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GOOGLE THE GOZERIAN AND FAIR USE SLIMED: COPYRIGHT AGAIN IN THE TECHNOCRAT'S DEN

Brian Sites*

ABSTRACT: This article considers the fair use doctrine as it applies to Google's Library Search Project and both predicts and advocates for a finding of fair use. Part I briefly reviews the past by considering the pertinent history of the fair use doctrine. It also explains the details of the current suit over Google's Library Project. Part II moves on to consider the current state of fair use analysis by reviewing 110 fair use cases and conducting simple statistical analyses. It then explains and applies the fair use doctrine to Google's project. Part III considers cases frequently compared to Google's and discusses their impact on Google's lawsuit. Part IV departs from a Google-centered analysis and examines the possible future of the four factors by suggesting modifications to the fair use doctrine.

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> "Gozer the Gozerian, Gozer the Destructor, Volguus Zildrohar, the Traveler, has come!"[1]

In the 1984 classic motion picture *Ghostbusters*, the near end of the world for downtown New York City came in the form of a three-hundred foot tall

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1. GHOSTBUSTERS (Columbia Pictures 1984). Though many Internet scripts are inaccurate for this area of the film; an accurate version may be found at Ghostbusters, http://www.angelfire.com/tx3/80schild/ghostbusters1.html (last visited Oct. 14, 2006).

Stay Puft Marshmallow Man. Sometimes bad things come in good packages. Twenty-two years later, some critics assert that yet another friendly packaged evil draws near and that the copyright end of the world for millions of authors is at hand. Who is the Copyright Destructor? The Internet search giant Google. Allegedly the harbinger of mass copyright infringement, Google faces multiple lawsuits over its recent Library and Book Search Projects.[2] What is the future for Google's aggressive projects? What would a ruling against Google really mean for copyright law and the Web? These answers and others lie down the path of the fair use doctrine and deep within the technocrat's den.[3]

I. THE PAST: THE HISTORY OF FAIR USE AND GOOGLE'S LIBRARY PROJECT

Several commentators have already explained the rich history of the fair use doctrine and its English roots.[4] However, addressing innovative copyright issues merits repeating some of that history. This part briefly reviews the past, explains Google's controversial projects, and outlines the basics of the lawsuits.

A. Fair Use Roots

Fair Use is an integral part of United States copyright law, both currently and historically.[5] The doctrine of fair use is over 250 years old[6] and is no stranger to the United States Supreme Court.[7] Throughout its history it has remained mutable and courts have rejected attempts to adopt bright-line tests,

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2. Google's two projects are heavily interrelated and yet distinct. Google Book Search scans books submitted by rights holders into a database that Internet users can search. A user can type in any word or phrase on Google Book Search's search engine and find books that contain that word or phrase. Google Library Project feeds the Book Search database using books scanned in from major libraries that have partnered with Google. Because the rights holders have not necessarily given Google permission to use the works that the libraries provide, this use invokes copyright concerns. See further discussion *infra* Part II.B.

3. Technocrat – "an adherent of technocracy . . . a technical expert." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1283 (11th ed. 2003).

4. *See, e.g.*, 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2006) (discussing fair use generally); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990) (citing WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6–17 (1st ed. 1985)).

5. A search in the LexisNexis Genfed Library, Courts File using the term "atleast25(fairuse) [atleast5(copyright)" returns 205 cases. Use of the search connector "atleast25" restricts search results to those that use the term at least 25 times and ensures return of "only documents that contain an in-depth discussion on a topic." LexisNexis, Search Tips, http://web.lexis.com/help/research/connect_frameset.asp (last visited Oct. 14, 2006).

6. Lawrence v. Dana, 15 F. Cas. 26, 44 (C.C. Mass. 1869) (using for the first time the phrase "defence of a fair use") (internal quotations omitted); Folsom v. Marsh, 9. F. Cas. 342, 348 (C.C. Mass. 1841) (discussing the elements of fair use later adopted into 17 U.S.C. § 107 (2000)); Gyles v. Wilcox, (1740) 26 Eng. Rep. 489, 490 (discussing "fair abridgement").

7. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

favoring instead its preservation as "an equitable rule of reason."[8] It is precisely this flexibility, emphasizing "case-by-case analysis,"[9] that has allowed fair use to retain the same four factor test discussed at the rule's common law christening in 1841.[10] However, this flexibility has also resulted in unpredictable application[11] and has led some to call for modification of the fair use analysis.[12]

Copyright was born in the English Statute of Anne of 1710.[13] In the course of the next nearly 300 years, the doctrine of fair use developed in England[14] and the United States and is now enshrined in the copyright statutes of both countries.[15] The purpose of copyright was to ensure that the public would continue to benefit from advances in the arts and sciences.[16] Copyright also protects against "the Ruin of [authors] and their Families" by copyright infringement.[17]

Beyond this historical context, applying the purpose of copyright is problematic. It is difficult to separate the ends of copyright (promoting knowledge) from the means (rewarding authors).[18] While authors surely produce for reasons other than remuneration, there is some force in the ancient claim that "nobody but a blockhead ever wrote except for money."[19] If we accept that

8. Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 107 (2d Cir. 1998) (citing *Sony*, 464 U.S. at 448).

9. *Harper & Row*, 471 U.S. at 561.

10. Courts had spoken of fair use prior to 1841 under the term "fair abridgement." *See generally Gyles*, (1740) 26 Eng. Rep. at 489–90. The first clear elucidation of a fair use test came in *Folsom*, and the same factors discussed are codified in 17 U.S.C. § 107. The court stated that it was necessary to "look to the nature and objects of the selections made [(Factors 1 and 2 of § 107 (the "purpose and character of the use" and "the nature of the copyrighted work"))], the quantity and value of the materials used [(Factor 3 of § 107 ("the amount and substantiality of the portion used"))], and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work [(Factor 4 of § 107 ("the effect of the use upon the potential market for or value of the copyrighted work"))] . . . ." *Folsom*, 9 F. Cas. at 348.

11. *See generally* NIMMER & NIMMER, *supra* note 4, § 13.05.

12. Judge Kozinski is one such example: "I really don't think that any theoretical fine-tuning of fair use doctrine is going to solve the problem. In fact, tonight I'm going to modestly propose that when it comes to derivative works, fair-use doctrine is a red-herring and we should just dump it." Alex Kozinski, *What's So Fair About Fair Use?: The 1999 Donald C. Brace Memorial Lecture*, 46 J. COPYRIGHT SOC'Y U.S.A. 513, 515 (1999).

13. Copyright Act, 1709, 8 Ann., c.19 (Eng.).

14. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6–18 (2d ed. 1995).

15. 17 U.S.C. § 107; Copyright, Designs and Patents Act, 1988, c. 48, §§ 29–30 (U.K.).

16. The first United States copyright statute stated it was "for the encouragement of learning." Copyright Act of 1790, 1 Stat. 124 (repealed 1831).

17. 8 Ann., c. 19.

18. *See generally, e.g.*, Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L.REV. 1197 (1995) (discussing the asserted purposes of copyright and their limited utility).

19. This quote is attributed to Dr. Samuel Johnson and is available at: Quotable Quotes on Writers and Writing (Feb. 9, 2006), http://www.logicalcreativity.com/jon/quotes.html#j.

remuneration is necessary to encourage new creations[20] then it immediately becomes clear that the means and ends are inseparable: if we truly want to promote new creations (the ends) we must necessarily pay authors (promote the means). The "spirit" of copyright, however, offers little guidance in practice: how are courts to balance the two when they are inextricably linked?[21]

In some ways the spirit of copyright law has, however, helped Congress and courts produce a tool for balancing remuneration against progress: the fair use doctrine.[22] Fair use is codified in 17 U.S.C. § 107 and requires that courts apply a four factor test to each case.[23] While courts have rarely complained it offers too little guidance,[24] leading scholars have criticized § 107 as vague concerning how to apply and how to balance the four factors in the aggregate.[25] This claim finds support in the courts as well: for example, in two of its three major fair use decisions, the Supreme Court split and all three cases have been reversed on each appeal.[26] The resulting unpredictability[27] is undesirable but, given the desire to preserve a "case-by-case determination"[28] there may be no alternatives.

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20. It is unclear if this assumption is as forceful as it is often made to appear. History is replete with instances of hobbyists creating great masterpieces. In fact, responding to Dr. Johnson's quote, *supra* note 19, Thomas Green said: "Instead of marveling with Johnson, how anything but profit should incite men to literary labor, I am rather surprised that mere emolument should induce them to labor so well." Quotable Quotes on Writers and Writing (Feb. 9, 2006), http://www.logicalcreativity.com/jon/quotes.html#green. Regardless of whether remuneration is required to encourage new works, at least some of the protections copyright law affords extend beyond what encouraging new works requires. *See, e.g.*, Sterk, *supra* note 18, at 1225–26 (arguing that architectural design protection does not promote new architecture).

21. "Thus, CBS contends, the public benefit gained from the encouragement of historical and biographical works outweighed the copyright owner's interest in this case." *Roy Export Co. Establishment of Vaduz, Liechtenstein, Black Inc. v. Columbia Broad. Sys. Inc.*, 503 F. Supp. 1137, 1143–44 (S.D.N.Y. 1980) (internal citations omitted).

22. 17 U.S.C. § 107 (2000).

