

JONATHAN BAND*

Google and Fair Use

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GOOGLE AND FAIR USE

I. INTRODUCTION

GOOGLE IS ONE OF THE MOST VISIBLE AND SUCCESSFUL U.S. COMPANIES in the new millennium. Its growth has been staggering, whether measured by market capitalization, revenue, profits, or the number of employees. It has been the subject of countless newspaper and magazine articles, television news reports, blogs, and even books.¹ Notwithstanding all this attention and scrutiny, the public and policymakers have little awareness that the company's crown jewel—its search engine—is heavily reliant on the fair use doctrine.²

This Article will explain the centrality of fair use to current search engine technology.³ This Article will then discuss how the fair use doctrine will be litigated in the Google Library Project.⁴ Lastly, the Article will discuss Europe's contrasting hostility towards the copyright issues presented by Google.⁵

II. SEARCH ENGINE TECHNOLOGY

The first generation of Internet search technology involved directories. The Yahoo directory, for example, was created by an army of human beings who surfed websites and classified them based on their content.⁶ While such directories had the virtue of reflecting human judgment,⁷ they were expensive to assemble and could not keep pace with the explosive growth of the Internet.⁸

The second generation of search technology involved software "spiders" sent out to "crawl" websites and copy metadata concerning the website's contents.⁹ A search firm could compile a search database containing website metadata more quickly and less expensively than it could create a directory reflecting human categorizations.¹⁰ However, website operators could easily deceive search engines dependent on metadata by manipulating the metadata.¹¹

1. See, e.g., JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* (2005); Kevin J. Delaney, *Google's Finance Chief to Resign*, WALL ST. J., Aug. 29, 2007, at B8; *Who's Afraid of Google?*, ECONOMIST, Sept. 1, 2007, at 9, 56–58.

2. See *infra* Parts III–V.

3. See *infra* Parts II–IV.

4. See *infra* Part VI.

5. See *infra* Part VII.

6. Yahoo! Small Business, *What's the Difference Between a Search Engine and a Directory?*, <http://help.yahoo.com> (last visited Sept. 6, 2007); see also PETER MORVILLE ET AL., *THE INTERNET SEARCHER'S HANDBOOK* 95–97 (1996).

7. S. REP. NO. 105-190, at 49 (1998).

8. See Search Engine History.com, *History of Search Engines: From 1945 to Google 2007*, <http://www.searchenginehistory.com> (last visited Sept. 13, 2007).

9. See generally NAT'L INFO. STANDARDS ORG., *UNDERSTANDING METADATA* (2004) (discussing metadata and how it is used). See also BATTELLE, *supra* note 1, at 20–21.

10. See generally BATTELLE, *supra* note 1, at 39–63 (discussing the shift from directories to search engines).

11. See Google Corporate Information: *Technology Overview*, <http://www.google.com/corporate/tech.html> (last visited Sept. 7, 2007).

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This deficiency, and the steadily dropping cost of computer storage, led to the third and current generation of search technology. Now, the software spiders copy much of the content of the websites they crawl, rather than just the metadata.¹² In order for search engine companies to remain at the forefront of their industry, each must copy a large (and increasing) percentage of the entire World Wide Web every few weeks.¹³ When a user enters a query into a search engine, the user receives back relevant information based on the websites stored in the search engine's database.¹⁴ The search engine then produces a list of responsive sites ranked by an algorithm that determines relevancy.¹⁵ The list of responsive sites that the user receives contains links to the original site and to a "cache" copy stored in the search engine's database.¹⁶ Searching the webpages, rather than just the metadata, allows search firms to provide users with far more accurate responses.¹⁷

III. SEARCH ENGINES AND COPYRIGHT INFRINGEMENT

Because neither the first nor the second generation search engine copied expression protected by copyright, the search engine firm could not incur direct infringement liability.¹⁸ At most, the search engine firm could be secondarily liable by virtue of linking to infringing material.¹⁹ The information location tool safe harbor of the Digital Millennium Copyright Act²⁰ (DMCA) provided a notice and takedown regime that adequately protected first and second generation search engines from this liability risk.²¹

However, as noted above, third generation search firms copy the actual webpages into their search indices.²² Significantly, the search engines conduct this vast amount of copying without the authority of the website operators.²³ Although the search engines will respect an exclusion header—a software "Do Not Enter" sign posted by a website operator—the search engines do not ask for permission before

12. *See id.*

13. JONATHAN BAND, AM. LIBRARY ASS'N, *THE GOOGLE LIBRARY PROJECT: THE COPYRIGHT DEBATE* 13 (2006).

14. *Id.*; *see also* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 711–13 (9th Cir. 2007) (providing an overview of current search engine technology).

15. *See* Google Corporate Information, *supra* note 11.

16. BAND, *supra* note 13; *see also* Amazon.com, 487 F.3d at 711–13.

17. *See* Google Corporate Information, *supra* note 11.

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

19. *See* Amazon.com, 487 F.3d at 725–29.

20. 17 U.S.C. § 512(d) (2000).

21. *See* Jonathan Band, Taro Ishiki & Anthony Reese, *The Digital Millennium Copyright Act*, 12 *WORLD INTELL. PROP. REP.* 412, 415–18 (1998) (outlining the copyright infringement safe harbor principles of 17 U.S.C. § 512).

22. *See supra* Part II.

23. BAND, *supra* note 13, at 13–14.

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they enter websites and copy the contents.²⁴ Thus, the search engines potentially are liable for direct infringement, not just secondary infringement.²⁵

Moreover, this wholesale copying of websites might not fall within the four corners of the § 512(d) information location tool safe harbor.²⁶ Section 512(d) applies to infringement occurring “by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.”²⁷ This list of activities does not explicitly include copying expression into a search database.²⁸

Yet, even if § 512(d) unquestionably applied to the full range of search engine activities, search engines would still be subject to injunctions relating to the reproductions they make during the course of performing their search function.²⁹ Section 512(d) prohibits monetary relief against an eligible service provider, but still permits injunctive relief.³⁰ Furthermore, a search engine is eligible for the § 512(d) safe harbor only if it expeditiously removes material at the request of the copyright owner, and meets a variety of other conditions.³¹ As a result, even with the DMCA’s protection, a search engine could still be required to remove information relating to vast numbers of legitimate websites, to the extent that the search engine indexed that information without the express permission of those websites’ operators.³² For this reason, search engines have relied upon another privilege afforded by the Copyright Act: the fair use doctrine.³³

IV. FAIR USE

The fair use doctrine is codified in section 107 of the Copyright Act, which provides:

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

24. *Id.* at 7.

25. *See, e.g.,* Jesse M. Feder, *Is Betamax Obsolete?: Sony Corp. v. Universal City Studios, Inc. in the Age of Napster*, 37 CREIGHTON L. REV. 859 (2004).

26. BAND, *supra* note 13, at 3–4.

27. 17 U.S.C. § 512(d) (2000).

28. *Id.* While search firms take the position that the § 512(d) safe harbor provision applies to all the copies a search engine makes in the course of its provision of information location services, to date no court has interpreted § 512(d) in this manner. BAND, *supra* note 13, at 14.

29. 17 U.S.C. § 512(d), (j).

30. *Id.* § 512(d).

31. *Id.*

32. BAND, *supra* note 13, at 13–14.

33. *See infra* Parts IV–V.

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ing whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.³⁴

Congress first codified the fair use doctrine in the Copyright Act of 1976,³⁵ but courts had been applying fair use at least since Supreme Court Justice Joseph Story's 1841 decision in *Folsom v. Marsh*.³⁶ Judges and scholars have struggled to categorize fair use. It has been called an affirmative defense,³⁷ a user privilege,³⁸ and even an affirmative right.³⁹ Some scholars have viewed it as a solution to market failure—as a means of permitting a use when the transaction costs were too great relative to the use, e.g., a short quotation, or the copyright owner refused to license the use, e.g., a parody.⁴⁰

Regardless of its categorization, fair use has a constitutional dimension. Scholars have long noted a tension between the Constitution's intellectual property clause⁴¹ and the First Amendment.⁴² After all, the intellectual property clause authorizes Congress to provide copyright protection to authors, but the First Amendment prohibits Congress from restraining speech.⁴³ Litigants have attempted to exploit this tension in an effort to convince courts to declare various provisions of the

34. 17 U.S.C. § 107.

35. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–18 (1976)).

36. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

37. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985)); see also H.R. REP. NO. 102-836, at 3 (1992).

38. See Charles R. McManis, *The Privatization (or "Shrink-Wrapping") of American Copyright Law*, 87 CAL. L. REV. 173, 175 (1999); see also ASS'N OF RES. LIBR., CONF. ON FAIR USE JOINT STATEMENT, CONFERENCE ON FAIR USE OF COPYRIGHTED WORKS CONCLUDES WITHOUT CONSENSUS, <http://www.arl.org/pp/ppcopyright/copyresources/confu.shtml>.

39. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 714 n.227 (2000).

40. See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 43–47 (2001) (discussing the social functions of fair use). See generally Stanley F. Birch, *Copyright Fair Use: A Constitutional Imperative*, 54 J. COPYRIGHT SOC'Y U.S.A. 139 (2007) (providing an overview of fair use scholarship).

41. U.S. CONST. art. I, § 8, cl. 8.

42. U.S. CONST. amend. I.

43. See, e.g., MARJORIE HEINS, FREE EXPRESSION POLICY PROJECT, "THE PROGRESS OF SCIENCE AND USEFUL ARTS": WHY COPYRIGHT TODAY THREATENS INTELLECTUAL FREEDOM 8 (2d ed. 2003), available at <http://www.fepproject.org/policyreports/copyright2d.pdf>; Birch, *supra* note 40, at 12 n.6.

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Copyright Act unconstitutional. The U.S. Supreme Court recently rejected such an effort on the grounds that the “copyright scheme . . . incorporates its own speech-protective . . . safeguards.”⁴⁴ In *Eldred v. Ashcroft*, Justice Ginsburg specifically identified fair use as one of copyright law’s “built-in First Amendment accommodations.”⁴⁵

In other words, fair use is not simply an exception created by Congress during the course of the political process that led to the Copyright Act of 1976, nor is it just an enactment of a long-standing judicial principle of equity. Rather, fair use is a constitutionally required structural element that harmonizes the copyright law with the First Amendment. As the Eleventh Circuit’s Judge Stanley Birch recently argued in the Brace Lecture sponsored by the Copyright Society of the U.S.A., fair use is essential to the constitutionality of the Copyright Act.⁴⁶

Fair use also plays another constitutional role: it helps achieve the stated objective of the intellectual property clause—promoting the progress of science and the useful arts⁴⁷—by permitting socially beneficial uses that do not unreasonably prejudice the copyright owner.⁴⁸ The Supreme Court explains that fair use is an “‘equitable rule of reason’ which ‘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.*”⁴⁹ Judge Kozinski writes that fair use, along with the idea/expression and fact/expression dichotomies, are “necessary to maintain a free environment in which creative genius can flourish.”⁵⁰ Paraphrasing the Supreme Court’s decision in *Feist v. Rural Telephone*,⁵¹ Judge Kozinski explains that these limitations allow “much of the fruit of a creator’s labor [to] be used by others without compensation.”⁵² Judge Kozinski continues by stressing that this reuse “is not some unforeseen byproduct of our intellectual property system; it is the system’s very essence.”⁵³ Judge Kozinski explains that “[c]ulture, like science and technology, grows by accretion, each new creator building on the works of those who came before.”⁵⁴ The intellectual property system provides authors with an incentive to create, but at the same time permits other authors to build on this creativity. This “is the means by which intellectual property law advances the progress of science and art.”⁵⁵

44. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

45. *Id.*

46. Birch, *supra* note 40.

47. U.S. CONST. art. I, § 8, cl. 8.

48. Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1188 (2000).

49. *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (emphasis added) (citations omitted).

50. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting).

51. 499 U.S. 340 (1991).

52. *White*, 989 F.2d at 1517 (Kozinski, J., dissenting).

53. *Id.*

54. *Id.* at 1513.

55. *Id.* at 1517.

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In sum, fair use is part of the constitutional fabric of the copyright law. Fair use harmonizes the intellectual property clause with the First Amendment, and promotes the progress of science and the useful arts by allowing new authors to build on the work of earlier authors.

V. CASE LAW ADDRESSING FAIR USE AS IT APPLIES TO GOOGLE

A. Kelly v. Arriba Soft Corp.

Google went public on August 19, 2004.⁵⁶ But July 7, 2003 might be an even more important date in Google's history. On that day, the U.S. Court of Appeals for the Ninth Circuit issued its decision in *Kelly v. Arriba Soft Corp.*⁵⁷ The *Kelly* court was the first appellate court to consider the lawfulness of a third generation search engine. By concluding that the fair use doctrine permitted the copying performed by search engines, the court gave a legal green light to the public's enormous investment in Google a year later.⁵⁸

Arriba Soft operated a search engine for Internet images.⁵⁹ Arriba compiled a database of images by copying pictures from websites, without the express authorization of the website operators.⁶⁰ Arriba reduced the full size images into thumbnails, which it stored in its database.⁶¹ In response to a user query, the Arriba search engine displayed responsive thumbnails.⁶² If a user clicked on one of the thumbnails, she was linked to the full size image on the original website from which the image had been copied.⁶³ Kelly, a photographer, discovered that some of the photographs from his website were in the Arriba search database, and he sued for copyright infringement.⁶⁴ The lower court found that Arriba's reproduction of the photographs was a fair use, and the Ninth Circuit affirmed in part.⁶⁵

With respect to the first of the four fair use factors, "the purpose and character of the use, including whether such use is of a commercial nature,"⁶⁶ the Ninth Circuit

56. See Google Corporate Information, *supra* note 11; see also Editorial, *Google Goes Public*, N.Y. TIMES, Aug. 20, 2004, at A22; Gary Rivlin, *After Months of Hoopla, Google Debut Fits the Norm*, N.Y. TIMES, Aug. 20, 2004, at C2 (discussing the first day of trading of Google stock).

57. 336 F.3d 811 (9th Cir. 2003).

58. *Id.* at 822.

59. *Id.* at 815.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Copyright Act of 1976, 17 U.S.C. § 107(1) (2000).

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acknowledged that Arriba operated its site for commercial purposes.⁶⁷ However, Arriba's use of Kelly's images

*was more incidental and less exploitative in nature than more traditional types of commercial use. Arriba was neither using Kelly's images to directly promote its web site nor trying to profit by selling Kelly's images. 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.*⁶⁸

The court then considered the transformative nature of the use—whether Arriba's use “merely superseded the object of the originals or instead added a further purpose or different character.”⁶⁹ The court concluded that

*the thumbnails were much smaller, lower-resolution images that served an entirely different function than Kelly's original images. [While] Kelly's images are artistic works intended to inform and to engage the viewer in an aesthetic experience[,] . . . Arriba's search engine functions as a tool to help index and improve access to images on the internet*⁷⁰

Further, users were “unlikely to enlarge the thumbnails” to use them for aesthetic purposes because they were of lower resolution and thus could not be enlarged without significant loss of clarity.⁷¹ In distinguishing other judicial decisions, the Ninth Circuit stressed that “[t]his case 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.”⁷² The court closed its discussion of the first fair use factor by concluding that “Arriba's use of Kelly's images promotes the goals of the Copyright Act and the fair use exception” because the thumbnails “do not supplant the need for the originals” and “they benefit the public by enhancing information-gathering techniques on the internet.”⁷³

With respect to the second fair use factor, the nature of the copyrighted work, the Ninth Circuit observed that “[w]orks that are creative in nature are closer to the core of intended copyright protection than are more fact-based works.”⁷⁴ Moreover, “[p]ublished works are more likely to qualify as fair use because the first

67. *Kelly*, 336 F.3d at 818.

68. *Id.* (citation omitted).

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

70. *Id.*

71. *Id.*

72. *Id.* at 819.

73. *Id.* at 820.

74. *Id.* (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001)).

