cmp.pdf> (last visited Mar. 17, 2006).

18 Pl.'s Compl., *McGraw-Hill Companies, Inc. v. Google Inc.*, No. 05-cv-8881 (S.D.N.Y. Oct. 19, 2005), available at <http://www.publishers.org/press/pdf/40%20McGraw-Hill%20v.%20Google.pdf> (last visited Mar. 17, 2006). In both lawsuits the focus appears to be on the agreement between Google and the University of Michigan. This is likely because Michigan has been the most forthcoming of the five in detailing both the terms of the agreement and its intention to provide books under copyright to Google for inclusion. Also, both Simon & Schuster and Wiley, since filing the complaint, appear to have agreed to display some of their texts on Google Book Search under its Partner Program.

19 Pl.'s Compl., *Author's Guild* at ¶¶ 39 & 46; Pl.'s Compl., *McGraw-Hill Companies, Inc.* at ¶ 38.

20 Susan Wojcicki, *Google Print and the Author's Guild*, Official Google Blog (Sept. 20, 2005), available at <http://googleblog.blogspot.com/2005/09/google-print-and-authors-guild.html> (last visited Mar. 17, 2006).

21 Google Book Search, Publisher Questions, available at [http://books.google.com/googlebooks/publisher\\_library.html#options3](http://books.google.com/googlebooks/publisher_library.html#options3) (last visited Mar. 24, 2006).

22 Jonathan Band, "Copyright Owners v. The Google Print Library Project," available at <http://www.policybandwidth.com/doc/googleprint-EntLaw.pdf> (last visited Apr. 9, 2006).

23 Copyright Act of 1976, 17 U.S.C. § 102(a) (2005).

24 *Sony Corp. of Amer. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

reproductions, (2) preparation of derivative works, (3) distribution, (4) public performances, and (5) public display.<sup>25</sup> Other uses of a copyrighted work are noninfringing.<sup>26</sup> Furthermore, the copyright holder's rights are otherwise limited. The Copyright Act only extends to the copyright holder control over the elements of the work that meets the "originality" requirement.<sup>27</sup> The use of the non-original aspects of a copyrighted work, therefore, is noninfringing. Moreover, the Copyright Act provides a variety of uses that, notwithstanding their *prima facie* infringing character under Section 106, are nevertheless noninfringing.<sup>28</sup> Section 107, for example, provides that "the fair use of a copyrighted work...is not an infringement of copyright."<sup>29</sup>

The "fair use" doctrine, now codified in Section 107, developed as judicially-created "equitable rule of reason," designed, in part, to avoid a rigid application of the Copyright Act when "it would stifle the very creativity which that law is designed to foster."<sup>30</sup> The fair use doctrine helps ensure that the Copyright Act comports with both the Progress Clause and the First Amendment.<sup>31</sup> That is, where a copyright holder's exercise of her rights has antidissemulative effects, or her exercise has a chilling effect on speech—and thus places the Copyright Act's constitutionality in question—her exercise may be defended against by a would-be infringer under the fair use doctrine.

The fair use doctrine is often employed to avoid the problems associated with market failure.<sup>32</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Sony Corp. of Amer.*, 464 U.S. at 447.

<sup>27</sup> "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (2005); *see also Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 348 (1991) ("[C]opyright protection may extend only to those components of a work that are original to the author.").

<sup>28</sup> *See e.g.* 17 U.S.C. §§ 107-122 (2005).

<sup>29</sup> 17 U.S.C. § 107 (2005).

<sup>30</sup> *Stewart v. Abend*, 495 U.S. 207, 236 (1990), quoting *Iowa State Univ. Research Found., Inc. v. Amer. Broadcasting Cos.*, 621 F.2d 57, 60 (2nd Cir. 1980).

<sup>31</sup> *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549, 560 (1985); *see also* Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 Law & Contemp. Prob. 173, 175-180 (2003).

<sup>32</sup> 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, 1617 (1982).

"An economic justification for depriving a copyright owner of his market entitlement exists only when the possibility of consensual bargain has broken down in some way."<sup>33</sup> Such a breakdown may occur when a work is out-of-print, and therefore unavailable.<sup>34</sup> The breakdown may occur when the transaction costs are high and the per-transaction profits are low.<sup>35</sup> For example, an individual scholar making photocopies for her own research, absent a fair use defense, would likely be dissuaded by the high cost of finding the copyright holder from copying; moreover, the copyright holder, given the infinitesimal license fee he could extract from the same researcher, would likely be discouraged from making the photocopying license easily obtainable.<sup>36</sup> The breakdown may occur because of a disconnect between the profit motive of the copyright holder and the not-easily-monetizable social motive of the would-be infringer.<sup>37</sup> Or the breakdown may occur when the copyright holder has an antidissemation motive.<sup>38</sup> For example, a songwriter may not seek to commercially exploit parodies of his copyrighted song as derivative works because he does not want the negative association.<sup>39</sup>

The fair use doctrine may also be employed to prevent a copyright holder from denying a particular use where such prevention would be fundamentally unfair, regardless of whether market failure is present.<sup>40</sup> For example, a copyright holder may have more success denying a particular use where the user obtained her copy of the original work by theft than where the user obtained her copy by legitimate means.<sup>41</sup> A copyright holder may be less able to establish infringement where she had previously denied a license for a socially unacceptable reason (e.g. Nabokov preventing anyone from publishing *Lolita*) than where she denied for a socially acceptable reason (e.g. Nabokov denying an

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33 *Id.* at 1615.

34 *Id.* at 1627-1628.

35 *Id.* at 1628-1629.

36 *Id.*

37 *Id.* at 1630-1631.

38 *Id.* at 1632-1633.

39 See e.g. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572-573 (1994).

40 Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137, 1152 (1990).

41 *Id.*

anti-age-of-consent group from publishing *Lolita*).<sup>42</sup> A copyright holder may be less able to condemn a particular use that has become widespread and generally accepted than one that is only narrowly employed.<sup>43</sup>

The fair use doctrine does not lend itself to bright-line application, but instead requires a case-by-case analysis.<sup>44</sup> Section 107 provides only general guidance, using terms like "including" and "such as" in the preamble paragraph, and characterizing its "fair use factors" as nonexclusive.<sup>45</sup> Nevertheless, the statutory factors are both required in the analysis ("shall include"<sup>46</sup>) and often determinative.<sup>47</sup>

The four statutory factors are

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."<sup>48</sup>

Because a substantial component of Google's fair use defense with respect to the initial copying—the digital reproduction of entire texts—depends upon the legality of its "Snippet View" display method, I will first discuss its fair use defense with respect to the latter.

#### IV. "SNIPPET VIEW" AS FAIR USE.

This section argue that Google Book Search's "Snippet View" distribution and public display of copyrighted works is fair use.

##### A. Purpose and character of the use.

###### 1. Transformation.

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42 *Id.*

43 *Id.*

44 *Campbell, 510 U.S. at 577.*

45 *Id.*

46 17 U.S.C. § 107 (2005).

47 *See e.g. Twin Peaks Productions, Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1377-1378 (2nd Cir. 1993) ("While the four statutory factors are non-exclusive, we do not believe that the various other factors discussed by the parties merit discussion in light of our agreement with the District Court that all of the statutory factors favor TPP.").

48 17 U.S.C. § 107 (2005).