23. The four 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.

Id.

24. Leval, *supra* note 4, at 1106.

25. *See, e.g.*, NIMMER & NIMMER, *supra* note 4, § 13.05.

26. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (no split); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (6–3 decision); Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417 (1984) (5–4 decision); NIMMER & NIMMER, *supra* note 4, § 13.105, at 13-156 to -157 & nn.10–12 (noting that each of the three cases was reversed at each level of appeal).

27. *See generally* NIMMER & NIMMER, *supra* note 4, § 13.05.

28. *Harper & Row*, 471 U.S. at 549.

Throughout the development of copyright it has been technological advance that has led to substantial modifications of fair use.[29] From the beginning of copyright, courts recognized the importance of applying existing judicial doctrine cautiously to technological innovations.[30] History teaches that, to be effective, courts must tread carefully in the technocrat's den; if they are overly restrictive, they may inhibit progress.[31] Alternatively, if courts are too permissive, their rulings may not effectively prevent infringement.[32] Finding the appropriate midpoint has proven difficult.

B. Google Book Search and Google Library

Google is the most popular search engine in the United States.[33] Its name has become synonymous with searching the Internet[34] and, largely through the advertising revenues it generates on its search engine page,[35] Google has been very successful.[36] The company's self-proclaimed goal is to make all of the world's information searchable.[37] As part of this mission, Google announced the Book Search project in October 2004.[38] Using the Book Search database, searchers can query the actual text of all the books in the database, in a manner similar to searching the Web. Books are included in the Book Search Project

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29. For a discussion of the development of copyright, see the sources listed *supra* note 4.

30. "[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science." Carey v. Kearsley, (1802) 170 Eng. Rep. 679, 681 (K.B.).

31. *See, e.g.*, *Sony*, 464 U.S. at 431. Explaining the need for caution in considering new technologies, especially when guidance from Congress is lacking, the Court stated, "[i]n a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests." *Id.*

32. Siva Vaidhyanathan, *Supreme Court's Unsound Decision*, SALON.COM, June 28, 2005, http://dir.salon.com/story/news/feature/2005/06/28/grokster/index_np.html (concluding that the Supreme Court erred in Grokster and that it will stifle technology).

33. Danny Sullivan, *Nielsen NetRatings Search Engine Ratings*, SEARCH ENGINE WATCH, Aug. 22, 2006, http://searchenginewatch.com/showPage.html?page=2156451.

34. Dictionary.com, http://dictionary.reference.com/browse/google (last visited Oct. 9, 2006).

35. While Google is a diverse company, offering a range of services, the majority of its revenue comes from advertising. *See, e.g.*, Google Investor Relations, Google Announces Third Quarter Fiscal 2005 Results, http://investor.google.com/releases/2005Q3_ earnings_google.pdf (last visited Oct. 27, 2006).

36. *See, e.g.*, *id.*

37. Google Corporate Information, Company Overview, http://www.google.com/corporate/ index.html (last visited Oct. 27, 2006) ("Google's mission is to organize the world's information and make it universally accessible and useful.")

38. Google Book Search, News & Views, http://books.google.com/googlebooks/newsviews/ history.html (last visited Oct. 27, 2006). The Google Book Search service was previously named "Google Print" and is directly connected to their Library Project. Because of their integrated nature in the lawsuit, the title "Google Book Search" is used to refer to the partnering with the Library Project that manifests in the Google Book Search Web site. As discussed infra, this Part, libraries that have partnered with Google are also making their books available to Google. Once scanned under the Library Project, the books are included in the Book Search database.

when publishers submit copies of their works to be scanned and included.[39] Once a user types in a search, a list of the books containing the search phrase is displayed on the screen. By clicking on these books, the context of the phrase's use in that book is viewable. How much context is provided depends on two factors: the copyright status of the book, and, if it is still under copyright, how much the rights holder has given permission to display. Under the Book Search Project, because books are only provided by publishers, the scope of this permission is easily negotiable.[40] Though Google has not been entirely forthcoming on how many books are currently included, some have speculated it includes over 10,000.[41]

Google describes the purpose of Google Book Search as "to help you discover books and learn where to buy or borrow them, not read them online from start to finish. It's like going to a bookstore and browsing—with a Google twist."[42] To avoid cover-to-cover browsing, Google has implemented several security protocols. For example, unless a book is in the public domain or a publisher has given permission to do so, searchers are not able to view the full text of the book. Instead, only snippets—no more than three sentences—are viewable. Google calls this "Snippet View" and analogizes it to a card catalog.[43] Once a user has identified whether the book is one she needs, Book Search also lists links that assist in obtaining the book, either through a library or through a vendor that sells it.

The Book Search Project is, according to Google, very secure as the scanned documents are stored on Google's "secure servers."[44] To use Book Search, the searcher must be signed in to Google, which requires having an account. Creating an account requires providing a current email address, password, completing a word verification,[45] and agreeing to the Terms of Service. Additionally, Google states in its Digital Millennium Copyright Act restrictions policy that it will terminate the accounts of "repeat [copyright] infring-

39. Google Book Search, About Google Book Search, http://books.google.com/googlebooks/about.html (last visited Oct. 27, 2006). *See also* Wikipedia, Google Book Search, http://en.wikipedia.org/wiki/Google_Print (last visited Oct. 9, 2006).

40. Google Book Search, About Google Book Search, *supra* note 39.

41. Wikipedia, *supra* note 39. Noticeably, Wikipedia neither provides a citation for this, nor is it clear which of the authors contributing to Wikipedia added it. As of June 2006, personal correspondence with Wikipedia by the author indicates they are working on this error. Email from Michelle Kinney, Volunteer, Wikipedia, to author (June 17, 2006 03:06:00 EST) (on file with author).

42. Google Book Search, Google Book Search Help Center, Why Can't I Read the Entire Book?, http://books.google.com/support/bin/answer.py?answer=43729 (last visited Oct. 30, 2006).

43. Google Book Search, About Google Book Search, *supra* note 39.

44. Google Book Search, Authors: Common Questions, http://books.google.com/googlebooks/author_faq.html (last visited Oct. 27, 2006).

45. A "word verification" is a process of displaying oddly shaped words or numbers, sometimes overlayed with lines of different colors or shapes. Blogger, Help: What Is the Word Verification Option?, http://help.blogger.com/bin/answer.py?answer=42520 (last visited Nov. 20, 2006). The user types the letters or numbers displayed with the lines into a box and, if they are entered correctly, the user passes the test. *Id.* Because they require a human being's visual skills to decipher, their primary design is to avoid spam or programs that create accounts automatically. *Id.* Word verification is becoming increasingly common on the Web. *Id.*

ers" in "appropriate circumstances."[46] Google also points out on its "Common Questions" page under "Author Help" that, unless a publisher instructs otherwise, the copy, save, and print functions are disabled when viewing pages of the books on Google Book Search.[47]

Google Book Search is a for-profit enterprise. Advertisement space on the results pages provides the financial fuel for the project, and Google shares this revenue with participating rights holders.[48] Google also shares search data with the publisher, letting it know how popular its book is on Google Book Search.[49]

Despite this voluntary sharing of benefits with rights holders, Google Book Search suffers from a core weakness: it depends on publishers to submit works to Google. Under the Google Book Search Model, the burden of helping to create a comprehensive Internet library would be on the collective rights holders—literally millions of authors and publishers throughout the world. The Google Library Project, on the other hand, reverses this burden, which allows the database to grow much faster.

On December 14, 2004, Google announced a plan to create a massive searchable database: the Library Project.[50] The Library Project is a partnership among the University of Michigan, Harvard University, The New York Public Library, Stanford University, Oxford University, and Google.[51] Through the partnership, Google will digitize every title in each of the five libraries' collections and, in return, the libraries will receive an electronic copy of the works Google scanned from that library's collection.[52] The search features of the Google Book Search database will remain unchanged in the Library Project: users will still not be able to see more than three sentences of copyright-protected works unless the publisher has given Google permission, and advertising revenue will still be shared with participating publishers.[53] However, the burden is placed on copyright holders to "opt out" of the program if they wish that their works not be a part of the database.[54] Opting out requires that the copyright holder identify herself as such, provide contact information, an email address, and a password.[55]

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46. Google, Digital Millennium Copyright Act, http://books.google.com/books_dmca.html (last visited Oct. 29, 2006).

47. Google Book Search, Authors: Common Questions, *supra* note 44.

48. Google Book Search, Google Book Search Help Center, How Much Will I Earn?, http://books.google.com/support/partner/bin/answer.py?answer=17894&topic=333 (last visited Oct. 29, 2006).

49. Google Book Search, Information for Publishers and Authors about the Library Project, http://books.google.com/googleprint/publisher_library.html (last visited Oct. 29, 2006).

50. Press Release, Google, Google Checks Out Library Books (Dec. 14, 2004), http://www.google.com/press/pressrel/print_library.html.

51. *Id.*

52. *Id.*

53. Google Book Search, Information for Publishers and Authors about the Library Project, *supra* note 49.

54. *See, e.g.*, Google Book Search, Library Project Exclusion Registration, https://books.google.com/partner/exclusion-signup (last visited Oct. 26, 2006).