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appearance of the artist's expression has already occurred."⁷⁵ Kelly's works were creative, but published.⁷⁶ Accordingly, the Ninth Circuit concluded that the second factor weighed "only slightly in favor of Kelly."⁷⁷

The third fair use factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"⁷⁸ The Ninth Circuit recognized that "copying an entire work militates against a finding of fair use."⁷⁹ Nonetheless, the court stated that "the extent of permissible copying varies with the purpose and character of the use."⁸⁰ Thus, "[i]f the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her."⁸¹ In *Kelly*, this factor weighed in favor of neither party:

*[A]lthough Arriba did copy each of Kelly's images as a whole, it was reasonable to do so in light of Arriba's use of the images. 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.*⁸²

The Ninth Circuit decided that the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work,"⁸³ weighed in favor of Arriba.⁸⁴ The court found that the Arriba "search engine would guide users to Kelly's web site rather than away from it."⁸⁵ Additionally, the thumbnail images "would not harm Kelly's ability to sell or license his full-sized images" because the low resolution of the thumbnails effectively prevented their enlargement.⁸⁶

B. Field v. Google Inc.

The Ninth Circuit's decision in *Kelly* in July 2003, obviously provided the search industry in general, and Google in particular, with legal confidence concerning its

75. *Id.* (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985)).

76. *Id.*

77. *Id.*

78. Copyright Act of 1976, 17 U.S.C. § 107(3) (2000).

79. *Kelly*, 336 F.3d at 820 (quoting *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000)).

80. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586–87 (1994)).

81. *Id.* at 820–21.

82. *Id.* at 821.

83. Copyright Act of 1976, 17 U.S.C. § 107(4).

84. *Kelly*, 336 F.3d at 882.

85. *Id.* at 821.

86. *Id.* at 821–22.

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method of operation.⁸⁷ But it was not until January 2006 that a court ruled that Google's own search activities fell within the fair use privilege.⁸⁸

In *Field v. Google*,⁸⁹ an attorney named Blake Field brought a copyright infringement lawsuit against Google after it automatically copied and cached fifty-one copyrighted stories he posted on his website.⁹⁰ The court found that Field posted the stories for the purpose of bringing copyright claims against Google: "Field decided to manufacture a claim for copyright infringement against Google in the hopes of making money from Google's standard practice" of caching the content it spiders and presenting users with links to the cached copies.⁹¹ "Field created a robots.txt file for his site and set the permissions within this file to *allow* all robots to visit and index . . . the site."⁹² Field intentionally chose not to use a "no archive" metatag, which would have prevented Google from providing users with links to the cache, because he wanted to "entrap" Google.⁹³

In his suit, Field argued that the Google Cache feature infringed his copyrights because it allowed Google users to link to an archival copy of websites indexed by Google.⁹⁴ Field did not argue that Google infringed by copying his stories into its index in the first place; he probably recognized that under *Kelly v. Arriba Soft Corp.*, which is binding precedent on the federal court in Nevada, the copying and storing of the stories was a fair use.⁹⁵ Rather, Field's complaint centered on Google's serving the cache copy to users.⁹⁶ In *Kelly*, by contrast, the user had "to go to Kelly's site to see the full-sized image."⁹⁷ The court granted summary judgment in favor of Google on five independent bases, including fair use.⁹⁸

87. *See supra* Part V.A.

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

89. *Id.* at 1106.

90. *Id.* at 1110.

91. *Id.* at 1113.

92. *Id.* at 1114.

93. *Id.*

94. *Id.* at 1109.

95. 336 F.3d 811 (9th Cir. 2003); *see also supra* Part V.A.

96. Complaint for Copyright Infringement at 2–4, *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (No. CV-S-04-0413-RCJ-LRL).

97. *Kelly*, 336 F.3d at 821.

98. *Field*, 412 F. Supp. 2d at 1109, 1123. The court relied on four additional bases for granting summary judgment in favor of Google. First, the court found that serving a webpage from the Google Cache did not constitute direct infringement by Google because it did not engage in any volitional activity with respect to serving the cached webpage. *Id.* at 1115. Rather, the user initiated the serving of the cached copy by clicking on the cache link. *Id.* Google's servers merely display the copy to the user by an automatic process. *Id.* Second, by posting an "allow all" robot.txt header and then failing to set a "no archive" metatag, Field indicated that he impliedly licensed search engines to permit users to access the cached copy. *Id.* at 1114–16. Third, Field was estopped from asserting a copyright claim because he induced Google to infringe by using software code that invited Google to scan and cache his website and then intentionally failed to instruct Google not to serve the cached copies. *Id.* at 1116–17. Fourth, the Google Cache qualifies for the Digital Millennium Copyright Act's section 512(b) caching "safe harbor" for online service providers. *Id.* at 1123–25.

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The *Field* court's fair use holding is significant in several respects. Most importantly, the court extended *Kelly* from the presentation of thumbnail images to the presentation of the complete text of web sites.⁹⁹ The court found that the display of cached copies served a different purpose from the original work and therefore did not supersede the original.¹⁰⁰ The cache copy allows users to access the work when it no longer is available on the original site.¹⁰¹ This is particularly significant for academics and journalists. The cache copy allows users to detect changes to a website.¹⁰² This can be important for political, educational, and legal reasons. The cache copy also allows a user to understand why a page is responsive to a query, because the queried term is highlighted in the copy.¹⁰³ The court concluded that the use is transformative (even though the copy is identical to the original) because it serves a different purpose from the original.¹⁰⁴ The court dismissed the argument that Google was a commercial entity by stressing that there was no evidence that Google profited from its use of Field's stories.¹⁰⁵ The court observed that his "works were among *billions* of works in Google's database."¹⁰⁶

With respect to the market impact of the cache copy, the court noted that Field made his work available for free on the Internet, and thus there was no market harm.¹⁰⁷ Further, the court found that "there is no evidence . . . of any market for licensing search engines the right to allow access to Web pages through 'Cached' links, or evidence that one is likely to develop."¹⁰⁸

Finally, the *Field* court considered a fifth fair use factor: "whether an alleged copyright infringer has acted in good faith."¹⁰⁹ The court found that because Google was following industry practice when serving up cached copies, and disabled the links to the cache as soon as Field filed his complaint, it acted in good faith.¹¹⁰

C. *The District Court Decision in Perfect 10, Inc. v. Google, Inc.*

Google and other search engines encountered a major road block when the federal district court in *Perfect 10 v. Google, Inc.*¹¹¹ rejected Google's assertion of fair use.¹¹²

99. *Id.* at 1114.

100. *Id.* at 1118–19.

101. *Id.* at 1118.

102. *Id.*

103. *Id.* at 1119.

104. *Id.*

105. *Id.* at 1120.

106. *Id.*

107. *Id.* at 1121.

108. *Id.* at 1122.

109. *Id.*

110. *Id.* at 1122–23.

111. 416 F. Supp. 2d 828 (C.D. Cal. 2006), *aff'd in part and rev'd in part*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

112. *Id.* at 851.

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Perfect 10 published erotic photographs in a magazine and a website.¹¹³ It claimed that other websites copied and displayed its photographs without permission.¹¹⁴ In the course of its search engine operations, Google automatically scanned the photographs on the infringing websites, stored them in its search database, displayed thumbnails of these infringing images in response to search queries, and provided links to the infringing sites.¹¹⁵ Additionally, Google provided the AdSense service.¹¹⁶ If a website was an AdSense partner, Google served ads to the website.¹¹⁷ Although AdSense and Google Search are distinct services, Google Search could lead a user to a website that was an AdSense partner.¹¹⁸ Perfect 10 alleged that some of the infringing sites to which Google linked were AdSense partners.¹¹⁹ A final fact: a company called Fonestarz Media Limited licenses photos and makes them available for download on cell phones.¹²⁰ Perfect 10 alleged that it had licensed its images to Fonestarz for download onto cell phones.¹²¹ It further alleged that cell phone users could download thumbnail Perfect 10 images from Google's site rather than from Fonestarz.¹²²

Perfect 10 sued Google both for displaying thumbnail images of Perfect 10 photographs in response to search queries and for linking to sites where infringing images were displayed.¹²³ Perfect 10 filed a motion for preliminary injunction, which the court granted in part.¹²⁴ In ruling on the display of the thumbnail images

113. *Id.* at 831–32.

114. *Id.* at 837.

115. *Id.* at 833–34.

116. *Id.* at 834.

117. *Id.*

118. *See id.*

119. *Id.* at 846–47.

120. *Id.* at 832.

121. *Id.*

122. *Id.* at 832, 838.

123. *Id.* at 831.

124. *Id.* at 831, 859. The court's rulings on the linking to infringing sites touched on issues other than fair use. *Id.* at 837–54. Perfect 10 argued that linking to an infringing site constituted both direct and secondary infringement. *Id.* at 837. After all, Google's "in-line" link incorporated the content from the linked site, and thus Google was engaging in an unlawful display of the content. *Id.* at 838–39. Google, on the other hand, argued that it was just pointing to the linked site, and that the linked site, not Google, was displaying the content. *Id.* After discussing the underlying technology, the court agreed with Google. *Id.* at 843.