In deciding whether the first statutory factor favors a finding of fair use, often the analysis turns on "whether and to what extent the new work is 'transformative.'" <sup>49</sup> A new work is "transformative" if it "adds something new, with a further purpose or different character;" it is not transformative if "the new work merely supersedes the objects of the original creation." <sup>50</sup> A work is generally not considered "transformative" simply because it is "retransmitted in another medium." <sup>51</sup> And a mere retransmission that "leaves the character of the original...unchanged" is not rendered "transformative" by virtue of its serving a different purpose than the original. <sup>52</sup>

For example, in *Infinity Broadcast Corp. v. Kirkwood*, the defendant, Kirkwood, captured over-the-air radio broadcasts and retransmitted them over phone lines. <sup>53</sup> The subscribers to this service were out-of-town advertisers, talent scouts, and others in the entertainment and advertising industry. <sup>54</sup> The purposes for which the subscribers used the service included verifying the broadcast of commercials and assisting the enforcement of copyrights. <sup>55</sup> The *Kirkwood* court found that the users' purposes in listening (e.g. to ensure their advertisements are being broadcasted) tended to be different from to the radio stations' purposes in broadcasting (e.g. to entertain the listening audience). <sup>56</sup> However, the court concluded that Kirkwood's use was not transformative because it did not add "new expression, new meaning, [or] new message" to the broadcasts. <sup>57</sup>

However, when the new work clearly serves a different purpose than the original, and the likelihood that the new work *could* serve the same purpose as the original is low, the extent to which the new work "adds something new" is less significant. To illustrate: in *Kelly v. Arriba Soft*, the

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<sup>49</sup> *Campbell*, 510 U.S. at 579.

<sup>50</sup> *Id.* at 578-579 (internal quotations omitted).

<sup>51</sup> *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349, 351 (S.D.N.Y. 2004).

<sup>52</sup> *Infinity Broadcast Corp. v. Kirkwood*, 150, F.3d 104, 108 (2nd Cir. 1998).

<sup>53</sup> *Id.* at 106.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 108.

<sup>57</sup> *Id.*

defendant, Arriba Soft, made unauthorized copies of image files, including photographs from the plaintiff-copyright holder's website.<sup>58</sup> Arriba Soft then created "thumbnails" from those image files; that is, it made a second copy of the images that were smaller in size and of lower resolution.<sup>59</sup> The full-size copies were then deleted.<sup>60</sup> Arriba Soft then distributed and displayed the thumbnails on its image search engine.<sup>61</sup> Because the "thumbnails" were smaller in size—both in terms of the amount of screen space each would require and in terms of the size of the file—Arriba Soft was able to display numerous thumbnails at a time in its search results, and was able to do so in a reasonably rapid manner.

The *Kelly* court found "improving access to information on the internet" to be the purpose of Arriba Soft's distribution and public display of the thumbnails.<sup>62</sup> Because Arriba Soft's purpose differed from the "artistic expression" purpose of the originals, and because "it would be unlikely that anyone would use [the] thumbnails for illustrative or aesthetic purposes because enlarging them sacrifices clarity," the *Kelly* court concluded defendant's use was transformative.<sup>63</sup> The *Kelly* court distinguished *Kirkwood* on the basis that there "people could use both types of transmissions for the same purpose."<sup>64</sup> This analysis implies that to the extent a new work is incapable of superseding the original, it is transformative, regardless of whether the new work contains new expression, meaning or message.

Google Book Search's "Snippet View" distributes and publicly displays a few sentences of copied text. Such a use could be accurately described as a retransmission in another medium; Google is reprinting the author's words verbatim, albeit on a computer screen rather than on paper. Google does

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<sup>58</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815-816 (9th Cir. 2003).

<sup>59</sup> *Id.* at 815.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 819.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

not really "add something new" in the sense that it does not infuse the words with "new information, new aesthetics, [or] new insights and understandings."<sup>65</sup> But Google does "add something new" in the sense that it adds new *functionality*. In the form in which the snippets are presented, the search terms are clearly highlighted, and the snippets are accompanied by information (e.g. author's name, title, publisher's name, and information about bookstores and libraries that have copies of the full text for sale or lending) that assists the user in finding the book.

If *Kelly's* analysis is followed, Google's use will be characterized as transformative. Google's purpose in distributing and publicly displaying the few sentences of copied text is to "improve access to information on the internet," not to serve the same purposes as the original books (e.g. "artistic expression," where the book in question is a novel or the like). Moreover, because of the very short length of Google's displayed text, a user will likely be unable to use the "snippets" as a substitute for the entire book. To the extent that Google's use does not supersede the purposes of the original work, it appears to be transformative. Even if *Kelly* is not followed insofar as "something new" is a hard requirement, Google Book Search may have enough in its added functionality to have its "Snippet View" deemed transformative.

Two things are worth noting at this point. Although Google clearly does not intend its snippets to replace the need for the original texts, users may succeed in doing so in two ways. First, with regard to very short works—e.g. certain poems—a Google Book Search user *may* be able to use the snippets to enjoy the original work's artistic expression. Second, mechanically stringing snippets into a full copy of the original work is technologically possible.

With regard to the first, the substitutional use of very short works will not weigh heavily against a finding that Google's use is transformative. Google's inclusion of very short works is liable to be rare

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<sup>65</sup> *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 142 (2nd Cir. 1998).

and not representative of the vast majority of included works. Analysis as to whether the distribution and public display of relatively substantial portions of very short works supersedes the objects of the original very short works is likely to be fact intensive and time consuming. While such an analysis would be entirely appropriate in a narrow suit for copyright infringement by a particular author of very short works, it is less appropriate in the context of a broad-based attack on the entire service.<sup>66</sup> Moreover, because Google has already implemented policies—e.g. its inclusion only of books, and not of shorter works<sup>67</sup>; and its "opt-out" policy—that tend to reduce the likelihood that Google Book Search will supersede the objects of included works, the impact of the occasional example of a nontransformative use within the service is reduced with respect to the overall transformative usage of the service.

With regard to the second concern, "[t]hird-party conduct would be wholly irrelevant in an action for direct infringement," but relevant in an action for indirect infringement.<sup>68</sup> Both actions under discussion here are for direct infringement, and neither complaint alleges contributory or vicarious infringement. Whether actual third party conduct is relevant to the defense to a direct infringement action is an open question. However, the possibility of the third party conduct is relevant. For example, the *Kelly* court considered important the feasibility of using Arriba Soft's search engine to obtain full-size images by resizing the thumbnails. Here, the concern is that Google Book Search users will recompile books by concatenating snippets. Two important questions with regard to this concern exist: (1) what Google has done to avoid snippet-to-book compilation, and (2) whether third parties will be likely to compile anyway. With regard to the first, Google has required that users register in order to

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66 See e.g. *Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512, 523 (counseling against ruling on books separately with regard to fair use when the briefs do not analyze the books separately).

67 Google Book Search, Partner Program, "What are the program policies?" available at <http://books.google.com/support/partner/bin/answer.py?answer=18625&topic=322> ("We are currently only accepting books with ISBNs. We are not able to accept journals, magazines, or calendars.") (last visited Mar. 30, 2006).

68 *Sony Corp. of Amer.*, 464 U.S. at 446.

see certain pages, and limited the amount of text a given user can view in a given period of time.<sup>69</sup>

With regard to the second, that *some* individuals will manage to create snippet-to-book compilations is almost certain; indeed, over a year ago, someone already did.<sup>70</sup> That *many* individuals will create such compilations is less obvious. However, so long as Google is making a good faith effort to prevent the creation of snippet-to-book compilations, and its efforts are largely successful, its use of the snippets will likely be deemed transformative.