55. *Id.*

In summary, while the Library Project and Book Search Project are distinct entities, they heavily interrelate. The distinction is simple: the Library Project involves scanning books into a database, whereas the Book Search Project takes that database, integrates in any display preferences for participating publishers, and allows users to search the text of the scanned books. Thus, technically, it is the Library Project that invokes copyright concerns, as it involves actual copying without explicit authorization from the copyright owner. But because the Book Search Project does the actual searching and users click into the service under links named "Google Book Search," this article refers to the Google Book Search Project as the subject of the lawsuit.

Google's projects have not been without detractors. The Authors Guild[56] and the Association of American Publishers[57] have both filed suit in the Southern District of New York.[58] Google has also drawn criticism from the Association of American University Presses[59] while simultaneously attracting competition in the book-searching market.[60] Because it is undisputed that Google is making a complete copy of the copyright-protected works and that copying is one of the enumerated exclusive rights granted by § 106,[61] Google will have to rely on some defense. Likely, that defense will be fair use.[62] The ability to search all of the world's books in the foreseeable future may thus hinge on whether Google's use is in fact "fair."[63]

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56. Press Release, Authors Guild, Authors Guild Sues Google, Citing "Massive Copyright Infringement" (Sept. 20, 2005), http://www.authorsguild.org/news/sues_google_citing.htm.

57. Press Release, Ass'n of Am. Publishers, Publishers Sue Google Over Plans to Digitize Books (Oct. 19, 2005), http://publishers.org/press/releases.cfm?PressReleaseArticleID=292.

58. The Authors Guild complaint is available at http://wendy.seltzer.org/media/AuthorsGuild-v-Google.pdf (last visited Oct. 19, 2006). The Association of American Publishers complaint is available at http://publishers.org/press/pdf/40%20McGraw-Hill%20v.%20Google.pdf (last visited Oct. 19, 2006). *See infra* Part III.A for a discussion on *MP3.com*, another case in this area.

59. Ass'n of Am. Univ. Presses, Google Book Search née Google Print, http://aaupnet.org/aboutup/issues/gprint.html (last visited Oct. 19, 2006).

60. A9.com, an Amazon.com search engine, already offers "Search Inside the Book." *See* Amazon.com, Search Inside the Book, http://www.amazon.com/Search-Inside-Books/b?le=UTF8&node=10197021(last visited Nov. 14, 2006). Yahoo.com has recently joined the book-searching market, although its version will search only public domain works. *See* Elinor Mills, *Yahoo To Digitize Public Domain Books*, CNET News.com, Oct. 2, 2005, http://news.com.com/Yahoo+to+digitize+public+domain+books/2100-1038_3-5887374.html. Microsoft has also entered the book-searching arena via its MSN Book Search, set to launch in 2006. Katie Hafner, *Microsoft to Offer Online Book-Content Searches*, N.Y. TIMES, Oct. 26, 2005, at C6 [hereinafter Hafner, *Microsoft to Offer*].

61. 17 U.S.C. § 106 (2000).

62. It is unlikely Google will defend with the other traditional defenses used in copyright. *See* discussion *infra* Part II.D; *see also* Elisabeth Hanratty, Note, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 10 (2005) (concluding, unlike this article, that Google's use is not a fair use); *infra* note 180 (discussing other possible defenses that could be raised).

63. *See infra* Part III.B (discussing alternative approaches to Google's present plan).

II. THE PRESENT: THE FOUR FACTORS OF GOOGLE'S COPYRIGHT END OF THE WORLD[64]

Under § 107, the court will apply four nonexclusive factors to determine whether Google's copying is a fair use. The four factors examine: (1) the purpose and character of the use, (2) the nature of the works used, (3) the amount of the works used, and (4) the impact on the market by the infringing use. The factors, however, are not given equal weight in the analysis. This part considers the historical weight of each factor using basic statistical analysis, and then turns to applying the four factors to Google's Book Search Project.

A. How Courts Consider the Four Factors: Frequency and Correlation Data

Courts have given the four factors different weights throughout the history of fair use analysis. While courts have sometimes explicitly stated that different factors receive more weight than others, other times factors theoretically given great weight do not parallel the final verdict. So what are courts basing decisions on? To paint a quantitative picture, I statistically analyzed 110 fair use cases to produce frequency[65] and correlation data.[66] The correlation data results, presented to parallel the method employed by Professor David Nimmer, supplements the frequency data and is displayed below.[67]

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64. *See* Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761, 814–19 (2006) (arguing that a proper interpretation of fair use would permit the Google Book Search Project, but fearing that narrow judicial application in recent cases would condemn it).

65. Frequency was analyzed by listing the possible factor-combination and holding scenarios, as Table 2 shows, and counting the number of times each combination occurred. For the frequency analysis, only "victory" on a factor was counted, because a court ruling the factor as neutral does not have a necessarily straight-forward meaning. Thus, the frequency table below reflects the number of times: 1) "fair use" was concluded, with the court citing the factors listed as supporting it, and 2) "unfair" use was concluded, with the court citing the factors listed as supporting it.

66. A correlation analysis reveals how things are related to each other. For example, you might say that ice cream sales are correlated with hot weather, meaning that as the temperature outside increased, ice cream sales would also increase. Correlations are measured on a scale from "–1" to "1". A "–1" means that for every one step variable X takes forward, variable Y takes exactly one step backwards. A "1" means that for every step X takes forward, Y takes exactly one step forward. Correlation does not demonstrate causation. In other words, although it reveals the two things being studied are related, it does not mean that the hot weather is really what makes ice cream sales go up. It could be, for example, that more ice cream trucks are circulating in neighborhoods in the summer.

67. David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003). Correlations are presented demonstratively here because, strictly speaking, this data is not linear, it is categorical. Thus, it violates the assumptions of correlation statistics. However, continuity (linearity) can be roughly assumed between "Unfair," "Neutral," and "Fair," in parallel to using correlations on other categorical data such as Likert scales. Finally, it is not that far-fetched to suspect that, in the mind of judges handling copyright claims, "Unfair," "Neutral," and "Fair" occurs in a "–1 to 1" type "continuous" scale.

Table 1[68] shows a sample of the cases used as raw data for the analysis; the full table and statistics are available in Appendix A.

CASE	FOUR FAIR USE FACTORS AND HOLDING				
Name and Citation	(1) Purpose & Character of Use	(2) Fact vs. Fiction	(3) Amount Used	(4) Effect on the potential market	Holding
American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994).	UNFAIR	FAIR	UNFAIR	UNFAIR	UNFAIR
Sega Enterprises, Ltd. v. Maphia, 948 F. Supp. 923 (W.D. Mich. 1994).	UNFAIR	UNFAIR	UNFAIR	UNFAIR	UNFAIR
Robinson v. Random House, Inc., 877 F. Supp. 679 (N.D. Cal. 1995).	UNFAIR	FAIR	UNFAIR	UNFAIR	UNFAIR
Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995).	UNFAIR	UNFAIR	FAIR	FAIR	UNFAIR

Table 1. Excerpt from full Table of Cases results.

68. This table and analysis is facially similar to Professor Nimmer's table in *"Fairest of Them All" and Other Fairy Tales of Fair Use*, but it is functionally quite different. *Id.* at 269–77. This table shows the *court's* conclusion on each factor and its subsequent holding; "NEUTRAL" indicates the court concluded the factor favored neither party. Nimmer's table shows the conclusions he believed the court *should have reached. Id.* at 282 n.70 ("As previously noted, the chart does not track the analysis actually employed in fair use cases....") For example, for *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, Nimmer's table lists Factor 1 as "FAIR," while, as this table notes, the court concluded it was "UNFAIR," saying "[o]n balance Plaintiff's should prevail on this issue . . . ." 900 F. Supp. 1287, 1300 (C.D. Cal. 1995).

This table comes from examining 110 fair use cases and reviewing the pertinent sections to objectively ascertain as best as possible the court's stated conclusion on each factor. Because the purpose of the table is to illuminate what courts are doing, it includes cases of every sort; in this way, it is again similar to Nimmer's table (which also included such cases). *Id.* at 278 ("First, the obligatory disclaimers. Every column in the chart is controversial . . . .").

Table 2 reveals the frequency analysis results for the 110 cases:

Frequency Data								
	COURT CONCLUDES USE IS							
Fair Use Factor Combinations	FAIR USE		UNFAIR USE		TOTAL FAIR & UNFAIR		Cumulative FAIR	Cumulative UNFAIR
	#	%	#	%	#	%	#	
1	0	0.00%	0	0.00%	0	0.00%	51	50
2	0	0.00%	0	0.00%	0	0.00%	22	35
3	0	0.00%	0	0.00%	0	0.00%	33	48
4	2	3.64%	0	0.00%	2	1.82%	53	49
12	1	1.82%	1	1.82%	2	1.82%		
13	0	0.00%	3	5.45%	3	2.73%		
14	9	16.36%	1	1.82%	10	9.09%		
23	0	0.00%	0	0.00%	0	0.00%		
24	1	1.82%	2	3.64%	3	2.73%		
34	0	0.00%	0	0.00%	0	0.00%		
123	1	1.82%	2	3.64%	3	2.73%		
124	9	16.36%	3	5.45%	12	10.91%		
134	22	40.00%	16	29.09%	38	34.55%		
234	1	1.82%	3	5.45%	4	3.64%		
1234	9	16.36%	24	43.64%	33	30.00%		
Totals	55	100.00%	55	100.00%	110	100.00%		

Table 2. Frequency data and number of times each factor combination paralleled final holding. See note 65 for a description of frequency analysis.