Additionally, the court rejected Perfect 10's argument that Google was secondarily liable for providing links to sites with infringing content. *Id.* at 852. With respect to contributory infringement, the court concluded that providing an audience for the infringement—providing users a means of finding these infringing sites—did not constitute material contribution to infringing activity. *Id.* at 856. The court observed that "Google has *not* actively encouraged users to visit infringing third-party websites, and it has not induced or encouraged such websites to serve infringing content in the first place." *Id.* The court stated that the "websites existed long before Google Image Search was developed and would continue to exist were Google Image Search shut down." *Id.*

Turning to vicarious liability, the court found that Google did not have the right and ability to control the infringing activity on the third party sites. *Id.* at 856–58. Google did not control the environment in which the websites operated, and could not render them inaccessible by means of other search engines. *Id.*

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in the search results, the court distinguished *Kelly* and found that Google's display was likely not a fair use.¹²⁵

Specifically, the court identified two features that differentiated this case from *Kelly*: AdSense and Fonestarz.¹²⁶ In *Kelly*, Arriba Soft received no direct financial benefit from the display of Kelly's photograph.¹²⁷ Here, by contrast, Google received a financial benefit from the display of the Perfect 10 thumbnails because the thumbnails led users to infringing sites from which Google profited via the AdSense program.¹²⁸ The court concluded that this made Google's use "more commercial" than Arriba Soft's.¹²⁹

Moreover, in *Kelly*, the court found that Arriba Soft's display of thumbnails did not harm the market for Kelly's work, in part because there was no market for the licensing of thumbnail images of Western scenery, the subject of Kelly's photos.¹³⁰ But there appears to be an emerging market for thumbnail images of naked women.¹³¹ Fonestarz licenses photos and makes them available for download on cell phones, where they are the same size as the thumbnails that Google displays.¹³² The court found that it was possible that Google's display of the thumbnails would interfere with the success of the Fonestarz service because cell phone users could see the thumbnails through a Google image search for free.¹³³ Because of these factors, the court concluded that Google was unlikely to prevail on its fair use defense.¹³⁴

The district court's ruling concerning the display of thumbnails could have created serious problems for search engines. The district court's analysis called into question any search business model that relied on advertising tied to search results.¹³⁵ The district court distinguished *Kelly* by citing Google's AdSense program, where Google serves advertising on websites that in theory users could access by clicking on Google search results.¹³⁶ The district court evidently believed that advertising revenue tied in any manner to search results rendered Google's use far more commercial than Arriba Soft's.¹³⁷ After all, AdSense and Google Search were separate and distinct programs offered by Google, and it was merely coincidence that a Google search result would lead a user to a website enrolled in the AdSense

125. *Id.* at 842, 851.

126. *Id.* at 846–47, 849.

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

128. *Perfect 10*, 416 F. Supp. 2d at 846–47.

129. *Id.* at 847.

130. *Kelly*, 336 F.3d at 818, 821–22.

131. *Perfect 10*, 416 F. Supp. 2d at 851.

132. *Id.* at 849.

133. *Id.*

134. *Id.* at 851.

135. *See id.* at 845–51.

136. *Id.* at 846–47.

137. *See id.*

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program.¹³⁸ If any linkage between advertising revenue and search results, no matter how tenuous, rendered the copying performed by search engines unfair, then advertising-based commercial search engines, which provide free access to users, would be in serious jeopardy.

The district court also distinguished *Kelly* by pointing to the Fonestarz service, which for a fee provided Perfect 10 images to cell phone users.¹³⁹ The district court concluded that Google's display of Perfect 10 thumbnails undermined the market for Fonestarz, thus tilting the fourth fair use factor against Google.¹⁴⁰ This analysis casted doubt on an all image search. In the future, firms may seek to provide specialized image download services to cell phones, e.g., images of entertainers, athletes, politicians, art, architecture, and animals. Each firm could claim that image search results competed with its service.

D. The Ninth Circuit Decision in Perfect 10, Inc. v. Amazon.com, Inc.

Fortunately for the search industry, on May 16, 2007, in *Perfect 10, Inc. v. Amazon.com, Inc.*¹⁴¹ the U.S. Court of Appeals for the Ninth Circuit reversed the district court's rejection of Google's fair use defense.¹⁴² The Ninth Circuit strongly reaffirmed its holding in *Kelly*, and rejected the district court's holding that *Kelly* was distinguishable due to the AdSense program and the cell phone downloads.¹⁴³ The

138. How Do Your Crawler and Site Diagnostic Reports Work?, <https://www.google.com/adsense/support/bin/answer.py?answer=43995&ctx=en:search&query=separate&topic=&type=f> (last visited Sept. 6, 2007).

139. *Perfect 10*, 416 F. Supp. 2d at 849, 851.

140. *Id.* at 851.

141. 487 F.3d 701 (9th Cir. 2007). The case name is styled *Perfect 10, Inc. v. Amazon.com, Inc.* because an appeal in a related case involving Amazon was consolidated with Google's appeal. *Id.* at 712–13. Perfect 10 sued Amazon for providing users with a link to Google search results. *Id.*

142. The Ninth Circuit affirmed the district court ruling that Google did not display or distribute the full sized images when it linked to them. *Id.* at 732–33. The Ninth Circuit, like the district court before it, looked closely at the actual technology involved. *Id.* at 715–19. It noted that Google did not store a full-sized copy in its server. *Id.* at 717. Instead, it provided HTML instructions that directed the user's browser to the third party site that stored the full-sized image. *Id.* The Ninth Circuit concluded that “[p]roviding these HTML instructions is not equivalent to showing a copy.” *Id.*

With respect to vicarious liability, the Ninth Circuit affirmed the district court's holding that Google did not have the right and ability to supervise the infringing activity on the third-party websites. *Id.* at 729–31. The court found that “Google cannot terminate those third-party websites or block their ability to ‘host and serve infringing full-size images’ on the Internet.” *Id.* at 731 (citation omitted).

However, the Ninth Circuit reversed the district court's finding that Google's linking to third party sites containing infringing content did not materially contribute to the infringement of the content. *Id.* at 729. The Ninth Circuit stated:

There is no dispute that Google substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials. We cannot discount the effect of such a service on copyright owners, even though Google's assistance is available to all websites, not just infringing ones. Applying our test, Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps.

Id.

143. *Id.* at 720, 722–23.

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Ninth Circuit found that there was no evidence that the Google thumbnails superseded the Fonestarz cell phone downloads.¹⁴⁴ Further, the court found no evidence that AdSense revenue derived from infringing sites was commercially significant.¹⁴⁵ At the same time, the court held that Google's use of the thumbnails was "highly transformative."¹⁴⁶ In fact, the court went so far as to say that "a search engine may be more transformative than a parody," the quintessential fair use, "because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work."¹⁴⁷

Accordingly, the Ninth Circuit "conclude[d] that the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case."¹⁴⁸ The Ninth Circuit stated that in reaching this conclusion, it was mindful that the Supreme Court stressed "the importance of analyzing fair use flexibly in light of new circumstances[,] . . . especially during a period of rapid technological change."¹⁴⁹

As noted above, the district court's rejection of Google's fair use defense on account of its AdSense program threatened the advertisement-based business models of search engines.¹⁵⁰ Likewise, the district court's focus on the hypothetical harm caused to the emerging adult cell phone download market endangered the entire image search market because any photographer or visual artist could make the same kind of assertion. The Ninth Circuit's reversal of the district court's fair use holding, therefore, is critical to the future of search engines.

The Ninth Circuit made another important fair use holding. The district court found that the cache copy made by a user's browser whenever he viewed a webpage is likely a fair use.¹⁵¹ The issue only arose because to prove secondary liability for Google, Perfect 10 needed to show that there was an underlying direct infringement by a third person.¹⁵² Perfect 10 argued that there were three possible direct infringements: the third party websites' unauthorized display of Perfect 10's images; users printing out images from these websites; and users making temporary copies of these images in the random access memory (RAM) of their computers while

144. *Id.* at 722–23. The court found that "the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails." *Id.* at 723.

145. *Id.*

146. *Id.* at 721.

147. *Id.*

148. *Id.* at 723.

149. *Id.* (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431–32 (1984)).