## 2. Commercialism.

The first statutory factor also turns on whether the use is "commercial."<sup>71</sup> "The crux of the [commercial]/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."<sup>72</sup> The more incidental and less exploitative in nature the commercial use, the less that finding will weigh against a fair use finding.<sup>73</sup> The commercial use of a copyrighted work is "incidental" if it is indirect—in the sense that the product in which the copyrighted work is used is different from the copyrighted work itself—and insignificant—in the sense that the draw of the product in which the copyrighted work is used is not significantly based on the inclusion of the copyrighted work.<sup>74</sup>

In *Religious Technology Center v. Netcom*, an Internet service provider, Netcom, hosted an electronic bulletin board system on to which a user has posted copyrighted materials.<sup>75</sup> The *Netcom*

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<sup>69</sup> Google Book Search, Help, *available at* <http://books.google.com/googlebooks/help.html> (last visited Mar. 24, 2006).

<sup>70</sup> Greg Duffy, "Hacking Google Print," *available at* <http://www.kuro5hin.org/story/2005/3/7/95844/59875> (Mar. 8, 2005) (last visited Mar. 24, 2006). Mr. Duffy made his technological work-around known to Google. Google fixed that particular hole and gave Mr. Duffy a t-shirt by way of thanks.

<sup>71</sup> 17 U.S.C. § 107 (2005).

<sup>72</sup> *Harper & Row, Publishers, Inc.*, 471 U.S. at 562.

<sup>73</sup> *Kelly*, 336 F.3d at 818.

<sup>74</sup> *Id.*

<sup>75</sup> *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361, 1362 (N.D. Cal. 1995). Note that *Netcom's* holding, that passive, automatic acts engaged in through a technological process initiated by another cannot be the basis for a direct infringement action, was later codified in the Online Copyright Infringement

court found that although Netcom gained financially from its distribution of the copyrighted materials, its financial incentive is unrelated to the infringing activity, and it received no direct financial benefit from the acts of infringement.<sup>76</sup> That is, Netcom's commercial use of the copyrighted work was largely incidental. The *Netcom* court also found significant that "there is no easy way for a defendant like Netcom to secure a license for carrying every possible type of copyrighted work onto the Internet."<sup>77</sup> Netcom was not therefore "exploiting the copyrighted work without paying the customary prices."<sup>78</sup>

In *Princeton University Press v. Michigan Document Services*, a copy shop, Michigan, copied excerpts from plaintiffs' copyrighted works without permission and bound them into educational course packets.<sup>79</sup> The excerpts ranged from 17 pages to 95 pages, and from 5% to 30% of the copyrighted works.<sup>80</sup> Michigan, unlike other copy shops in the area with whom it competed, did not pay royalties, or "permission fees," to the copyright holders of the works excerpted.<sup>81</sup> The *Princeton* court found Michigan's use commercial largely because it had exploited the plaintiff's copyrighted works without paying the customary fee.<sup>82</sup> Whether the "permission fees" paid by most copy shops were "customary fees" depended upon whether the permission fees evolved within a "traditional, reasonable, or likely to be developed market."<sup>83</sup> The *Princeton* court concluded that because the market had already been developed, and because its acceptance by copy shops was widespread, and therefore presumably reasonable, the commercial use prong of the first statutory factor weighed heavily against Michigan.

Google Book Search distribution and public display of snippets of unlicensed books is commercial in the sense that it increases user traffic, and therefore increases advertising revenue. Its

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Liability Limitation Act, 17 U.S.C. § 512 (2005). See H.R. Rep. No. 105-551 pt. 1, at 11 (1998).

<sup>76</sup> *Id.* at 1379.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1384 (6th Cir. 1996).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1386-1389.

<sup>83</sup> *Id.* at 1387.

commercial use, however, is largely incidental. Google's Snippet View does not contain advertisements.<sup>84</sup> Google does not profit when a user purchases a book through one of the linked booksellers.<sup>85</sup> So Google's commercial use of the snippets is indirect. Also, the draw of Google Book Search does not depend significantly upon the inclusion of an individual snippet. So Google's commercial use of the snippets appears to be insignificant. However, the draw of Google Book Search may depend significantly upon the inclusion of many snippets. After all, Google Book Search's insistence that unlicensed works be included in its service is what sets it apart from the other major book search services with which it competes. So Google's commercial use of the snippets, while not as exploitative as Michigan's commercial use, is likely not as incidental as Netcom's commercial use.

In *Perfect 10 v. Google*, Google created thumbnails of Perfect 10's copyrighted images for its image search engine.<sup>86</sup> Google obtained Perfect 10's images from third party websites.<sup>87</sup> The *Perfect 10* court noted that "Google unquestionably derives significant commercial benefit from Google Image Search in the form of increased user traffic—and, in turn, increased advertising revenue."<sup>88</sup> The *Perfect 10* court found that this commercial use is more incidental than exploitative because Google did not directly promote its search engine or attempt to profit from selling Perfect 10's images.<sup>89</sup> However, the *Perfect 10* court found that Google also derived commercial benefit from its AdSense program.<sup>90</sup> Google's AdSense program "allows third party websites 'to carry Google-sponsored advertising and share revenues that flows from the advertising displays and click-throughs.' "<sup>91</sup> When Google's

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84 Google Book Search, Common Questions, *available at* <http://books.google.com/googlebooks/common.html#6> (last visited Mar. 24, 2006).

85 Google Book Search, Common Questions, *available at* <http://books.google.com/googlebooks/common.html#5> (last visited Mar. 24, 2006).

86 *Perfect 10 v. Google, Inc.*, 2006 WL 454354, \*2 (C.D. Cal. Feb. 17, 2006).

87 *Id.* at \*4.

88 *Id.* at \*15.

89 *Id.*

90 *Id.*

91 *Id.*

thumbnails lead users to AdSense partner websites that contain infringing copies of Perfect 10's images, Google's use of the thumbnails is thereby less incidental and more exploitative.<sup>92</sup>

However, Google does not avoid paying the customary price. No established licensing market with regard to the distribution and public display of snippets exists, and it is not likely that one will develop. Note that the existence of the "Partner Program" does not change this result; while a market for several *page* excerpts from books undoubtedly exists, that a market for several *word* excerpts will develop is doubtful. And, because of the scope of the service, Google and others in similar positions will not easily be able to seek permission from copyright holders. Therefore, although Google is undoubtedly a commercial enterprise, its commercial use does not weigh heavily against a finding of fair use.

"The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."<sup>93</sup> Because Google Book Search's distribution and public display of snippets is rather transformative, and because the commercial nature of the use is weak, the first statutory factor should ultimately favor a finding of fair use.

#### B. Nature of the copyrighted work.

The second statutory factor turns on two questions: (1) whether the copyrighted work is published, and (2) whether the copyrighted work is "factual."<sup>94</sup> "The scope of fair use is narrower with respect to unpublished works."<sup>95</sup> And "the scope of fair use is greater with respect to factual than non-factual works."<sup>96</sup> Factual works are "primarily informational rather than creative," and thus are farther from the core of protectable subject matter.<sup>97</sup> "Factual" works include, for example, biographies and

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92 *Id.*

93 *Campbell*, 510 U.S. at 579.

94 *New Era Publications Int'l, ApS v. Carol Publishing Group*, 904 F.2d 152, 157 (2nd Cir. 1990).

95 *Harper & Row*, 471 U.S. at 564.

96 *New Era Publications Int'l, ApS*, 904 F.2d at 157.

97 *Id.*

history textbooks.<sup>98</sup> "Non-factual" works include novels and other fictional works.<sup>99</sup>

Google Book Search includes "pretty much any kind of book you can imagine: fiction, non-fiction, reference, scholarly, textbooks, children's books, scientific, medical, professional, [and] educational."<sup>100</sup> As a result, on a case-by-case basis the second factor sometimes favors a finding of fair use, and sometimes does not. But in the context of a broad-based attack on the entire service, the second statutory factor likely weighs against a finding of fair use.