Essentially, Table 2 shows how often lawsuit parties won or lost overall based on a particular combination of the four fair use factors. The factor combinations listed down the far-left side of the table were cited by the court as supporting a finding of fair use the number of times listed under the "FAIR USE" column, and cited as supporting a finding of unfair use the number of times listed under the "UNFAIR USE" column. The "TOTAL FAIR & UNFAIR" column lists the number of times the factors were cited to support whatever conclusion the court came to: basically, it adds the prior columns together for a "big picture." Finally, the last two columns, partially grayed out, list the number of times a single factor was cited as matching the end result. For example, under this column, Factor 1—looking at all the possible combinations it occurs in—was cited 51 times to support a "fair use" conclusion and 50 times to support an "unfair use" conclusion.[69] But what do these numbers tell us?

The data show that, not surprisingly, Factors 1 and 4 are the most commonly cited "victory" factors (under the CUMULATIVE columns). This roughly equates to saying they are given the most weight in the overall analysis. Additionally, the table shows the frequency with which factors are used to reach a conclusion: in the fair use and unfair use contexts, the "134" combination is common, showing again the relative unimportance of Factor 2. Somewhat surprisingly, it also shows that "shutouts" (winning all factors) occurs more in the unfair use context than the fair use context. While the data cannot explain the reason, we can speculate that because fair use is a defense, it is applied more carefully when uses are objectively unfair than when they are objectively fair.[70] Finally, the table also shows perhaps the most interesting result of the analysis: the only factor that a user has won and still successfully claimed a fair use, despite losing all other factors, is Factor 4.

The raw data from the 110 cases can also be used to find correlations between the variables (the four factors and the court's holding). Coding fair as "1," neutral as "0" and unfair as "–1," I correlated the case holdings to each factor, as summarized in Table 3:[71]

69. These numbers were obtained by counting each factor combination that included Factor 1, then Factor 2, and so on.

70. In other words, if a use really is fair, the court should have no trouble concluding the copyright holder should not be compensated. Because after all, if the use is fair, the rights holder is not entitled to compensation. But, when a use is not fair, the court would be inclined to swiftly strike it down, because it inappropriately risks defeating the copyright holder's valid expectation of compensation.

71. See Appendix B to view the data used for correlation in Table 3.

	Factor 1	*Factor 2*	*Factor 3*	*Factor 4*	*Holding*
Factor 1	1				
Factor 2	0.075836	1			
Factor 3	0.633896	-0.0581	1		
Factor 4	0.734191	0.105194	0.558622	1	
Holding	0.862567	0.170504	0.604598	0.874028	1

Table 3. Correlation between Fair Use Factors and Court Holdings

Table 3 shows that Factor 1 and Factor 4, represented by the "Factor" columns, are most correlated with the court's conclusion, represented by the "Holding" entry, in fair use cases. This indicates that, when a court finds that Factors 1 or 4 support fair use, that court is likely to find the use fair; and conversely, when the court finds that Factors 1 or 4 support a determination of unfair use, that court is also likely to conclude that the use is unfair overall. This is not surprising, as there are multiple instances in which the fair use analysis expressly turned on either Factors 1 or 4.[72] It is also largely congruent with the spirit of copyright law because it weights most heavily the right to compensation (Factor 4) and the benefit to the public (Factor 1).[73]

Somewhat surprisingly, Factors 1 and 4 are on relatively equal ground statistically. This result is odd given the Supreme Court's statement that Factor 4 is to be given the most weight among the factors.[74] The results also show that Factor 2 is weakly predictive in the fair use analysis. This is, again, not a foreign sentiment in court opinions.[75] To a lesser extent, Factor 3 is also not a strong predictor when juxtaposed with Factors 1 and 4. Nevertheless, the correlation data show Factor 3's weight as surprisingly high, demonstrating that Factor 2 is the weak factor and suggesting that Factor 3 may play more of a role in the analysis than the court opinions give it credit for.[76] Finally, the statistics show that Factors 1, 3, and 4 are correlated with each other.

The statistics, more generally, offer insight into how previous cases have been decided and into how courts are treating each factor in the decision-making process. They show that the Supreme Court's emphasis on Factor 4 has not been overlooked by lower courts. In showing the strong link between Factor 1 and Holding, they also provide some support for putting Factor 1 on the same level as Factor 4 analytically. Finally, the statistics provide additional reason to examine the current test that calls for balancing the factors. What

72. *Compare, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579–85 (1994), *and* Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114–15 (2d Cir. 1998) (both focusing on Factor 1 in two parody cases) *with* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566–69 (1985) (focusing on Factor 4 as the most important).

73. This is particularly true when Factor 1 includes an analysis of societal benefit. See discussion *infra* this Part. Factor 1 also reflects the importance of whether the accused work is transformative, which is an important aspect of the social benefit that the fair use doctrine is designed to promote.

74. *Harper & Row*, 471 U.S. at 539.

75. *See* discussion *infra* this Part.

76. *But see* discussion about causation vs. correlation *infra* this Part.

utility does Factor 2 really have in such a balancing if it is weighted so weakly? Isn't saying that creative works get additional protection wholly vacuous if courts are not really giving them such protections? And if the strength of Factor 3 is also somewhat weak comparatively, should its role in the analysis change?

What don't the statistics show? In a word: causality. Both the frequency and correlation analyses—all statistics in fact—do not prove a causal link between variables. So here, it remains entirely possible, as has been suggested elsewhere,[77] that courts simply reach the conclusion they think they should reach, then align the factors to support it. This theory might explain, for instance, Factor 3's surprisingly high correlation to "Holding" in Table 3, because it asks if the amount used was "in proportion to," and also whether it was a "necessary" amount: very malleable standards.[78] It might also explain the high correlation between Factors 1, 3, and 4. We hope it is not true that judges fit the reasoning to the result they secretly seek, because this is not what the four factors are designed to do. Nevertheless, even assuming judges adhere to the purpose of the factors and rigorously work through each to find the result, the statistics still cannot truly show causation. They can and do, however, paint a quantitative picture of a largely qualitative phenomenon.

B. Google's Use

In applying the four fair use factors to Google's use, the court should find: (1) that Factor 1 favors Google because, despite being commercial, Google's use is highly transformative and of great public benefit; (2) that the second factor favors neither party strongly but may lean towards Google because the works (both creative and factual) are used in a nontraditional manner; (3) that the third factor favors Google because the copying of entire works is proportional to the project's requirements and; (4) that the fourth factor favors Google because the derivative works test favors fair use as the database in no way supersedes the original and Google's use is not in a traditional or reasonable derivative market. However, as discussed above, the analysis will likely focus primarily on the first and fourth factors.

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77. Nimmer, *supra* note 67.

> By now, we have come far enough to realize that, pious words notwithstanding, it is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases . . . . The clash of the nine justices themselves in *Harper & Row* demonstrates that jurists up to the Supreme Court level feel the need to align the factors unanimously in favor of the desired result, perceiving that any deviation could be a fatal chink in the armor.

Id. Additionally, the statistics cannot explain the possibility Nimmer suggests that there are even cases where the clear result is that all four factors favor one result, yet the court reaches exactly the opposite. *Id.* at 282–83.

78. After all, if the use is not fair, taking *any* is too much. If the use is fair, taking the entire work is sometimes permissible. *See infra* Part II.E for additional discussion on the analysis of Factor 3.

C. Factor 1: The Purpose and Character of the Use

1. *Background to Factor 1*

Factor 1 requires an analysis of "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[79] The preamble to § 107 lists several examples of uses likely to be determined as fair.[80] Unfortunately, no further guidance on what purposes and uses might otherwise qualify as fair is given. Courts have addressed this factor by considering four different elements of "the purpose and character of the use":[81] (1) whether the infringing use is commercial, (2) the defendant's behavior, (3) whether the use is transformative, and (4) the public benefit of the project.[82] Though complex, this analysis is important because, as the statistics above illuminate, Factor 1 is one of the two most influential fair use prongs.

Courts once held that a commercial use is presumptively unfair.[83] However, the Supreme Court has subsequently retreated from this position, recognizing that this would "swallow nearly all of the illustrative uses" in the statute's preamble as they, too, are often commercial.[84] The commercial nature may still lean towards a finding of unfair use if the use is exploitative of the copyright "without paying the customary price."[85] Or, as the Ninth Circuit has phrased it, if the use is "not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use."[86]

Under Factor 1, courts also consider the "propriety of the defendant's conduct."[87] Prior to *Campbell*, some critics called consideration of defendant's conduct a "false factor," employed simply to justify the court's ruling.[88] But in *Harper & Row*, the Court recognized that "[f]air use presupposes good faith and fair dealing" and a finding of bad faith weighs against a finding of fair use.[89] One such example is *Rogers v. Koons*, where an artist tore a copyright notice off a note card depicting a photo before sending the photo to a lab to be the basis of a sculpture.[90] The defendant did this, presumably, so the lab would be willing to create the sculpture he had commissioned. The court found this

79. 17 U.S.C. § 107 (2000).

80. The preamble lists such likely fair uses as: "criticism, comment, news reporting, teaching . . ., scholarship, or research . . . ." *Id.* Though not dispositive, it is interesting to note that Google's service strongly promotes research and would be very useful to several other listed fair uses.