150. See *supra* Part V.C. Without a viable defense to copyright infringement, search engines may be forced to seek revenue by charging users. This would dramatically change internet users' expectations.

151. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 852 n.17 (C.D. Cal. 2006), *aff'd in part and rev'd in part*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

152. *Id.* at 851.

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viewing these sites.¹⁵³ The Ninth Circuit agreed that the unauthorized display of the images was infringing, but found that there was no evidence that users printed out the images.¹⁵⁴ Further, the Ninth Circuit agreed with the district court that the RAM copies were a fair use.¹⁵⁵ While observers have long assumed that the RAM copies made by users browsing the Internet was a fair use, this is the first time a circuit court has so held. As with its ruling that a link is not a display, and that a search engine's display of thumbnails is a fair use, the Ninth Circuit here has given the green light to a basic Internet activity.

VI. LOOKING FORWARD TO THE GOOGLE LIBRARY PROJECT

Google has undertaken an ambitious project of scanning into its search database the full text of millions of books in library collections around the world.¹⁵⁶ Publishers and authors have sued Google for copyright infringement, and fair use will be Google's main defense.¹⁵⁷

The Google Book Search Project (formerly the Google Print Project) has two facets: the Partner Program (formerly the Publisher Program) and the Library Project.¹⁵⁸ Under the Partner Program, a publisher controlling the rights in a book can authorize Google to scan the full text of the book into Google's search database. In response to a user query, the user receives bibliographic information concerning the book as well as a link to relevant text.¹⁵⁹ By clicking on the link, the user can see the full page containing the search term, as well as a few pages before and after that page.¹⁶⁰ Links would enable the user to purchase the book from booksellers or the publisher directly, or visit the publisher's website.¹⁶¹ Additionally, the publisher would share in contextual advertising revenue if the publisher has agreed for ads to be shown on their book pages.¹⁶² Publishers can remove their books from the

153. *Id.* at 837.

154. *Amazon.com*, 487 F.3d at 718–19.

155. *Id.* at 726.

156. Google Book Search Library Project, <http://books.google.com/googlebooks/library.html> (last visited Sept. 6, 2007).

157. See, e.g., Complaint, *The McGraw-Hill Cos., Pearson Educ., Inc., Penguin Group (USA) Inc., Simon & Schuster, Inc., and John Wiley & Sons, Inc. v. Google Inc.*, No. 05 CV 8881, 2005 WL 2778878 (S.D.N.Y. Oct. 19, 2005) [hereinafter Complaint]; Class Action Complaint, *The Author's Guild, Associational Plaintiff, Herbert Mitgang, Betty Miles and Daniel Hoffman, Individually and on Behalf of All Others Similarly Situated v. Google Inc.*, No. 05 CV 8136, 2005 WL 2463899 (S.D.N.Y. Sept. 20, 2005) [hereinafter Class Action Complaint]. For a more detailed discussion of the Google Library Project and related fair use issues, see Jonathan Band, *The Google Library Project: Both Sides of the Story*, 1 PLAGIARY: CROSS-DISCIPLINARY STUDIES IN PLAGIARISM, FABRICATION, AND FALSIFICATION (Advance Online Copy) 1 (2006), available at <http://quod.lib.umich.edu/p/plag/images/5240451.0001.002.pdf>.

158. Google Book Search, <http://books.google.com/googlebooks/about.html> (last visited Sept. 6, 2007).

159. Google Book Search Tour, http://books.google.com/googlebooks/book_search_tour/books3.html (last visited Sept. 6, 2007).

160. Google Book Search, *supra* note 158.

161. Google Book Search Library Project, *supra* note 156.

162. Google Book Search Tour, *supra* note 159.

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Partner Program at any time.¹⁶³ The Partner Program raises no copyright issues because it is conducted pursuant to an agreement between Google and the copyright holder.

A. The Library Project

Under the Library Project, Google plans to scan into its search database materials from an ever-growing list of research libraries.¹⁶⁴ In response to search queries, users will be able to browse the full text of public domain materials.¹⁶⁵ However, for books still under copyright, users will be able to see only a few sentences on either side of the search term—what Google calls a “snippet” of text.¹⁶⁶ Users will *not* see a few pages, as under the Partner Program, *nor* the full text, as for public domain works. Indeed, users will never see even a single page of an in-copyright book scanned as part of the Library Project.¹⁶⁷

Moreover, if a search term appears many times in a particular book, Google will display no more than three snippets, thus preventing the user from viewing too much of the book for free.¹⁶⁸ Finally, Google will not display any snippets for certain reference books, such as dictionaries, where the display of even snippets could harm the market for the work.¹⁶⁹ The text of the reference books will still be scanned into the search database, but in response to a query the user will only receive bibliographic information.¹⁷⁰ The page displaying the snippets will indicate the closest library containing the book, as well as where the book can be purchased, if that information is available.¹⁷¹

Because of non-disclosure agreements between Google and the libraries, many details concerning the project are not available. It appears that Google will scan only public domain materials from several of the participating libraries, while it will scan both public domain and in-copyright books at Michigan, California, and Stanford.

163. Google Book Search Help Center, <http://books.google.com/support/bin/answer.py?answer=43756&topic=9011> (last visited Sept. 6, 2007).

164. The research libraries, as of September 18, 2007, include Bavarian State Library, Committee on Institutional Cooperation, Cornell University Library, Ghent University Library, Harvard University, Keio University Library, Oxford University, Princeton University, Stanford University, The National Library of Catalonia, The New York Public Library, University of California, University Complutense of Madrid, University Library of Lausanne, University of Michigan, University of Texas-Austin, University of Virginia, and University of Wisconsin-Madison. Google Book Search Library Partners, <http://books.google.com/googlebooks/partners.html> (last visited Sept. 18, 2007).

165. Google Book Search Library Project, *supra* note 156.

166. *Id.*

167. Displays of the different treatments can be found at Google's Book Search Library Project webpage. See *supra* note 156.

168. Google Book Search, *supra* note 158.

169. Posting of Ryan Sands to Inside Google Book Search: From the Mail Bag: Four Book Views, <http://booksearch.blogspot.com/2006/07/from-mail-bag-four-book-views.html> (July 5, 2006, 16:41 EST).

170. *Id.*

171. Google Book Search, *supra* note 158.

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As part of Google's agreement with the participating libraries, Google will provide each library with a digital copy of the books in its collection scanned by Google.¹⁷² Under the agreement between Google and the University of Michigan, the University agrees to use its copies only for purposes permitted under the Copyright Act.¹⁷³ If any of these lawful uses involve posting all or part of a library copy on the University's website—for example, posting the full text of a public domain work—the University agrees to limit access to the work and to use technological measures to prevent the automated downloading and redistribution of the work.¹⁷⁴ Another possible use described by the University is keeping the copies in a restricted (or “dark”) archive until the copyright expires or the copy is needed for preservation purposes.¹⁷⁵

In response to criticism from groups such as the American Association of Publishers and the Authors Guild, Google adopted an opt-out policy.¹⁷⁶ If the publisher or author of a particular title asked Google not to scan that particular title, Google would respect that request, even if the books were in the collection of one of the participating libraries.¹⁷⁷ Thus, Google provides a copyright owner with three choices with respect to any work: it can participate in the Partner Program, in which case it would share in revenue derived from the display of pages from the work in response to user queries; it can let Google scan the book under the Library Project and display snippets in response to user queries; or it can opt-out of the Library Project, in which case Google will not scan its book.

B. The Litigation

On September 20, 2005, the Authors Guild and several individual authors sued Google for copyright infringement.¹⁷⁸ The lawsuit was styled as a class action on behalf of all authors similarly situated. A month later, on October 19, 2005, five publishers—McGraw-Hill, Pearson, Penguin, Simon & Schuster, and John Wiley & Sons—sued Google.¹⁷⁹ The authors requested damages and injunctive relief.¹⁸⁰ The publishers, in contrast, only requested injunctive relief.¹⁸¹ Neither group of plain-

172. Google Book Search Help Center—Do the Libraries Get a Copy of the Book?, <http://books.google.com/support/bin/answer.py?answer=43751> (last visited Sept. 6, 2007).

173. See Cooperative Agreement by and between Google Inc. and the Regents of the University of Michigan Library, Ann Arbor Campus, Aug. 2005, available at <http://lib.umich.edu/mdp/umgooglecooperativeagreement.html>.