C. Amount and substantiality of the portion used.

The third statutory factor is informed by a qualitative analysis, as well as a quantitative analysis.<sup>101</sup> However, the quantitative question is often unhelpful. "In some instances, copying a work wholesale has been held to be fair use, while in other cases taking only a tiny portion of the original work has been held unfair."<sup>102</sup> The qualitative question is often phrased as whether the excerpt taken is the "heart of the book."<sup>103</sup>

In *Harper & Row v. Nation Enterprises*, the news magazine The Nation copied excerpts, totaling 300-400 words, from former U.S. President Ford's memoirs.<sup>104</sup> Ford's book contained roughly 200,000 words.<sup>105</sup> The portions The Nation lifted dealt with Ford's pardon of former U.S. President Nixon.<sup>106</sup> The *Harper & Row* Court found "the words actually quoted were an insubstantial portion" of Ford's memoirs.<sup>107</sup> However, the Court found that the quoted portions were substantial qualitatively.<sup>108</sup> The Court based this conclusion in part upon the plaintiff's characterizations of the excerpted portions

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98 *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522, 1532-1533 (S.D.N.Y. 1991).

99 *Id.*

100 Google Book Search, Help, available at <http://books.google.com/googlebooks/help.html#2> (last visited Mar. 25, 2006).

101 *Harper & Row*, 471 U.S. at 564-565.

102 *Maxtone-Graham v. Burtchell*, 803 F.2d 1253, 1263 (2nd Cir. 1986).

103 *Harper & Row*, 471 U.S. at 564-565.

104 *Id.* at 539.

105 *Id.* at 579 (Brennan, J., dissenting).

106 *Id.* at 542.

107 *Id.* at 564.

108 *Id.* at 565.

as "the most interesting and moving parts of the entire manuscript."<sup>109</sup> The Court also found significant that The Nation admitted it could not adequately convey the "definitive quality" of Ford's description of the facts underlying the Nixon pardon without direct quotes.<sup>110</sup> Finally, the Court found significant that although the quoted portions represented about .002% of Ford's memoir, the quoted portions represented 13% of The Nation's article.<sup>111</sup> The Court concluded that "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist."<sup>112</sup>

In *Maxtone-Graham v. Burtchaell*, the defendant, Burtchaell, in preparing a series of essays on abortion, quoted extensively from interviews with women discussing their experiences with abortion and unwanted pregnancy.<sup>113</sup> The interviews were published in a book form by the plaintiff, Maxtone-Graham, years earlier.<sup>114</sup> Burtchaell did not secure permission from Maxtone-Graham before using the interviews.<sup>115</sup> The *Maxtone-Graham* court concluded that Burtchaell's inclusion of 4.3% of Maxtone-Graham's book favored fair use on the quantitative question.<sup>116</sup> And the court found that because Maxtone-Graham's book contained no "heart"—in the sense that no one section that was of special import to readers existed—Burtchaell's use appeared more fair on the qualitative question.<sup>117</sup>

With regard to Google Book Search, the quantitative question clearly resolves in favor of a fair use finding. The Snippet View contains no more than a few lines of text, typically representing significantly less than 1% of the copyrighted work.

On the qualitative factor, however, does not so definitively resolve in favor of a fair use finding.

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109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Maxtone-Graham*, 803 F.2d at 1255.

114 *Id.*

115 *Id.*

116 *Id.* at 1263.

117 *Id.*

As a general rule, the snippets will be rarely be "the most interesting and moving parts" of the book. However, in individual cases, the "heart of the book" may be displayed. Also, the fact that a Google Book Search user's search terms led them to the snippet may indicate its significance to the book from whence it came. Furthermore, *Harper & Row's* examining the amount and substantiality of the copied work *with respect to the infringing work* does not bode well for Google Book Search. The snippets themselves certainly represent a substantial portion of the Snippet View, and are they are the focus of the display.

However, *Harper & Row* can be distinguished. The quotes there were chosen both to relate the facts contained therein—e.g. Ford's feelings about the Nixon pardon—*and* to capitalize on the expression. That is, The Nation article's author chose the quotes, in part, because of their aesthetic quality. A Google Book Search user, on the other hand, chooses which quotes to display on the basis of whether search terms are present therein. Where an aesthetic component to the decisionmaking process is present, to infer from the fact that the writer chose the quotes that they are more qualitatively substantial with respect to the original work may be reasonable. Where the aesthetic component is absent, to make that inferential leap is less reasonable. A Google Book Search user makes no evaluation about the quality of the quote—a "this is the best part of the book" judgment—when she indicates her choice. Rather, the user only makes the rather mundane judgment she would prefer to see only snippets containing a particular word or phrase. The aesthetic component of her judgment is absent, and so to infer that the quotes she chooses to view are qualitatively significant with respect to the original book is unreasonable.

Moreover, the *Harper & Row* Court was careful to note that "[s]ome of the briefer quotes from the memoirs are arguably necessary adequately to convey the facts; for example, Mr. Ford's characterization of the White House tapes as the 'smoking gun' is perhaps so integral to the idea

expressed as to be inseparable from it." <sup>118</sup> Google Book Search's display of brief quotes from copyrighted books is arguably necessary adequately to convey the fact that the search term appears in the book, and that the search term is abutted by a particular set of other terms. Google Book Search could return only the fact that the search term appears in the book and a list of the adjacent terms, along with information about their placement. <sup>119</sup> But this method of displaying the fact of the search term's presence and placement is so inefficient as to suggest that displaying full quotes is necessary.

The very short length of Google Book Search's snippets, the method by which they are chosen by the user, and the snippets being no longer than necessary to convey their factual content all strongly favor a finding of fair use with respect to the third statutory factor.

D. Effect of the use upon the market.

The fourth statutory factor turns on whether "the challenged use, 'should [it] become widespread...would adversely affect the *potential* market for the copyrighted work. This inquiry must take into account not only the harm to the original but also the harm to the market for derivative works." <sup>120</sup> However, to include in the assessment of this factor the harm to the markets for derivative works, the markets must be "traditional, reasonable, or likely to be developed." <sup>121</sup>

In *Perfect 10 v. Google*, Perfect 10 commercially exploited its images in several markets: the print magazine market, the online adult website subscription market, and the cell phone image download market. <sup>122</sup> The *Perfect 10* court found Google's use of thumbnails was not likely to affect the market for full-size images in the print magazine or the online adult website subscription markets. <sup>123</sup>

<sup>118</sup> *Harper & Row*, 471 U.S. at 563.

<sup>119</sup> For example, Google could, rather than displaying a snippet, return, "Your search term, 'cholera,' appears on page 1 of Stories in the Time of Cholera: Racial Profiling During a Medical Nightmare by Charles L. Briggs... Your search term is abutted by 'leaves' to its left, and 'patients' to its right. That instance of 'leaves' is abutted by 'dehydration' to its left; that instance of 'patients' is abutted by 'weak' to its right..."

<sup>120</sup> *Harper & Row*, 471 U.S. at 568 (emphasis in original).

<sup>121</sup> *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000).

<sup>122</sup> *Perfect 10*, 2006 WL 454354 at \*19.

<sup>123</sup> *Id.*

On the other hand, the court found Google's use of thumbnails was likely to affect the market for reduced-size images in the actually-developed cell phone image download market.<sup>124</sup> The distinction was based largely on the size of the screen on which the images were to be viewed.<sup>125</sup> Presumably the court concluded that a thumbnail, scaled to the size of a cell phone screen, would be worth looking at; but a thumbnail would not be worth looking at if scaled to the size of computer screen.