81. *Id.*

82. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 818, 820 (9th Cir. 2003) (discussing element 4); NIMMER & NIMMER, *supra* note 4, § 13.05[A][1][b][d] (discussing elements 1–3).

83. Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 451 (1984).

84. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (citing J. Brennan's dissent in Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 592 (1985).

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

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

87. *Harper & Row*, 471 U.S. at 562 (citing NIMMER & NIMMER, *supra* note 4, § 13.05[A]).

88. Leval, *supra* note 4, at 1125–26.

89. *Harper & Row*, 471 U.S. at 562 (citing Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968)) (internal quotations omitted).

90. Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992).

evidenced bad faith, supporting the conclusion that Factor 1 weighed against him.[91] But the inquiry into bad faith is not always so simple. For example, bad faith is not necessarily evidenced by lack of permission; a defendant denied permission to use a copyright-protected work who uses it anyway is not necessarily acting in bad faith.[92] Ultimately, the Court's most recent consideration of this element of Factor 1 was only brief and in a footnote, and it declined to indicate how much weight bad faith received.[93] It is thus unclear how influential the propriety of the defendant's conduct is in the aggregate fair use analysis. It is clear, however, that bad faith does not favor fair use, and that good faith, to some extent, does favor fair use.

Courts also consider whether the infringing use is "transformative."[94] A transformative work is one that "adds value to the original . . . [and uses] copyrightable expression . . . as raw material, transformed in the creation of new information, new aesthetics, new insights and [new] understandings . . . ."[95] "The central purpose of this investigation is to see . . . whether the new work merely supersedes the objects of the original creation or instead adds something new. . . [I]t asks, in other words, whether and to what extent the new work is transformative."[96] However, even with this guidance, it remains unclear when courts will declare a work transformative.[97] This is all the more problematic given that some courts treat "'not transformative' as a shorthand for 'not fair,' and correlatively 'transformative' for 'fair.'"[98] But, when a work is transformative, it not only tilts Factor 1 towards "fair use," it also causes other subfactors like commercialism to weigh less against a finding of fair use.[99]

Finally, Factor 1 sometimes involves consideration of the societal benefit flowing from the use.[100] Oddly, courts do not always make explicit their consideration of the benefit society will derive from the use, but shades of this concern color almost every discussion of fair use. When courts do directly contemplate the benefit to the public the infringing use offers, they may invoke it at any point in the analysis, not just under Factor 1. For example,

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91. *Id.* at 309.

92. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 n.18 (1994).

93. *Id.*

94. "Transformative" was originally coined by Judge Pierre N. Leval and is similar to a "productive use." *See generally* NIMMER & NIMMER, *supra* note 4, § 13.05[A][1][b], at 13-166 & n.82.

95. Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998) (quoting Leval, *supra* note 4) (internal quotations omitted).

96. *Campbell*, 510 U.S. at 579 (internal quotations and citations omitted).

97. NIMMER & NIMMER, *supra* note 4, § 13.05[A][1][b], at 13-168 to -169 (discussing disparate holdings).

98. *Id.*; *see also* discussion and statistics of the weight of the factors *supra* Part II.A.

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

100. Sony Computer Entm't Am., Inc. v. Bleem, L.L.C., 214 F.3d 1022, 1027 (9th Cir. 2000).

while the Ninth Circuit has considered public benefit under Factor 1,[101] the Second Circuit once characterized Factor 4 as balancing "*the benefit the public will derive* if the use is permitted and the personal gain the copyright owner will receive if the use is denied."[102] Wherever the consideration is made, the societal benefit analysis is useful. Because part of the purpose of copyright law is to benefit the public, an inquiry into how much the defendant's use serves the public is only logical. Copyright was intended to promote "the enrichment of society,"[103] and fair use helps ensure "public benefit."[104] Though courts have not given this element much express weight, it has great utility as one of only two considerations that speak directly to the spirit of copyright law.[105]

2. *Application to Google*

The analysis here shows that Factor 1 favors Google. While Google's use is commercial,[106] its commercialism is outweighed by its transformative nature. On this point alone, the factor favors a finding of "fair;" Google's apparent good faith, fair dealing and the societal benefit of its use are persuasive but superfluous aspects of the Factor 1 analysis. The greatest source of debate under Factor 1 in Google's lawsuits will likely be over whether the use is transformative.

The transformative inquiry is the bulk of the Factor 1 analysis, but the precedents do not clarify exactly what is and is not transformative. Arguably, the essence of a transformative use is one that puts the work to use in an entirely different manner. For example, consider a fictional Google project, the Google Café. In Google Café, Google has built all of its booths, chairs and tables out of thousands of full-color photocopies of books, bound with their titles clearly visible; none of the books can be opened, however.[107] Google's patrons are invited to eat and drink in an atmosphere of literary diversity; drinking coffee while reclining on *Catcher in the Rye* or conversing around a table built out of *World Almanacs*. The Café Project is sued for using copy-right-protected works in a commercial manner without copyright holders' permission. Are Google Café's uses permissible? The use of the books is transformative because, although the books were created to entertain, inform, or appease, now they are employed as furniture—a completely different use. Google Book Search has done the same: books once used for entertainment are

101. Kelly v. Arriba Soft Corp., 336 F.3d 811, 818, 820 (9th Cir. 2003); *Sony Computer Entm't Am.*, 214 F.3d at 1027. The Ninth Circuit has also analyzed societal benefit under Factor 4. *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 804–05 (9th Cir. 2003).

102. MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981) (emphasis added).

103. Leval, *supra* note 4, at 1111; *see also Campbell*, 510 U.S. at 579.

104. *Kelly*, 336 F.3d at 820.

105. The second is Factor 4, which contemplates economic harm, for example, remuneration to authors.

106. The database it creates may be useful for research, criticism and comment but it is being created to generate additional revenue for Google via advertising.

107. For the purposes of this analogy, we assume that Google photocopied the insides of the books even though they cannot be opened.

now used like a card catalog. The technological aspect of Google's use should not confuse the transformativeness analysis.

But is the transformative nature of Google's use undercut by that Google Book Search does not add new expression? The Supreme Court has never required that a fair use add new expression, instead it has only required that a new use add "something new, *with a further purpose or different character*, altering the first with new expression, *meaning, or message* . . . [to be considered] transformative."[108] One way that a work may be transformative is if it adds new expression, but this is not the only way. Because granting a copyright requires expressive elements, Google may not be able to copyright its projects. Nevertheless, the fair use defense is still available despite the unavailability of copyright protection itself. Google's use even advances the examples in preamble of § 107: the database enhances scholarship and research.

The transformative inquiry thus asks whether the otherwise infringing use is distinct from the use or purpose the copyright-protected works serve. Here, the original purpose of the books Google is copying is entertainment and education. Google is not duplicating these purposes because the purpose of its use is information location. In a very literal way, Google is using the original works as raw material which it transforms into new information.[109] Google's copying books into memory uses copyright-protected materials in total disregard for what those materials say, stand for, invoke or represent—perhaps a first in the history of fair use analysis. To the Google search engine, these works are no more than an assembly of letters, a pool of words that are meaningful only when a user specifies a certain subset. Google uses copyright-protected materials in a manner wholly separate from their original and traditional purposes. Because Google's transformative use renders its commercial status—the only element of Factor 1 that does not favor a finding of fair use—less significant, on a transformative analysis alone Factor 1 favors Google.

Google may also find support based on the propriety of its behavior. It appears Google has acted in good faith and has, on multiple occasions, taken steps to accommodate those who object to its projects.[110] Google has also resisted opportunities to compete directly with book stores and libraries by refusing, for example, to provide downloadable or printable copies of documents that are in the public domain.[111] The issue therefore comes down to whether Google's continuance despite lack of permission, and the opting-out requirement that Google imposes on copyright holders indicate bad faith.

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108. *Campbell*, 510 U.S. at 579 (emphasis added) (internal quotations omitted). *But see* Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998) (discussed *infra* Part III.B).

109. Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 142 (1998) (citing Leval, *supra* note 4).

110. One such occasion is Google's allowing copyright holders to "opt out" of Google's Library Print Project. *See* Press Release, ArriveNet, Google Print Library Position "Backwards" (Aug. 25, 2005), http://press.arrivenet.com/education/article.php/685666.html (arguing copyright holders should not have to opt out).

111. Interview by Knud Böhle with Jens Redmer, Google Book Search Europe, in Hamburg, Germany (Nov. 23, 2005), http://www.indicare.org/tiki-read_article.php?articleId=153 ("We will neither put Libraries nor Publishers out of business.").

While the lack of permission claim is legally unsound,[112] the opting-out criticism is not as obviously so. It is a fair criticism that forcing copyright owners to opt out to protect their works is generally inappropriate. Tangible property owners do not have to opt out to render illegal the unauthorized use of the property by others. Of course, if there is no infringement, there is nothing to be protected from. If the use is fair independent of the opt out, then opting out is a chance for copyright holders to stop Google's use of the work, *even though Google's use would be entirely legal.* If the use is fair without an opt out, it shows that the opt out *favors* fair use and therefore cannot work against Google under a good-faith analysis. Moreover, a good faith analysis inquires into what parties actually believed. It is thus Google's intent that is most relevant to evaluating the propriety of its behavior.