174. *Id.*

175. UM Library/Google Digitization Partnership FAQ, Aug. 2005, <http://www.lib.umich.edu/staff/google/public/faq.pdf> (last visited Sept. 6, 2007).

176. Google Book Search Help Center, *supra* note 163.

177. See *id.* Because the author, the publisher, or a third party can own the copyright in a work, this Article will refer to “owners.”

178. Class Action Complaint, *supra* note 157, at *1.

179. Complaint, *supra* note 157, at 1.

180. Class Action Complaint, *supra* note 157, at *11–13.

181. Complaint, *supra* note 157, at 14.

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tiffs moved for a temporary restraining order or a preliminary injunction. Neither group sued the libraries for making the books available to Google.

The Library Project involves three actions that raise copyright questions. First, Google copies the full text of books into its search database.¹⁸² Second, Google makes and provides each library with a digital copy of each book made available by that library.¹⁸³ Third, in response to user queries, Google presents users with a few sentences from the stored text.¹⁸⁴ Because the amount of expression presented to the user is *de minimus*, this third action probably would not lead to liability. Because the libraries will use their copies for noncommercial preservation purposes, Google has a strong fair use defense with respect to making these copies. Perhaps for this reason, the lawsuits focus on the first issue, Google's copying of the full text of books into its search database.¹⁸⁵

As noted above, Google honors a request from the author or the publisher not to scan its book.¹⁸⁶ The owners, however, insist that the burden should not be on them to request Google not to scan a particular work; rather, the burden should be on Google to request permission to scan the work. According to Pat Schroeder, Association of American Publishers President, Google's opt-out procedure "shifts the responsibility for preventing infringement to the copyright owner rather than the user, turning every principle of copyright law on its ear."¹⁸⁷ The owners assert that under copyright law, the user can copy only if the owner affirmatively grants permission to the user—that copyright is an opt-in system, rather than an opt-out system. Thus, as a practical matter, the entire dispute between the owners and Google boils down to who should make the first move: should Google have to ask permission before it scans, or should the owner have to tell Google that it does not want the work scanned.

C. Google's Fair Use Argument

The owners are correct that copyright typically is an opt-in system, and that Google is copying vast amounts of copyrighted material without authorization. Google responds that this copying is permitted under the fair use doctrine.¹⁸⁸ The critical question is whether the fair use doctrine excuses Google's copying.¹⁸⁹

182. Google Book Search Library Project, *supra* note 156.

183. Google Book Search Help Center—Do the Libraries Get a Copy of the Book?, *supra* note 172.

184. Google Book Search, *supra* note 158.

185. Class Action Complaint, *supra* note 157, at *6, *9.

186. See *supra* text accompanying note 177.

187. Press Release, Ass'n of Am. Publishers, Google Library Project Raises Serious Questions for Publishers and Authors (Aug. 12, 2005), available at <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=274>.

188. See Copyright Act of 1976, 17 U.S.C. § 107 (2000).

189. In its answer to the Authors Guild lawsuit, Google raised numerous additional defenses, including merger doctrine, *scenes à faire*, failure to comply with copyright registration formalities, lack of suitability for class action treatments, and the plaintiffs' lack of standing. Answer, Jury Demand, and Affirmative Defenses of Defendant Google Inc., The Author's Guild, Associational Plaintiff, Herbert Mitgang, Betty Miles and Daniel

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Google probably will attempt to convince the court that the Ninth Circuit's decisions in *Kelly* and *Amazon.com* control this case. Although Google operates the program for commercial purposes, it is not attempting to profit from the sale of a copy of any of the books scanned into its database, and thus its use is not highly exploitative.¹⁹⁰ Like the Arriba and Google Image search engines, Google's use here is transformative in that Google is creating a tool that makes "the full text of all the world's books searchable by anyone."¹⁹¹ The tool will not supplant the original books because it will display only a few sentences in response to user queries. Like Arriba and Google Image Search, the Library Project involves only published works.¹⁹² While some of the works included in the Library Project will be creative, most will be non-fiction.¹⁹³

Similar to the search engines in *Kelly* and *Amazon.com*, Google's copying of entire books into its database is reasonable because it allows the search engines to operate effectively. After all, the purpose is the effective operation of the search engine; searches of partial text necessarily would lead to incomplete results. Moreover, unlike Arriba and Google Image Search, Google will not provide users with a copy of the entire work, but only with a few sentences surrounding the search term.¹⁹⁴ And if a particular term appears many times in the book, the search engine will allow the user to view only three instances—thereby preventing the user from accessing too much of the book.¹⁹⁵

Finally, as with the Arriba and Google Image search engine, it is hard to imagine how the Library Project could actually harm the market for books, given the limited amount of text a user will be able to view. To be sure, if a user could view (and print out) many pages of a book, it is conceivable that the user would rely upon the search engine rather than purchase the book. Similarly, under those circumstances, libraries might direct users to the search engine rather than purchase expensive reference materials. But when the user can access only a few sentences before and

Hoffman, Individually and on Behalf of All Others Similarly Situated v. Google Inc., Civil Action No. 05 CV 8136 (JES) (S.D.N.Y. Nov. 30, 2005). In the Publishers' suit, Google raised many of these defenses, as well as license to scan and the publishers' lack of ownership of electronic rights. See Answer, Jury Demand, and Affirmative Defenses of Defendant Google Inc., The McGraw-Hill Cos., Pearson Educ., Inc., Penguin Group (USA) Inc., Simon & Schuster, Inc., and John Wiley & Sons, Inc. v. Google Inc., Civil Action No. 05 CV 8881 (JES) (S.D.N.Y. Nov. 8, 2005).

190. In *Field v. Google Inc.*, the court dismissed the argument that Google was a commercial entity by stressing that there was no evidence that Google profited from using Field's stories. 412 F. Supp. 2d 1106, 1120 (D. Nev. 2006). As noted above, the court observed that his works were among the billions of works in Google's database. *Id.* In the Library Project cases, Google will be able to make the same argument with respect to any one owner.

191. Posting of Adam M. Smith to Official Google Blog: Making Books Easier to Find, <http://googleblog.blogspot.com/2005/08/making-books-easier-to-find.html> (Aug. 12, 2005, 16:31 EST).

192. See Google Book Search Library Project, *supra* note 156.

193. Jonathan Band, *Copyright Owners v. The Google Print Library Project*, E-COMMERCE L. & POL'Y, Aug. 2005, available at <http://www.policybandwidth.com/doc/googleprint-EntLaw.pdf>.

194. Google Book Search Library Project, *supra* note 156.

195. Google Book Search, *supra* note 158.

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after the search term, any displacement of sales is unlikely. Moreover, the Library Project may actually benefit the market for the book by identifying it to users and demonstrating its relevance. This is particularly important for the vast majority of books not well publicized by their publishers. Google will encourage users to obtain a hard copy of the book by providing a link to information on book borrowing or purchase information.¹⁹⁶

D. The Owners' Response to Google's Fair Use Argument

The owners have four responses to the *Kelly* and *Amazon.com* precedents.¹⁹⁷

1. Quality of Copy

First, the owners note that Arriba and Google Image Search stored a compressed, low-resolution version of each image, while here Google will store the full text of each book.¹⁹⁸ This seems to be a distinction without a difference because Arriba and Google Image Search had to make a high-resolution copy before compressing it. Furthermore, the low-resolution image Arriba and Google Image Search displayed to users represents far more of the work than the snippets Google will display to its Library Project users. In any event, neither the scanned copy nor the snippets supplant the market for the original work.¹⁹⁹

2. Internet Environment

Second, the owners suggest that *Kelly* and *Amazon.com* are distinguishable because they involved the copying of digital images on the Internet, while here Google will be digitizing analog works.²⁰⁰ If an owner decides to place a work on a website, the owner knows that the website will be "crawled" by a software "spider" sent out by a search engine, and the owner knows that the spider will copy the work into its search index.²⁰¹ Thus, by placing the work on the website, the owner has given a search engine an implied license to copy the work into its search database.²⁰² By

196. Posting of Adam M. Smith to Official Google Blog, *supra* note 191.

197. The responses are based on arguments that owners' representatives have made at a series of debates on the Google Library Project in which the author of this Article participated. See, e.g., Allan Adler, *The Google Library Project*, MEDIA L. RES. CTR. BULL., Dec. 2006, at 73, 76 n.7 (2006); Solveig Singleton et al., *Gutenberg Meets Google: The Debate About Google Print*, PROGRESS & FREEDOM FOUND., Jan. 2006, available at <http://pff.org/issues-pubs/pops/pop13.1googletranscript.pdf>; see also *Fair Use: Its Effects on Consumers and Industry: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (2005) [hereinafter Fair Use Hearing].