In *Ty, Inc. v. Publications Int'l Ltd.*, defendant Publications International published Beanie Babies collector's guides.<sup>126</sup> Plaintiff Ty owned a copyright in Beanie Babies as sculptural works.<sup>127</sup> Publications International's guides contained color photographs of Ty's copyrighted "sculptures."<sup>128</sup> Those photographs were derivative works of Ty's copyrighted works.<sup>129</sup> The *Ty* court found the "copyright licenses that [Ty] grants to those publishers whom it is willing to allow to publish Beanie Baby collectors' guides reserves to right to veto any text in the publisher's guides."<sup>130</sup> The *Ty* court, however, found that the collectors' guides themselves were not derivative works, analogizing to book reviews.<sup>131</sup> As a result, Ty's legitimate interest in exploiting the market for photographs of Beanie Babies did not extend to the collectors' guides market.<sup>132</sup> So even a showing that a market for derivative works *has* been developed is not always sufficient to show that market is "traditional, reasonable, or likely to be developed," where, for example, the copyright holder's interest in developing the derivative market is in "suppress[ing] criticism of its product."<sup>133</sup>

In *American Geophysical Union v. Texaco*, the defendant Texaco purchased subscriptions to

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124 *Id.*

125 *Id.*

126 *Ty, Inc.*, 292 F.3d at 515.

127 *Id.*

128 *Id.*

129 *Id.* at 519.

130 *Id.* at 520.

131 *Id.* at 521.

132 *Id.*

133 *Id.* See also *Campbell*, 510 U.S. at 591-592 (distinguishing between use that harms the market by suppressing demand and use that harms the market by usurping it).

academic journals for use in its scientific research department.<sup>134</sup> Plaintiffs published some of those journals, and owned copyrights in the articles contained therein.<sup>135</sup> Texaco purchased only a handful of copies of each academic journal.<sup>136</sup> Texaco then permitted its 400 to 500 researchers to check out the journals from its library.<sup>137</sup> Many of the researchers copied specific articles of interest.<sup>138</sup> The *Texaco* court found significant that obtaining a "photocopying license" from the copyright holders had developed.<sup>139</sup> Although the plaintiffs had not established a "conventional market for the direct sale and distribution of individual articles, they [had] created...a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying."<sup>140</sup> The *Texaco* court acknowledged that before the photocopying license market developed, that market was considered by some courts to be nontraditional, unreasonable or unlikely to be developed.<sup>141</sup> But the court found that changes in distribution systems and payment mechanisms allowed an efficient photocopying license market to develop.<sup>142</sup> That is, an unreasonable market may become reasonable when novel efficiencies are introduced to the market.

Google Book Search's distribution and public display of snippets from copyrighted works is transformative, and thus less likely to provide substitutes for the original works. The inference of cognizable market harm is therefore less appropriate.<sup>143</sup> Indeed, Google Book Search's Snippet View, because it contains links to booksellers, will likely have a positive impact on the market for the original works. Note, for example, that sales of textbooks included in Amazon's Search Inside the Book service

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134 *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 915 (2nd Cir. 1994).

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.* at 931.

140 *Id.* at 930.

141 *Id.* at 931. See *Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345, 1357-1359 (Ct. Cl. 1973).

142 *Id.*

143 *Id.* at 591.

increased by 10% compared with similar books not included within the service.<sup>144</sup> While this is not a perfect fit, given that Amazon's service supplies several pages of a book, as opposed to Google Book Search's Snippet View's supply of only a few lines, it does tend to imply that the increased visibility that Google Book Search supplies translates to increased sales.

Furthermore, Google Book Search includes out-of-print books.<sup>145</sup> The likelihood of market harm caused by using out-of-print works is reduced as compared to in-print works.<sup>146</sup>

A more important question is whether Google Book Search's Snippet View harms the copyright holders' interest in exploiting the derivative market. In *Perfect 10*, the market for reduced-size copies had already developed. Here, on the other hand, no market for "snippets" of text currently exists. While a market for larger excerpts does exist—indeed, Google is a significant buyer in this market as part of its Partner Program—this does not imply that a market for "snippets" is likely to develop. Indeed, the opposite result seems likely. The display of several page excerpts from a book serves two purposes: (1) allowing users to find a book by virtue of its including certain search terms, and (2) allowing users to peruse a book to get a feel for its writing style and composition. The display of only a few lines from a book does serve the former purpose; it does not serve the latter. An analogy may lie in the difference between a recorded music seller—e.g. iTunes—permitting a user to listen to the 30 seconds of a song, as compared to the 2 seconds of a song. In the former case, the user is able to ascertain both that the song contains the phrase, for example, "domo arigato," and that the song sounds good. In the latter case, the user is only able to hear "domo arigato" sung once, and is unlikely to have a sufficient sample size to infer much of anything about the general character of the song. Furthermore, because the use of a snippet is widely a considered permissible fair use in a whole host of areas—e.g. book reviews and

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144 Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 64 (Dec. 5, 2005) (Pepperdine L. Rev., forthcoming, available at <http://ssrn.com/abstract=860784>).

145 Google Book Search, Help, available at <http://books.google.com/googlebooks/help.html#2> (last visited Mar. 26, 2006).

146 *Basic Books, Inc.*, 758 F.Supp. at 1533.

academic treatises—where a larger excerpt would be questionable, the market for snippets as it pertains to many consumers would be anything but "traditional" or "reasonable." Even insofar a snippet-as-derivative-work market may develop, that market has such a strong potential to run afoul of the favorite children of copyright law—e.g critics and academics—that the market may not be favorably viewed.

Of course, circumstances may change. A broader demand for snippets may rise. The transaction costs associated with licensing use of snippets may fall. The public may view the snippet market as legitimate. Therefore, according to *Texaco*, the question of whether the market for snippets is "traditional" or "reasonable" may need to be revisited at some point. But at this point in time, absent a showing that the introduction of market-changing efficiencies is imminent, that possibility is too speculative to have a significant impact on the analysis under the fourth statutory factor.

The fourth statutory factor weighs heavily in favor of a fair use finding, because Google Book Search's Snippet View likely visits little harm on the market for original works or their derivatives, and because Google Book Search likely has a positive impact upon the market for original works.

#### E. Review.

The first statutory factor weighs in favor of a fair use finding. The second statutory factor weighs slightly against a fair use finding. The third statutory factor weighs heavily in favor of a fair use finding. And the fourth statutory factor weighs heavily in favor of a fair use finding. Therefore, Google Book Search's distribution and public display of snippets is likely fair use.

### V. INITIAL COPYING AS FAIR USE.

This section will analyze whether Google Book Search's creation and storing of single digital copies of numerous copyrighted works is fair use.