Google does not appear to have offered the opt-out option because it believed it was inappropriately using copyright-protected materials; it seems to have offered it in an attempt to resolve disagreement or as a courtesy. Google has certainly maintained that it believes its actions constitute fair use.[113] But how will the court treat it? In similar analyses, courts have refused to penalize defendants whose request for permission to use a work was denied.[114] The principle here is that courts should encourage pursuing the considerate path, even though it may not satisfy the copyright holder. On this same principle, the court should recognize that Google's opt-out option is cordial and a sign of good faith. Just as would-be defendants are encouraged to ask permission from copyright holders, an actual defendant like Google should not be penalized for offering a chance to opt out of what it believes is a fair use.[115]

Turning to consideration of societal benefit, Google Book Search has been helpful to many users. User comments demonstrate the tremendous service the database offers.[116] Researchers are able to find materials more efficiently, everyday users are able to find new and interesting books, and the likelihood of finding out-of-print materials is substantially improved.[117] Other benefits are also evident: researchers can look for specific phrases in works, speech writers can more quickly find quotes, and journal editors can locate pinpoint cites more easily. The libraries benefit as well: Google is providing each of the five participating libraries complete digital copies of the works that library

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112. *See* discussion *supra* note 80; *see also Campbell*, 510 U.S. at 585 n.18.

113. Posting of Susan Wojcicki, Vice President, Product Management to Official Google Blog (Sept. 20, 2005), http://googleblog.blogspot.com/2005/09/google-print-and-authors-guild.html.

114. *See, e.g.*, Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986).

115. The suggestion here is not to increase the weight assigned to a defendant's beliefs. The critical element of advocacy here is that Google should not be *penalized* for its belief. Defendants who have even the best intentions, if they are willfully blind to the reality of their infringing use, should still be ineligible for a victory under this aspect of the fair use analysis. And even those who have genuine good faith should not have carte blanche access to the fair use defense: a mistaken good-faith belief does not render an objectively unfair use fair. However, the good faith of a defendant is a reasonable, precedent-based portion of the Factor 1 analysis. In this limited capacity, Google's good faith favors a finding of fair use.

116. Google Book Search User Stories, http://books.google.com/googleprint/testimonials.html (last visited Oct. 29, 2006).

117. *Id.*

submits.[118] Some authors and publishers are also pleased with Google's use and have seen various benefits.[119] There are clearly substantial societal gains flowing from Google's use, which tilt Factor 1 further towards favoring fair use.

A societal benefiting use, however, is not a free ticket to use works without paying. This raises the question: if Google is required to pay for the works' use, will the societal benefits offered by the Book Search Project survive? The public domain works at the libraries would presumably still be scanned either way, but they account for only a small percentage of the libraries' total collection. Thus, the greatest strength of Google's use—its comprehensive scope—would be severely diminished. Could the project still succeed if Google had to acquire licenses for the copyright-protected books? Given the immense complexities in licensing alone, the answer may be no.[120] Google estimates it will take seven years to digitize books that are already neatly catalogued on shelves at the five major libraries; how much longer would it take to accomplish this with the additional tasks of locating, negotiating for and securing rights to millions of books, and then coordinating piecemeal scanning from the libraries? It is also unclear whether Google would still provide the digital copies to libraries that it is providing under the Library Project. This fringe benefit of Google's use, though certainly not controlling, may be illustrative of the costs of a ruling against Google. Given that fair use is specifically intended to promote things such as research and scholarship, it seems reasonable it would protect Google's project. In taking note of the societal benefit this project offers, courts would be wise to recognize its implausibility if Google's use is ruled "unfair."

But what about libraries? If Google and other similarly-situated companies cannot create such a database if required to obtain authorization, could libraries somehow do it, thereby preserving the societal benefit? A massive digitization project requires a substantial staff to scan works, catalog them, upload them, track status, and carry out a host of other clerical, administrative and technical duties. Even the best-funded libraries might balk at undertaking a task similar to the scope of Google's Project. James Hilton, interim university librarian at the University of Michigan, had his staff research how long it would take their library to digitize their collection of over *seven* million vol-

118. Google Book Search, Information for Publishers and Authors about the Library Project, *supra* note 49.

119. *See* discussion *infra* note 168.

120. At least two commentators have concluded the cost would be prohibitive. *See* Jonathan Kerry-Tyerman, Note, *No Analog Analogue: Searchable Digital Archives and Amazon's Unprecedented Search Inside the Book Program as Fair Use*, 2006 STAN. TECH. L. REV. 1, ¶ 81 (2006) (analyzing the possibility of securing rights for Amazon's Search Inside the Book program, as well as other issues that parallel Google's claims); Travis, *supra* note 64, at 805–10 (concluding that digital libraries would "'literally have to hire a private detective'. . . and track down the inheritors under thousands of wills, trusts, and succession battles" among several other potentially insurmountable hurdles).

umes.[121] The answer?—over 1,000 years.[122] It is estimated that Google may spend between $200 million[123] and $500 million to scan the fifteen million volumes earmarked for the project.[124] Even the largest and best-funded libraries balk at such figures.[125] Creating such a digital library involves several other hurdles: the works must be scanned and stored somewhere (both physically and then digitally), delicate books demand exquisite handling during scanning, and works must be collected to be scanned. Google leased a 40,000-square-foot warehouse in Ann Arbor, Mich., developed new scanners to handle delicate books, and invested an unknown number of staff in the Book Search Project.[126] Libraries faced with these burdens have retreated, unable to shoulder the weight; even the Library of Congress—"the largest repository of human knowledge in history"[127]—is counting on the private sector for digitization projects.[128] Perhaps Google is the only vessel sturdy enough to contain such a project. Finally, even if libraries (or others) could overcome these hurdles, they would also be subject to a copyright infringement suit.[129] Consequently, a likely end result of a ruling against Google would be that nothing near the scope of Google's attempt could be realized now or in the near future.

In summary, the focus of Factor 1 is likely to be the transformative analysis. Google is using the works in a commercial manner, which favors a finding of unfair use. However, because Google is using the works in a way that is distinct from their original purpose, its use is transformative; such a finding

121. Katie Hafner, *At Harvard, a Man, a Plan and a Scanner: Google's Quest to Digitize Books Prompts Soul Searching*, N.Y. TIMES, Nov. 21, 2005, at C1 [hereinafter Hafner, *At Harvard*].

122. *Id.*

123. *Id.* Google has not disclosed how much it is spending on the project but analysts have speculated this figure.

124. This number is derived by using the estimate that a $5 million donation is enough to scan approximately 150,000 books, dividing it by 150,000 (to estimate the cost per book—$33.33) and multiplying it by 15 million. Hafner, *Microsoft to Offer*, *supra* note 60, at C6. Certainly this is a very rough estimate as it does not take into account the special scanning equipment Google is using (which may reduce cost) or that books cost less as more are scanned. *Id.* at C5. (stating $5 million is enough to scan about 150,000 books); Google Book Search: News & Views, *supra* note 38 (stating the libraries partnering with Google as of 2005 contain over 15 million books).

125. Hafner, *At Harvard*, *supra* note 121, at C1. Sidney Verba, former chairman of the Harvard University Press, stated that digitizing the library "would be beyond anything we could imagine funding." *Id.*

126. *Id.* (reporting the lease of the warehouse and creation of new, secret scanners).

127. Kerry-Tyerman, *supra* note 120, ¶ 70 (citing LIBRARY OF CONGRESS, STRATEGIC PLAN: INTRODUCTION: BACKGROUND AND FUTURE DIRECTION FOR THE LIBRARY OF CONGRESS (2004), http://www.loc.gov/about/history/pdfs/04-08StrategicPlan8-14.pdf).

128. Katie Hafner, *Google Gift to Digital Library*, N.Y. TIMES, Nov. 22, 2005, at C6 ("Long on ambition, but short on the necessary funds, the Library of Congress has increasingly turned to the private sector for underwriting its digitization projects."). This article also reports Google's three million dollar gift to the Library's efforts with "no strings attached." *Id.*

129. 17 U.S.C. § 108(c)(2) (2000); *see also* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.03[E][1])[c], at 8-44 n.63.17 ("Congress intended to permit [various copies but not in] a computerized form." (quoting S. Rep. No. 105–190, at 61 (1998)). *See* discussion *infra* note 180 on the library exception.

will lessen the importance of the commercial nature of the use. Because Google also appears to have acted in good faith and in a manner that benefits society greatly, this factor should favor a finding of fair use.[130]

D. Factor 2: The Nature of the Copyright-Protected Work

1. *Background to Factor 2*

Factor 2 examines whether the works being infringed are works of fiction (creative works) or works of fact. Creative works are supposedly afforded more protection than factual works.[131] This is not surprising as copyright protects expression, not factual content. Courts rarely discuss this factor in detail and it is generally not given much weight.[132] In fact, in cases of both nonfiction (where this factor would favor fair use) and cases of fiction (where this factor would favor unfair use), courts have readily reached the opposite fair or unfair use determination.[133] But ultimately, the idea is that while protected, factual works are more susceptible to a finding of fair use, and the user is thus more likely to win the second factor.