198. Singleton et al., *supra* note 197, at 3, 13.

199. *Id.* at 22. Additionally, in *Field v. Google Inc.*, the court found Google's presentation of caches of the full text of Field's stories to be a fair use. 412 F. Supp. 2d 1106, 1119 (D. Nev. 2006).

200. Singleton et al., *supra* note 197, at 13.

201. Fair Use Hearing, *supra* note 197, at 32 (testimony of Jonathan Band).

202. *Id.* at 63 (testimony of Paul Aiken).

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contrast, the author or publisher of a book has not given an implied license for the book to be scanned.²⁰³

Google has three possible responses to this argument. One, *Kelly* makes no reference to an implied license; its fair use analysis did not turn on an implied license.²⁰⁴ Two, this argument suggests that works uploaded onto the Internet are entitled to less protection than analog works.²⁰⁵ This runs contrary to the entertainment industry's repeated assertion that copyright law applies to the Internet in precisely the same manner as it applies to the analog environment.²⁰⁶

Three, Google can argue that its opt-out feature constitutes a similar form of implied license. A critical element of the implied license argument with respect to material on the Internet is the copyright owner's ability to use an "exclusion header."²⁰⁷ In essence, an exclusion header is a software "Do Not Enter" sign that a website operator can place on its website. If a search engine's spider detects an exclusion header, it will not copy the website into the search index.²⁰⁸ Thus, if a website operator places content on the Internet without an exclusion header, the search engine can assume that the operator has given it an implied license to copy the website.²⁰⁹ Similarly, Google can argue that any owner that has not opted out has given it an implied license to scan.

3. Licensing

The owners argue that the Library Project is distinguishable from *Kelly* because the Library Project restricts owners' ability to license their works to search engine providers.²¹⁰ However, the existence of the Partner Program, which involves licensing, demonstrates that the Library Project does not preclude lucrative licensing arrangements. By participating in the Partner Program, publishers receive revenue streams not available to them under the Library Project. Google presumably prefers for

203. See *id.*

204. See *Field*, 412 F. Supp. 2d at 1117–18. The implied license argument did not apply in *Perfect 10 v. Google, Inc.* because the websites from which Google copied the Perfect 10 images infringed Perfect 10's copyright and did not have the authority to license Google's use, either implicitly or explicitly. 416 F. Supp. 2d 828, 856–58 (C.D. Cal. 2006), *aff'd in part and rev'd in part*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

205. Singleton et al., *supra* note 197, at 13.

206. *Id.*

207. *Id.* at 19–20.

208. Fair Use Hearing, *supra* note 197, at 34 (prepared statement of Jonathan Band on behalf of NetCoalition).

209. In *Field v. Google Inc.*, Google raised implied license as a defense. 412 F. Supp. 2d at 1116. But, Google's implied license argument in *Field* does not support the owners' attempt to distinguish *Kelly* on the basis of the unique characteristics of spidering the Web. In *Field*, the court treated implied license and fair use as distinct defenses. *Id.* at 1109. Thus, the absence of an implied license for the scanning in the Library Project does not weaken Google's fair use defense based on *Kelly*. Moreover, *Field* used a software header that specifically invited Google's spider to crawl his website. *Id.* at 1114. There is no evidence that *Kelly* made a similar invitation to Arriba Soft. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2003).

210. Fair Use Hearing, *supra* note 197, at 97–98 (letter from Peter Jaszi).

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publishers to participate in the Partner Program because Google saves the cost of digitizing the content if publishers provide Google with the books in digital format. And Google made it clear that it is willing to upgrade a book from the Library Project to the Partner Program upon the owner's request.²¹¹

Furthermore, Yahoo announced the formation of the Open Content Alliance, which will include works licensed by their owners, nearly a year after Google announced the Library Project.²¹² Google's Library Project obviously did not deter Yahoo from adopting a different business model based on licensing.

Significantly, the Library Project will not compete with a business model involving licensed works because such a model will probably show more than just snippets. While the Library Project will help users identify the entire universe of relevant books, a model with licensed works will provide users with deeper exposure to a much smaller group of books.²¹³ Each business model will satisfy different needs. Stated differently, the Library Project targets the indexing market, while other online digitization projects aim at the sampling market.²¹⁴ By concentrating on the indexing market, the Library Project will not harm the sampling market.

Further, even if the owners succeed in showing that the Library Project's harm to the indexing market is not completely speculative,²¹⁵ in a recent decision the Second Circuit suggested that courts should not consider the loss of licensing revenue that the copyright owner could have obtained from "a transformative market." The court stated:

*[W]e hold that DK's use of BGA's images is transformatively different from their original expressive purpose. In a case such as this, a copyright holder cannot prevent others from entering fair use markets merely "by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work." "Copyright owners may not preempt exploitation of transformative markets" Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.*²¹⁶

211. Posting of Adam M. Smith to Official Google Blog, *supra* note 191.

212. Press Release, Yahoo! Media Relations, 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>.

213. Fair Use Hearing, *supra* note 197, at 67 (prepared statement of Paul Aiken on behalf of the Authors Guild) ("And a negotiated license could pave the way for a real online library—something far beyond the excerpts Google intends to offer through its Google Library program.")

214. See *BMG Music v. Gonzalez*, 430 F.3d 888, 891 (7th Cir. 2005).

215. As noted above, the court in *Field v. Google Inc.* found that "there is no evidence before the Court of any market for licensing search engines the right to allow access to Web pages through 'Cached' links, or evidence that one is likely to develop." 412 F. Supp. 2d 1106, 1122 (D. Nev. 2006).

216. *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006) (internal citations, quotation marks, and footnotes omitted).

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Under this reasoning, the owners' hypothetical loss of revenue from the licensing of indexing rights should not enter into the fair use calculus.²¹⁷

Finally, even if the court decided to include the loss of licensing revenue into its fair use analysis, it likely would be influenced by the Ninth Circuit's holding in *Kelly* that "the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case."²¹⁸

4. Legal Error

The copyright owners' final response to *Kelly* and *Amazon.com* is that they were wrongly decided.²¹⁹ In other words, the Ninth Circuit made a mistake. The authors and publishers sued Google in federal court in New York, part of the Second Circuit.²²⁰ While the trial court in New York may look to *Kelly* and *Amazon.com* for guidance, *Kelly* and *Amazon.com* are not binding precedent in the Second Circuit. Similarly, when the case is appealed to the Second Circuit, the Second Circuit will be interested in how the Ninth Circuit handled similar cases, but it is free to conduct its own analysis.

The owners suggest that the trial court will be influenced by an earlier decision in the same district: *UMG Recordings, Inc. v. MP3.com, Inc.*²²¹ MP3.com established a "space-shift" service that allowed people who purchased a CD to access the music on the CD from different locations.²²² MP3.com copied several thousand CDs into its server, and then provided access to an entire CD to a subscriber who demonstrated that he possessed a copy of the CD.²²³ MP3.com argued that the copies it made on its server constituted fair use.²²⁴ The court rejected the argument and assessed millions of dollars of statutory damages against MP3.com.²²⁵ The owners might try to suggest that *MP3.com* demonstrates that for a work to be "transformed" in the Second Circuit for purposes of the first fair use factor, the work

217. The owners could argue that the Library Project might deprive them of the promotional value of their works, e.g., steering traffic away from their websites were they to offer search capability. See *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 202 (3d Cir. 2003). Interpreting the fourth fair use factor to incorporate promotional value of this sort significantly limits the utility of the fair use privilege because every work theoretically has some promotional value. Additionally, if a particular owner believes that a search index of the works it owns has promotional value, it can simply opt-out of the Library Project. Singleton et al., *supra* note 197, at 13. In contrast, Video Pipeline did not permit Disney to opt-out of its service displaying film trailers. *Video Pipeline*, 342 F.3d at 195.

218. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 723 (9th Cir. 2007).

219. Singleton et al., *supra* note 197, at 13.

220. *Id.* at 13–14.

221. 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

222. *Id.* at 351.

223. *Id.* at 350.

224. *Id.*

225. *Id.* at 352.