#### A. Purpose and character of the use.

As discussed in Part IV, the first statutory factor typically turns on (1) whether the new work is

"transformative" with respect to the original work, and (2) whether the use is "commercial." A finding that the new work is "transformative" supports a finding of fair use. A finding that the use is "noncommercial" supports a finding of fair use. Another question that informs the purpose and character of the use is the "propriety" of the copier's conduct.<sup>147</sup> The fact that a work is "purloined," for example, weighs against a fair use finding.<sup>148</sup> A fourth question that affects the first statutory factor is whether the use is "intermediate," as opposed to "final."<sup>149</sup>

#### 1. Propriety.

Section 108 of the Copyright Act provides libraries and archives with the right to reproduce and distribute copies of copyrighted works.<sup>150</sup> That right is limited in a number of ways, most relevantly in that it does not apply if "the reproduction or distribution is made [with] any purpose of direct or indirect commercial advantage"<sup>151</sup> Two conclusions follow from this limitation: (1) Google cannot itself qualify as a "library" or "archive," and (2) Section 108 does not permit the University of Michigan and the other libraries with whom Google contracted to authorize Google to create noninfringing copies on their behalf.<sup>152</sup>

Google, however, *is* effectuating some of the purposes of Section 108. Section 108(c), for example, focuses on preventing out-of-print works from becoming lost due to damage, deterioration, loss, theft, or technological obsolescence<sup>153</sup> Section 108(h) is concerned with ensuring the wide availability for preservation, scholarship, or research purposes works whose copyright is close to expiration and whose commercial exploitation has vanished.<sup>154</sup> Remember that Google Book Search,

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147 *Harper & Row*, 471 U.S. at 562.

148 *Id.*

149 *Sony Computer Entertainment, Inc.*, 203 F.3d at 602-603.

150 17 U.S.C. § 108 (2005).

151 17 U.S.C. § 108(a)(1) (2005).

152 H.R. Rep. No. 94-1476, at 74 (1976).

153 17 U.S.C. § 108(c) (2005).

154 17 U.S.C. § 108(h) (2005).

in addition to creating a digital copy for itself, also creates a second digital copy for its library partners. Those library partners are permitted to create similar copies themselves—at least with respect to certain books in their collections—and avoid copyright infringement under Section 108. Google cannot take advantage of Section 108 directly. However, because Google is furthering the purposes of Section 108, the propriety of its use should not be questioned under Section 107's first statutory factor. That is, Google's use of the library books does not take on the "purloined" flavor that weighs against a fair use finding.

## 2. Transformation.

In *Sony v. Connectix*, the plaintiff Sony produced the PlayStation gaming console, a small specialized computer designed to play video games produced under Sony's license.<sup>155</sup> Sony held a copyright in the software upon which the PlayStation operates.<sup>156</sup> The defendant Connectix created a program called "Virtual Game Station."<sup>157</sup> VGS was a gaming console emulator; it caused users' personal computers to function as gaming consoles.<sup>158</sup> VGS allowed its users to play Sony PlayStation games on their computers.<sup>159</sup> In the process of producing VGS, Connectix "repeatedly copied Sony's copyrighted [operating software]."<sup>160</sup> The *Connectix* court found that the VGS itself "modestly transformative."<sup>161</sup> The court relied in part upon the fact that VGS served a different purpose in that it afforded users with the opportunity for game play wherever a PlayStation and television were unavailable, but where a computer with a CD-ROM drive was.<sup>162</sup> Moreover, the court found that while VGS and PlayStation had similar "uses and functions," VGS and PlayStation did not have similar

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<sup>155</sup> *Sony Computer Entertainment, Inc.*, 203 F.3d at 598.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 606.

<sup>162</sup> *Id.*

"organization and structure of the object code." <sup>163</sup>

The *Connectix* court framed the above analysis in its discussion of fair use. However, the court really determined that Connectix's VGS was *noninfringing* of Sony's PlayStation. And the court appears to have done so on the basis of a lack of substantial similarity between PlayStation's operating software and VGS. The court, in discussing the "transformative" prong of the first statutory factor, inappropriately did not examine whether Connectix's copies of the Sony operating software, which *were* substantially similar, were transformative. The *Connectix* court answered that question within its discussion of the second statutory factor.

In that portion of the opinion, the *Connectix* court determined that Connectix's purpose in copying Sony's operating software was to "gain access to [its] unprotected functional elements." <sup>164</sup> This purpose is obviously different from Sony's purpose to entertain. Connectix did copy the Sony operating software into another medium—an emulated computer environment. The court found, however, that Connectix changed the character of the Sony operating software so that its intra-chip signals were observable by the programmers. <sup>165</sup> Connectix thereby added "something new," at least in terms of functionality. Furthermore, Connectix's added functionality arguably revealed new understanding of Sony's original work. Thus, Connectix's copying of Sony's copying operating software was transformative.

In *UMG Recordings v. MP3.com*, defendant-MP3.com purchased copies of thousands of sound recordings in which the plaintiff-record companies had copyrights. <sup>166</sup> MP3.com copied those recorded sounds on to its computer servers. <sup>167</sup> MP3.com's purpose in doing so was to "stream" the sound

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 603.

<sup>165</sup> *Id.* at 603-604.

<sup>166</sup> *UMG Recordings, Inc.*, 92 F.Supp.2d at 350.

<sup>167</sup> *Id.*

recordings to its users; that is, the service would allow its users to listen to the sound recordings over the Internet.<sup>168</sup> The *MP3.com* court found that the sound recordings were retransmitted in another medium.<sup>169</sup> The court acknowledged that MP3.com added functionality—it permitted users to listen to sound recordings "without lugging around the physical discs themselves."<sup>170</sup> Yet MP3.com did not infuse the sound recordings with "new meaning, new understanding, or the like." The ultimate purpose of the streamed sound recordings was to entertain the listener.<sup>171</sup> This purpose was identical to the purpose of the original sound recordings.<sup>172</sup> The court found, therefore, that the initial copying was not "transformative."<sup>173</sup> The *MP3.com* court distinguished *Connectix* on the basis that Connectix copied "in order to develop a new product," whereas MP3.com copied in order to provide the same expression, albeit in a different medium.<sup>174</sup>

In *Texaco*, the defendant Texaco's several hundred researchers copied individual articles from Texaco's handful of copies of plaintiffs' copyrighted journals.<sup>175</sup> The *Texaco* court found that some of the researchers' copying was transformative.<sup>176</sup> For example, the copying that enabled researchers "to go into the lab with pieces of paper that (a) were not as bulky as the entire volume..., and (b) presented no risk of damaging the original by exposure to chemicals" was transformative.<sup>177</sup> However, the *Texaco* court found that the primary reason the researchers copied the articles was to provide each researcher with "her own personal copy of each article without Texaco's having to purchase another

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168 *Id.* MP3.com was taking measures to ensure that, before a user is permitted to listen to a particular sound recording, she demonstrate that she had actually purchased her own physical copy of the sound recording.

169 *Id.* at 351.

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *American Geophysical Union*, 60 F.3d at 915.

176 *Id.* at 920.

177 *Id.*

original journal." <sup>178</sup> That is, because the researchers were primarily using the copied articles in precisely the same way they would have used the original journal (i.e. reading them for educational purposes in their offices)—but for a manufactured scarcity problem—the use was found to be superseding, and not transformative. <sup>179</sup>

Google Book Search's purposes in copying of the library books include (1) creating a new searching product, (2) gaining access to the factual components of the books, and (3) librarying. <sup>180</sup>

The "new product" at issue is, of course, Google Book Search. Unlike the factual scenario faced in *MP3.com*, Google Book Search is not simply retransmitting the same expression in a different medium, at least not with respect to the Snippet View. <sup>181</sup> As discussed in Part III, Google Book Search is a service designed to improve access to information on the Internet. At least one of Google's purposes in copying the library books is in aid of creating its Google Book Search service. To the extent that the ultimate purpose determines whether a use is transformative, this prong of the first statutory factor favors a finding of fair use.

However, the other two proffered "purposes" may factor into the analysis.

The "factual" components of the books at issue are the presence and placement of particular words. <sup>182</sup> The fact that the word "Molly" appears at the start of the last full paragraph on page 76 of *The Lust Lizard of Melancholy Cove*'s first trade paperback printing is no more protected than the fact that the same book's plot concerns a blues musician, or that a Toronto Star book reviewer's

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 921.