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itself must be changed, as in a parody. Under this reasoning, a mere repurposing of the work is insufficient to render a use transformative.

Google will contend that *MP3.com* is easily distinguishable by claiming that its use is far more transformative than *MP3.com*'s—it is creating a search index, while *MP3.com* simply retransmitted copies in another medium. Additionally, Google will claim that its use will not harm any likely market for the books—there is no market for licensing books for inclusion in digital indices of the sort envisioned by Google. In contrast, *MP3.com*'s database clearly could harm markets for online music, which the plaintiffs had already taken steps to enter.

Google also will insist that the Ninth Circuit correctly decided *Kelly* and *Perfect 10*. It will point to the Ninth Circuit's heavy reliance in *Kelly* on the Supreme Court's most recent fair use decision.²²⁶ *Kelly* noted that the Court in *Campbell v. Acuff-Rose Music, Inc.* held that “[t]he more transformative the new work, the less important the other factors, including commercialism, become.”²²⁷ Likewise, *Kelly* cited *Campbell* for the proposition that “the extent of permissible copying varies with the purpose and character of the use.”²²⁸ And *Kelly* followed *Campbell*'s conclusion that “[a] transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work.”²²⁹

Perhaps most importantly, *Kelly* repeated the Supreme Court's articulation in *Campbell* and *Stewart v. Abend*²³⁰ of the objective of the fair use doctrine: “This 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.’”²³¹ Google will contend that the Library Project is completely consistent with this objective in that it will ensure that creative accomplishments do not fade into obscurity. Because the Ninth Circuit so closely followed *Campbell*, and because the Second Circuit is also obligated to follow *Campbell*, Google will urge the Second Circuit to conduct a fair use analysis similar to the Ninth Circuit's.

The owners' contention that the Second Circuit applies a different standard for transformation took a blow in May 2006, when the Second Circuit issued its decision in *Bill Graham Archives, LLC v. Dorling Kindersley, Ltd.*²³² Dorling Kindersley (DK) published a coffee table biography of the Grateful Dead with over two-thousand different images.²³³ Among these were seven posters whose copyright was owned by Bill Graham Archives (BGA).²³⁴ BGA sued for infringement, but the Dis-

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

227. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2003) (citing *Campbell*, 510 U.S. at 579).

228. *Id.* at 820 (citing *Campbell*, 510 U.S. at 586–87).

229. *Id.* at 821 (citing *Campbell*, 510 U.S. at 591).

230. 495 U.S. 207 (1990).

231. *Kelly*, 336 F.3d at 817 (quoting *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997)).

232. 448 F.3d 605 (2d Cir. 2006).

233. *Id.* at 607.

234. *Id.*

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trict Court found that DK's use was fair.²³⁵ The Second Circuit affirmed, holding that DK's inclusion of reduced images of the posters in a new work was transformative.²³⁶ The court noted that

*DK's purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created. Originally, each of BGA's images fulfilled the dual purpose of artistic expression and promotion. . . . In contrast, DK used each of BGA's images as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on [its] timeline.*²³⁷

Thus, the Second Circuit, like the Ninth Circuit in *Kelly*, focused on the repurposing of the original work, rather than on changes to the work itself.²³⁸

Further strengthening the transformational nature of DK's use was "the manner in which DK displayed the images."²³⁹ The court noted that DK reduced the size of the reproductions, and cited *Kelly* as authority for the transformational nature of reproductions.²⁴⁰ The court further noted that BGA's images "constitute an inconsequential portion" of the book.²⁴¹ These factors are present in the Google Library Project as well—Google displays only snippets, which reveal far less of a work than a thumbnail. Moreover, any one work constitutes an inconsequential portion of the Google search index. In sum, the *BGA* decision suggests that a court in the Second Circuit would find Google's use transformative.²⁴²

VII. EUROPEAN HOSTILITY TO SEARCH ENGINES

It is no accident that the world's leading search engines are all based in the United States; fair use provides a far more fertile legal environment for innovation than regimes with a handful of specific exceptions.²⁴³ However, as Google and its U.S. search engine competitors expand their operations globally, they will increasingly expose themselves to infringement liability overseas.

While the fair use doctrine in the United States has allowed for the explosive growth of the Google, Yahoo, Ask, and MSN search engines, the legal environment

235. *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 333 (S.D.N.Y. 2005), *aff'd*, 448 F.3d 605 (2d Cir. 2006).

236. *Bill Graham Archives*, 448 F.3d at 615.

237. *Id.* at 609.

238. *Id.* at 608.

239. *Id.* at 611.

240. *Id.*

241. *Id.*

242. The *Bill Graham Archives* court also cited *Kelly* twice in its discussion of the third fair use factor. *Id.* at 613. Given the Second Circuit's extensive reliance on *Kelly*, the owners will not be able to marginalize it as an aberrant Ninth Circuit decision. *See id.*

243. British Commonwealth countries have adopted the U.K. concept of "fair dealing," which typically is much narrower than the U.S. concept of "fair use." Copyright, Designs and Patents Act, 1988, c. 48, § 29 (Eng.).

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in the European Union has been much more hostile to search engines. The relevant EU Directives and their national implementations do not appear to contain exceptions as flexible as § 107 of the United States Code.²⁴⁴ The EU Copyright Directive's exception for temporary and incidental copies of no economic significance probably would not shield search engines from liability for the copies they make.²⁴⁵ Similarly, the EU E-Commerce Directive has safe harbors for mere-conduit, system caching, and hosting functions, but not for information location tools.²⁴⁶ Additionally, it is far from clear that the caching safe harbor would apply to the kind of caching performed by search engines. The U.K. copyright law has a fair dealing exception, but it is narrower than fair use; it is limited to noncommercial uses for research or study.²⁴⁷

European courts also have shown little sympathy to search engines. Several European courts have found search engines' gathering of information from websites to violate national implementations of the EU Database Directive.²⁴⁸ And in February 2007, the Belgian Court of First Instance specifically found that Google's caching of websites, and subsequent display of the cache copies to users, infringes copyrights.²⁴⁹ The court considered, and rejected, the various defenses Google raised, including the exception for news reporting.²⁵⁰ Moreover, the court found that GoogleNews infringed copyrights and violated the Database Directive by copying and displaying the headlines and lead sentences from articles.²⁵¹

The absence of a broad fair use exception in European nations suggests that their copyright laws would not permit the scanning of a library of books. For this reason, in Europe Google will scan only public domain books. Fortunately for researchers of books published outside of the United States, the U.S. libraries participating in the Google Library Project possess vast collections of books published around the world. Thus, these important resources will be included in the Google search database, notwithstanding the absence of a fair use doctrine in their country of origin.²⁵²

244. See Copyright Act of 1976, 17 U.S.C. § 107 (2000).

245. Council Directive 2001/29, The Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5, 2001 O.J. (L 167) 10, 16 (EC).

246. Council Directive 2000/31, Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, arts. 13–15, 2000 O.J. (L 178) 1, 12–13 (EC).

247. Copyright, Designs and Patent Act, 1988, c. 48, § 29 (Eng.).

248. See P. Bernt Hugenholtz, *The Database Right File*, INST. FOR INFO. L., Dec. 13, 2006, <http://www.ivir.nl/files/database/index.html>.

249. SCRL Copiepresse v. Google, Gen. Role No. 06/10.928/C, 22 (Ct. of the First Instance of Brussels Feb. 15, 2007).

250. *Id.* at 31–32.

251. *Id.* at 28.

252. Of course, the search results will be viewable in other countries. This means that Google's distribution of a few sentences from a book to a user in another country must be analyzed under that country's copyright laws. (Google arguably is causing a copy of the sentences to be made in the random access memory of the user's computer.) While the copyright laws of most countries might not be so generous as to allow the repro-

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VIII. CONCLUSION

As Justice Ginsburg noted in *Eldred*, the fair use doctrine acts as one of copyright law's built-in accommodations to the First Amendment. Hence, it is particularly fitting that two of Google's endeavors that advance First Amendment values—its search engine and Library Project—depend on the fair use doctrine for their lawfulness.²⁵³ In contrast, European nations with less developed free speech traditions lack a fair use analog. These jurisdictions present a hostile copyright environment to Google's search engine and library project.

duction of an entire book, almost all copyright laws do permit short quotations. These exceptions for quotations should be sufficient to protect Google's transmission of Library Project search results to users.

253. See *supra* Parts V–VI.