<sup>180</sup> I am using the term "librarying" here in the same way the Supreme Court used the term in *Sony Corp. of Amer.*, 464 U.S. at 458-459.

<sup>181</sup> With respect to Google Book Search's "Full Book View," where it distributes and publicly displays public domain books in their entirety, this is exactly what it is doing.

<sup>182</sup> *Matthew Bender & Co., Inc. v. West Publishing Corp.*, 158 F.3d 693, 699 (2d Cir. 1998) ("Because the internal pagination of West's case reporters does not entail even a modicum of creativity, the volume and page numbers are not original components of West's compilations and are not themselves protected by West's compilation copyright").

recommendation is excerpted on the back cover.<sup>183</sup> Of course, under the facts of *Connectix*, the unprotected information sought was not readily obtainable by simply "reading" Sony's copyrighted material; it was written in "object code" which is readable only by computers.<sup>184</sup> Here, one could learn the placement of "Molly" by opening the book. However, while technically feasible for an individual to catalog the placement of each individual word in the book by hand, that having a computer do this is more efficient is certain. And the proscription against the copyright of ideas and facts is, in part, designed to prevent precisely this sort of inefficiency.<sup>185</sup> That is, a copyright holder should not be permitted to require the least efficient means of accessing and using the unprotected ideas and facts contained within his work.

Because Google Book Search stores complete electronic copies of the unlicensed books on its servers, one of its purposes in creating those copies is arguably "librarying." Much as Texaco's researchers kept photocopies of the purchased journals in their offices, Google's servers are keeping digital copies of the borrowed library books on their hard drives. However, the analogy breaks down on further inspection. First, the *Texaco* court found important that the researchers were using the photocopies in precisely the same manner they would have used the journals. Google cannot use paper books to power its book search service. Second, the *Texaco* court was concerned that Texaco could have, but chose not to, purchase additional copies of the journals for its researchers. For most of the titles in Google Book Search's library partners' collections, an electronic version is simply not available for purchase. Furthermore, most electronic versions of books that are available for purchase are coded

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<sup>183</sup> Christopher Moore, *The Lust Lizard of Melancholy Cove* 76 (Avon Books 1st trade paperback ed. 2000).

<sup>184</sup> *Sony Computer Entertainment, Inc.*, 203 F.3d at 600. See also *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1525 (9th Cir. 1992) ("[H]umans cannot read object code. Sega makes much of Mike Lorenzen's statement that a reverse engineer can work directly from the zeros and ones of object code but 'it's not all that fun.' In full, Lorenzen's statements establish only that the use of an *electronic* decompiler is not absolutely necessary. Trained programmers can disassemble object code by hand. Because even a trained programmer cannot possibly remember the millions of zeros and ones that make up a program, however, he must make a written or computerized copy of the disassembled code in order to keep track of his work.").

<sup>185</sup> *Id.* at 605.

in such a way as to prevent them from being usable by Google Book Search. Moreover, for many of the titles, not even a paper copy is available for purchase. Third, the *Texaco* court found transformative purposes in librarying, including practical concerns about usability and loss prevention. Those purposes, however, were secondary to the nontransformative purpose of librarying: namely, avoiding purchasing additional copies. Google's purposes in librarying are primarily practical concerns about usability—only an electronic version is searchable—and loss prevention—some of the included library books are rare.

Google Book Search's purposes in creating digital copies of the library books makes its use more transformative than superseding. Thus, this prong of the first statutory factor weighs in favor of fair use.

### 3. Commercialism.

Whether a use is commercial depends upon whether (1) the user avoids paying the customary price, and (2) the use is incidental, as opposed to exploitative.

In *Texaco*, the court found that Texaco was not gaining direct or immediate commercial advantage from the photocopying.<sup>186</sup> The court labeled Texaco's commercial use "intermediate;"<sup>187</sup> however, this could be understood as roughly analogous to "incidental." The *Texaco* court did find, however, that Texaco had avoided paying the customary price.<sup>188</sup> On the balance, the *Texaco* court found the use modestly commercial, weighing slightly against a fair use finding.<sup>189</sup>

As discussed in Part IV, Google Book Search's Snippet View is more incidental than exploitative. Google's digital copying of the library books is, if anything, even more incidental.

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<sup>186</sup> *American Geophysical Union*, 60 F.3d at 921.

<sup>187</sup> *Id.* In discussing what is meant by "intermediate," the court focused on the insignificance of the use ("Texaco's profits, revenues, and overall commercial performance were not tied to its making copies of eight...articles for" one researcher) and the indirectness of the use.

<sup>188</sup> *Id.* at 922.

<sup>189</sup> *Id.*

Because the digital copying is an additional step from the money-making process, the copying is even more indirect than the Snippet View display method.

As far as avoiding paying the customary price is concerned, however, Google's digital copying is arguably more commercial. That is, a customary price for an electronic copy of an entire book is more likely to exist than a customary price for an electronic copy of a few lines from a book. However, two things reduce the likelihood of a finding of commercialism here. First, a market for electronic editions with regard to most of the included unlicensed books does not exist. Second, even where a market for electronic editions does exist, the books are sold in a form that would prevent their being used by Google. For example, the electronic editions may have accompanying digital rights management software that prevents Google from layering its search technology on top. Or the electronic editions may be accompanied by licenses that would prevent Google by contract from creating Google Book Search. Therefore, Google cannot purchase the book in the required form; the rights Google needs to create Google Book Search are simply not for sale.

Ultimately, because Google's use is incidental, and because Google is not avoiding paying the customary price, Google's use is likely only minimally commercial.

#### 4. Intermediacy.

In certain cases, the fact that the infringing copy is temporary and does not become part of the final product favors of a fair use finding.<sup>190</sup> For example, the fact that the copies were "intermediate" was highlighted by the *Connectix* court.<sup>191</sup>

In *Sony v. Universal City Studios*, the Supreme Court examined the various uses of defendant Sony's Betamax home video tape recorder.<sup>192</sup> The Court found "time-shifting"—the practice of

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<sup>190</sup> I take "intermediate," as it is used by certain courts, roughly to mean "temporary" and "not incorporated into the final product."

<sup>191</sup> *Sony Computer Entertainment, Inc.*, 203 F.3d at 606.

<sup>192</sup> *Sony Corp. of Amer.*, 464 U.S. at 423.

recording a broadcast television program, watching the program later, then erasing the copy—as fair use in part because the copy was temporary.<sup>193</sup> The *Sony* Court was careful to distinguish "librarying"—the practice of recording a broadcast television program, then archiving the tape for repeated viewing later—from "time-shifting."<sup>194</sup> The only real distinction between the two practices, however, is the permanency of the recording. That is, whether the tape was erased.

Google does not erase the digital copy of the library books after using them. Instead, Google incorporates them into the final product, Google Book Search. The copies are, therefore, not intermediate. Thus, this prong of the first statutory factor weighs against Google.

"The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."<sup>195</sup> Because Google Book Search's digital copying of the library books is transformative, because the commercial nature of the use is weak, and because Google did not improperly obtain the paper copies of the books, the first statutory factor should ultimately favor a finding of fair use, notwithstanding the non-intermediate nature of the use.

#### B. Nature of the copyrighted work.

As discussed in Part IV, the second statutory factor typically turns on (1) whether the original work was "published," and (2) whether the original work was "factual." A finding that the original work was "published" supports a finding of fair use. A finding that the original work was "factual" supports a finding of fair use.

The analysis on this factor does not differ substantially from the analysis in Part IV. The second statutory factor weighs against a fair use finding.

#### C. Amount and substantiality of the portion used.

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<sup>193</sup> *Id.* at 451, 456.

<sup>194</sup> *Id.* at 451.

<sup>195</sup> *Campbell*, 510 U.S. at 579.

As discussed in Part IV, the third statutory factor typically turns on (1) the quantity of the original work used, and (2) whether the new work used the "heart" of the original. However, where the entire copyrighted work is used, the quantity/quality questions become largely irrelevant. When the quantity is "all" the third factor generally weighs against the alleged infringer.

A complete copy weighs heavily against a fair use finding, however, only where more of the original was used than necessary to effectuate the transformative purpose of the new work. Where the new work is transformative, and where the entire original work is required to create the new work, the third factor weighs lightly against a fair use finding.

Connectix, for example, made complete copies of Sony's copyrighted operating software.<sup>196</sup> And the *Connectix* court found the third statutory factor weighed against a fair use finding.<sup>197</sup> Connectix could not have gained access to the unprotected functional elements of Sony's operating software with a partial copy, however. That is, Connectix necessarily copied the PlayStation operating software in its entirety in order to create its new work, the VGS emulator.<sup>198</sup> As a result, the *Connectix* court found the third statutory factor to be of "very little weight."<sup>199</sup>

In *Campbell v. Acuff-Rose Music*, defendant-musicians 2 Live Crew incorporated portions of plaintiff Acuff Rose's copyrighted song in order to create a parody of that song.<sup>200</sup> The Supreme Court found that 2 Live Crew used no more than was necessary to effectuate its parody.<sup>201</sup> Because 2 Live Crew's parody was transformative, and because 2 Live Crew used no more than necessary, the Court found the third statutory factor to weigh lightly against a fair use finding.<sup>202</sup>

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196 *Sony Computer Entertainment, Inc.*, 203 F.3d at 605-606.

197 *Id.*

198 *Id.*

199 *Id.*

200 *Campbell*, 510 U.S. at 572.

201 *Id.* at 588.

202 *Id.*

## Christopher Taylor – Google Book Search and Fair Use

Google makes complete, verbatim, digital copies of the library books. This factor clearly weighs against a finding of fair use. But Google copied no more than was necessary to create its transformative book searching service. The third statutory factor weighs only lightly against a fair use finding.

### D. Effect of the use upon the market.

As discussed in Part IV, the fourth statutory factor typically turns on (1) whether the use tends to negatively affect the market for the original work, and (2) whether the use tends to negatively affect the market for derivative works. A finding that the market for the original work would not be diverted from the copyright holder, even if the use becomes widespread, supports a finding of fair use. A finding that the market for derivative works would not be diverted from the copyright holder, even if the use becomes widespread, supports a finding of fair use.

As discussed in Part IV, Google Book Search's Snippet View distribution and public display service likely has a positive impact on the market for Plaintiff's original works, and a non-existent effect upon the market for Plaintiff's derivative works because there *is* no market for snippets.

Google Book Search's digital copying of the books in its library partners collections is in a slightly different posture. The service overall is likely to have a positive impact on the market for the books themselves, and is unlikely to have any negative impact. Furthermore, with regard to the digital copying of the library books, a negative impact on the market for the original works is unlikely.

But with regard to derivative works, Google Book Search is negatively impacting at least one potential market. "Derivative works" are the result of recasting, transforming, or adapting original works.<sup>203</sup> The statute cites "translation" and "art reproduction" as examples of derivative works.<sup>204</sup> To characterize Google's digital copies as "derivative works" is appropriate.

<sup>203</sup> 17 U.S.C. § 101 (2005).

<sup>204</sup> *Id.*

Google's digital copies of the library books differ from the commercially available digital copies of books ("eBooks-for-sale") in two important ways. First, the eBooks-for-sale are typically accompanied by digital rights management software that typically restricts the ways in which the eBooks can be used.<sup>205</sup> For example, many are readable only with certain, proprietary software. Many also have restrictions that completely forbid, or severely restrict, copying excerpts. Second, eBooks-for-sale often are accompanied by contractual obligations that forbid circumventing the security measures, or using the eBook for commercial purposes.

In short, a market for the particular derivative work Google requires does not exist. So the question becomes whether the potential market would be harmed by the type of copying in which Google is engaged if that copying became widespread. The answer to this question depends in large part upon how the "challenged use" is characterized. If Google's creation of digital copies of library books is lumped with the creation of digital copies of library books by anyone for any purpose, a market impact is all but certain.<sup>206</sup> But the use ought to be characterized with more particularity, with a "for the purpose of making books searchable" component of some sort. Therefore, the negative impact on the potential market is not as certain.

Moreover, the only potential derivative markets of concern are those that are "traditional, reasonable, or likely to be developed." The market for book searching services is relatively new. But the market for Internet searching services is relatively mature. And the market for Internet searching services has not developed in such a way as to compensate the owners of copyrights for inclusion of their works in the service. Rather, the copyright holder who publishes to the Internet has two options:

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<sup>205</sup> See e.g. eBooks.com, Customer License, *available at*, <http://usa2.ebooks.com/information/customerlicense.asp> (last visited Mar. 30, 2006).

<sup>206</sup> I say "all but" because some anecdotal evidence suggests that the widespread dispersal of digital copies of books actually increases sales of paper copies. See e.g. Eric Flint, "Introducing the Baen Free Library," *available at* <http://www.baen.com/library/home.htm> (last visited Mar. 30, 2006).

(1) allow her work to be included in the searching service without compensation, or (2) utilize the "webcrawler exclusion" opt-out scheme.<sup>207</sup> That is, a market for search engine listings as derivative works has not developed. And, given the maturity of the market, the indications that such a market is likely to develop, or would be considered reasonable or traditional, are conspicuously absent.

The differences between the mature Internet search industry and the nascent book search industry are numerous. But, with regard to the legitimacy of copyright holders demanding compensation for inclusion, the comparison is appropriate. Both book search services and web search services are only useful when the scope of their coverage is bordering on complete. Yet the inclusion of an individual work is generally of de minimis significance. Most copyright holders whose works are included within searching services of both varieties are ultimately compensated, not directly with license fees, but indirectly with increased visibility. The search service providers, the copyright holders, and the public at large tend to benefit from inclusion; but because of the scale of the search services, the transaction costs associated with creating such services would be prohibitive. The likely result is, therefore, that a market for inclusion fees paid by the search service provider to the copyright holders will never develop.

In the end, the fourth statutory factor weighs in favor of a fair use finding.

E. Review.

The first statutory factor weighs in favor of a fair use finding. The second fair use factor weighs against a fair use finding. The third fair use factor weighs slightly against a fair use finding. The fourth fair use factor weighs in favor of a fair use finding. On the balance, the statutory factors favor a finding of fair use with respect to Google's digital copying of books from its library partners' collections.

## VI. CONCLUSION.

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<sup>207</sup> Michael R. Mattioli, *Opting Out: Procedural Fair Use*, 7 (Mar. 1, 2006), available at <http://ssrn.com/abstract=892283> (last visited Apr. 24, 2006).

## Christopher Taylor – Google Book Search and Fair Use

Google Book Search's Library Project promises to benefit society by making a significant portion of the paper past searchable. While Google Book Search's most significant contributions may be in making public domain and licensed works significantly available, the value added in relative completeness by including unlicensed works cannot be discounted. As demonstrated above, Google Book Search's "Snippet View" display method, and its unlicensed digital copying of books from its library partners' collections are fair uses. The misguided efforts of the Author's Guild and the plaintiff publishers to derail the Library Project will, therefore, be largely unsuccessful. And that's a boon to us all.