2. *Application to Google*

Under a traditional analysis this factor likely cancels itself out. Because both creative and factual works will be part of the Google Library, this factor, on an aggregate scale, offers little assistance to the fair use analysis. And considering this in light of the minimal weight the statistics show Factor 2 traditionally carries, Factor 2 will not likely be a matter for heavy debate. This section, however, briefly considers two possible deviations from the traditional analysis, given the type-blind nature of Google's use.

First, courts have not clearly indicated whether the increase in protection a creative work is offered is proportional to the decrease in protection a factual work is offered. Even if Google's use of each type could be quantified, which is improbable given the number of works involved, it is still unclear what a court would do with such statistics: does a 50% creative works to 50% factual works ratio equate to this factor's coming out neutral? Perhaps the additional protection offered to creative works is sufficiently potent that even a 25% creative to 75% factual ratio still favors unfair use. Based on the minimal

130. Other commentators have come to a slightly different conclusion than I have. *See, e.g.*, Emily Anne Proskine, *Google's Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project*, 21 BERKELEY TECH. L.J. 213, 226–27 (2006) (concluding the use is not commercial). Ms. Proskine comes to different conclusions on other points as well, though she suggests the possibility of a digital library indexing immunity, potentially a viable remedy to address the host of modern caching and indexing problems facing courts. *Id.* at 233–34. Ms. Proskine's article also makes the interesting suggestion of preemptively addressing security concerns by creating an "insurance fund" to be used for compensating authors in the event of a leak or successful hacking of Google's full-text copies. *Id.* at 234–35.

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

132. NIMMER & NIMMER, *supra* note 4, § 13.05[A][2][a].

133. *Id.* § 13.05[A][2][a], at 13-182.1 n.136.2.

attention courts have given this factor previously and the corresponding reduced influence the factor commands,[134] it is unlikely, under a traditional analysis, that this factor will favor either unfair or fair use.

Second, what if the factual versus fictional distinction is more than just a "what kind of work is it" analysis? What if it also concerns how the content of the work is used? Unlike a Factor 1 analysis that considers whether the fictional or factual work is used in a new way, here the inquiry would instead be on whether the new use is still one where copyright is interested in drawing a factual-fictional distinction. Specifically, if the new use were one where there was no utility in drawing a distinction, would Factor 2 favor a finding of fair use? A sort of "nontraditional-ambivalent" analysis would thus be employed.

Again, the Google Café analogy is instructive in this nontraditional analysis. As before, Google has built all of its booths, chairs and tables out of full-color photocopies of books. Under a fair use analysis, would chairs made of factual works be more likely to be found a fair use while tables made of fictional works were more prone to a finding of unfair use? It seems odd to distinguish the *Catcher in the Rye* chair from the *World Almanac* table on the nature of the works comprising each. Instead, Factor 2 would note that this use poses no greater danger to copyright's spirit and, just as factual works are farther from the core of copyright's protections and favor fair use, here the chairs and tables escape the nexus requiring additional protections. Factor 2 would then favor fair use. Under this analysis, Factor 2 is most true to the purpose of distinguishing factual works from fictional works: protecting expression. In other words, this test would ask whether the use of the works was one copyright was "ambivalent" about or not, and if it was, Factor 2 would favor a finding of fair use. However, this would be a new approach, and it is likely that the analysis in Google's lawsuits will rely on the traditional fact-fiction distinction and Factor 2 will come out neutral. Even if it does not come out neutral, as the statistics above reveal, Factor 2 carries hardly any weight in the fair use analysis. Thus, this factor likely is neutral, and carries too little weight to affect the decision much even if not neutral.

E. Factor 3: The Amount and Substantiality of the Portion Used

1. *Background to Factor 3*

Factor 3 considers "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[135] This factor rewards defendants for using only as much of a copyright-protected work as is necessary and considers both the qualitative and quantitative value of the copied portion.[136] For example, taking only a small amount can still be too much if the portions taken

134. *See supra* Part II.A for statistical data and discussion illustrating this.

135. 17 U.S.C. § 107 (2000).

136. *See generally* NIMMER & NIMMER, *supra* note 4, § 13.05, at 13-157 to -158 & n.18, § 13.05[A][3], at 13-191 to -192.

constitute the "heart" of the work.[137] The amount used may also assist in determining other factors such as one and four: if an entire work was copied, it may reveal "a dearth of transformative character [pertaining to Factor 1] . . . or a greater likelihood of harm under the fourth [factor]."[138] Again, there are no bright-line rules and copying entire works, when necessary for an otherwise fair use, is permitted.[139] This factor appears to command some weight in the results when considered statistically. However, given its mutable nature, courts are likely to give it little weight in the fair use analysis.[140]

Courts have sometimes treated this factor as either favoring the plaintiff or favoring no one. In considering "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," courts have effectively made this a pass-fail test for the defendant: if she used too much, she fails this test and Factor 3 favors the plaintiff. But if she uses an acceptable amount, instead of it favoring the defendant, it favors no one.[141] The Supreme Court, however, has recognized that using only the appropriate amount causes this factor to favor the defendant.[142] This recognition is important to the analysis—if the fair use test is to remain a balancing of interests, a defendant's appropriate conduct should do something more than merely set the scales to even.[143]

2. *Application to Google*

Google's use of entire works is "presumptively unfair"[144] but, because it is necessary to its product, this should not weigh against fair use.[145] Google cannot provide a search engine that is useful for finding actual words in the text by using anything other than the full text. If Google were to pick and choose what search terms would return a book, it would substantially decrease the

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

138. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587 (1994).

139. *See generally* Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003); Nuñez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000).

140. Ironically, this factor's question of whether the use took too much often cannot be answered until the use is determined fair or unfair. After all, if a use is unfair, no matter how little it took, it was too much. Similarly, if it is fair, the use may take the entire work if necessary (which courts usually conclude is the case). Thus, to know how much is too much, the court first has to decide if the use is fair or not. So while the statistics in Part II.A indicate it receives a great deal of weight, it is more accurate to conclude it is controlled by what the other three factors dictate.

141. *See generally Kelly*, 336 F.3d 811 (holding that complete copying of photos, though appropriate to the use in a photo search engine, resulted in Factor 3 favoring neither party).

142. *Campbell*, 510 U.S. at 599.

143. Alternatively, Factor 3 could be modified to be an unweighed factor that functions as a blue pencil trigger. As in contract law, if a use is found to take too much, courts could, if appropriate, specify the amount that would be permissible. The aggregate fair use analysis would not be affected by this factor. Instead, otherwise fair uses that took too much from the copyright-protected work would be permitted under the remaining three-pronged analysis and under this factor would be blue penciled. See Part IV for additional discussion of this idea and other modifications to the analysis.

144. *Campbell*, 510 U.S. at 594.

145. *See id.*

utility of its database; card catalogs already do this. A substantial part of the utility of Google's project is that it vastly exceeds the scope of a card catalog or even an index of reviewers: it empowers users to find any word, in any text, anywhere in the world's books. Google must copy entire works to achieve this and thus this factor should favor fair use.

Google has, however, taken "the heart of the works"[146] by copying them in their entirety: in fact, Google has taken the heart, body, and every other essential organ within the works by comprehensively copying them. But the important distinction under this factor is that Google has not taken the *soul.* The *Harper & Row* Court crafted the "heart" language to mean more than just a section of the work, some quantitative number of pages. The Court meant "heart" in the more symbolic sense of "the important essence of the piece."[147] This distinction is critical because while Google took everything inside the works, it has left the "important essence," or "soul" as worded above, fully intact. Paradoxically, it has not used the *expression* of the works, it has merely made an exact copy of the words creating that expression. While every word in *Of Mice and Men* is searchable on Google Book Search, a user can know nothing but snippets of George's great struggle through even a detailed search: she must go obtain the book to experience its soul.[148] Because Google has taken only what it needs—and has not taken the soul—this factor favors fair use.

F. Factor 4: The Effect on the Potential Market

1. *Background to Factor 4*

"The effect of the use upon the potential market for or value of the copyrighted work" has occasionally been treated by the Supreme Court as the most important factor of the four.[149] Not surprisingly, the statistics in Part II.A above show it has been given the most weight in the fair use analysis. Under this rubric, courts have given the effect on the market substantial weight and declared it "undoubtedly the single most important element of fair use."[150] However, in *Campbell*, the Court may have implicitly retreated from this emphasis because no mention was given to its previously preeminent status in the analysis.[151] But this is a very tenuous precedential argument currently, as it exists only by implication. In fact, Factor 4 has still recently been referred to

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

147. *Id.* at 566.

148. Unless of course the publisher chooses to allow reading a large percentage of the book, which, because it would be permission based, would not be copyright infringement.

149. Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 450 (1984); *Harper & Row*, 471 U.S. at 566.

150. *Harper & Row*, 471 U.S. at 566.

151. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

by some courts as the first among equals[152] and it generally offers the most reliable means of predicting whether an infringing use is a fair use.[153]

Under Factor 4, courts consider the harm to the market caused by the infringing use.[154] Courts agree that if the original work is superseded by the infringing use, this factor weighs heavily against fair use.[155] Indeed, the infringing use need not itself have harmed the market of the original, it is enough that if the challenged use were to become widespread the market would be damaged.[156] The market harmed also does not have to presently exist (it may be a future, potential market)[157] and the market need not be the same market as that of the original (a derivative market will also suffice).[158] But it is at this point—determining what derivative markets suffice—that courts part company. Some adopt a narrow interpretation, considering only those markets likely to be developed under this factor.[159] Other courts imply that any market that the plaintiff could conceivably license is enough.[160] This "conceivably license" test is highly problematic. It is clear that everything can conceivably be licensed: if the use is profitable, *someone* will pay for it. This always-anti-defendant approach risks substantially undermining the fair use doctrine.[161]

In fair use cases, at least where the use is commercial, the defendant puts the plaintiff's copyright-protected work to use in a market that the defendant predicts will be lucrative.[162] Additionally, copyright holders pursue innovative markets often without warning and so it is unclear what markets "would in

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152. Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1385 (6th Cir. 1996) (en banc). *But cf.* Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 113 (2d Cir. 1998) (stating that Factor 4 must be considered equally along with the other three and is no longer given the most weight, and noting that the analysis pursued previously in *Harper & Row* and *Sony* was "conspicuously absent from the *Campbell* opinion"). Also, note that the statistics included in Part II.A indicate that Factor 1 also carries great weight.

153. *See* statistics *supra* Part II.A; NIMMER & NIMMER, *supra* note 4, § 13.05[B] (articulating the use of Factor 4's functional test).

154. *Campbell*, 510 U.S. at 590.

155. *Campbell*, 510 U.S. at 590; Nuñez v. Caribbean Int'l News Corp., 235 F.3d 18, 24–25 (1st Cir. 2000); Sony Computer Entm't Am., Inc. v. Bleem, L.L.C., 214 F.3d 1022, 1029 (9th Cir. 2000); Amsinck v. Columbia Pictures Indus., Inc., 862 F. Supp. 1044, 1048–49 (S.D.N.Y. 1994).

156. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 569 (1985).

157. UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

158. *Id.*

159. "The market for potential derivative uses includes only those that creators of original works would *in general* develop or license others to develop." *Campbell*, 510 U.S. at 592 (emphasis added).

160. This factor would be satisfied "even if the copyrightholder [sic] had not yet entered the new market in issue, for a copyrightholder's [sic] 'exclusive' rights . . . include the right, *within broad limits*, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable." *MP3.com*, 92 F. Supp. at 352 (emphasis added) (citations omitted).

161. Other commentators have also noted this circularity and the great danger it poses. See NIMMER & NIMMER, *supra* note 4, § 13.05[A][4] for a discussion of this problem.

162. There are exceptions to this, of course. For example, a plaintiff could sue to secure, through settlement or a verdict, a licensing fee independent of the success of the defendant's market.

general develop or [be] license[d]."[163] If the mere possibility of a market controls this factor, fair use may be impossible: in a capitalist system, there may be a market for everything. And if a competitor entering a market post-lawsuit proves or creates a potential market, entering a market becomes a business weapon: if your competitor is being sued for an infringing use, by entering that market yourself, the defendant loses the fourth factor.[164] What then is the proper analysis under Factor 4?

The question is not answered clearly by existing Supreme Court precedent. At a minimum, it is clear that several historically fair uses could be licensed but courts have nevertheless protected them as fair: parodies, use of photographs in newspapers, and use of works in films are a few such examples.[165] But beyond this bedrock principle, consensus is rare. Worst of all for Google, this puzzle is especially problematic in cases where courts wrestle with innovative applications such as those presented by the Internet. As a result, deference to existing markets and possible licensing schemes may be all the more likely here. Clearly, this factor is in need of clarification.[166] The following application to Google fleshes out these problems in greater detail. In addition, Part IV discusses some possible Factor 4 modifications.

2. *Application to Google*

Google's situation will certainly test the courts' understanding of this factor. In a strict sense, Google is using copyright-protected works in a completely different market from the original market for the works and is in no way superseding the use of the books. This is because unless the copyright holders give Google permission, no Google Book Search user can read full copies of books online. Even if Google's use were to become widespread it is unlikely the market for the protected works would be harmed. In fact, while not controlling,[167] Google Book Search has thus far helped at least some participating publishers, and widespread use may actually benefit copyright holders, as it has for related programs like Amazon's Search Inside the

163. *Campbell*, 510 U.S. at 592.

164. *See* Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 851 (C.D. Cal. 2006) (stating that a post-lawsuit licensing contract was evidence of a potential market).

165. *See, e.g.*, NIMMER & NIMMER, *supra* note 4, § 13.05[A][4] (discussing that even these uses could be claimed as markets a plaintiff would like to enter).

166. See discussion *infra* this Part and Part IV for some possible clarifications.

167. *Campbell*, 510 U.S. at 591 n.21.

Book.[168] As the Author's Guild itself noted in an official press release on Amazon's similar program, projects like these do not hurt much of the book market: "Most fiction titles are not likely to be greatly threatened."[169] Up to this point it is clear this factor favors fair use.

The confusing portion of the analysis comes when Google's use is examined as impacting a derivative market: licensing the books to be copied for use in a searchable database. The analysis begins by looking for a current or emerging market. As discussed above, it is likely that Google (or another similarly-situated competitor like Yahoo! or Microsoft) would be *willing* to pay for a license if necessary to start such a project. But such reluctant willingness does not control, as fair use asks who *should* pay, not who *would.* There is also an existing market—predominantly occupied by journals and not books—for licensing the complete display of works, including the ability to search those works.[170] However, the existing market fails to capture the essence of Google's project—Google Book Search does not display full copyright-protected works and it would contain more works. Thus, unless reluctant willingness or competitor attacks are counted, there appears to be no market

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168. Tony Sanfilipo, Penn State Press Marketing and Sales Director, stated:

> Since our titles became active on Google [Book Search], visits to our website have gone up 124 percent. The converted POD titles averaged 19 sales per month before [Google Book Search]—and 74 copies in the first month after we joined . . . . We're quite happy with the results. . . . With Google Book Search, we make more content available—forever—and we sell more books.

Google Book Search Partner Program, Google Book Search Case Study, https://books.google.com /partner/pennstate (last visited Oct. 29, 2006).

At least some authors also are grateful:

> As an author whose books appear in Google [Book Search], I want to express my support for the project. I appreciate potential readers being able to find my book, examine an excerpt—as they might do while leafing through the book at a store, or as they might do on a major seller like Amazon—and deciding for themselves if the book is for them. . . . Google is not in any way alleviating the need for books to exist or be purchased, and in fact are making these books more noticeable and accessible than ever before. [-Don, Author, Las Vegas, NV]

Google Book Search, User Stories, *supra* note 116.

It is also likely that authors generally will benefit. The ability to search and view the actual text of books at Amazon.com increased sales of searchable books by 10% over "the mute, print-only versions." Travis, *supra* note 64, at 822 (citing Monica Soto Ouchi, *New Amazon Feature Aids Sales*, SEATTLE TIMES, Oct. 31, 2003, at E3).

169. The Authors Guild, Amazon's New Database Likely to Help Sales of Some Works, May Undermine Others, Text of Guild's E-Mail to Members (Oct. 24, 2003), *available at* http://www.authorsguild.org/news/10_24_03.htm. The press release e-mail also notes: "This program will likely prove to be useful in promoting certain titles. Midlist and backlist books that are receiving little attention, for example, may benefit from additional exposure in searches." *Id.* The books the press release is most concerned about—recipe books for example, because being able to see even a full page gives away value—are not at risk in Google's program, because Google only displays three sentences, not nearly enough to make most recipes.

170. Westlaw, Lexis, and HeinOnline immediately spring to mind as examples. It is unclear whether the right to search is implied or explicitly stated in whatever licensing agreement the online databases have with publishers.

presently for licensing only the use of the work in a searchable database.[171] The factor turns on how to determine whether the market that obviously could exist affects the fair use analysis.

Different courts have used various standards to determine what derivative and potential markets enter the fair use analysis. Precedent supports that some uses do not require a license despite being a derivative market,[172] but the guidance provided in identifying those markets is weak. The court may rely on the language "traditional, reasonable and likely to be developed [markets will favor unfair use]."[173] Applying this language, Google's use is not "traditional" because it is one of the first in the market. But it is tempting to call it a "reasonable" or "likely" use. The court could look at the progression of the Web and gradual move to put copyright-protected works online and conclude that it was natural for publishers to put works online. This temptation should be resisted as this observation, while accurate, is not answering the right question. The questions posed by Factor 4 is whether the market for using complete copyright-protected works, *as searchable documents* in a *centralized database* containing the works of *all* publishers, is likely to be developed by any given publisher or by publishers as a group.

This is not likely a market that publishers would traditionally, reasonably, or likely enter. Publishers have never attempted anything like this before—even though publishers were on notice of this potential market as early as 1993[174] and even after Amazon.com allowed Search Inside the Book via A9.com. On the other hand, one commentator has noted that there is still a market for licensing the books' display beyond the snippets provided by the database via the Google Book Search Publisher's Program.[175] Even still, Factor 4 would favor a finding of fair use because the market is not a traditional or likely market. Unfortunately, given the conflicting precedent, the courts may or may not reach this conclusion.

In concluding the Factor 4 analysis, it bears revisiting that a "reluctant willingness" to license by potential Google competitors should not control this

171. Unless Yahoo! or Microsoft have in fact begun to purchase licenses from publishers, in which case the question discussed earlier becomes relevant: is the fact that someone is willing to pay for a license dispositive in this factor? The answer should be no or fair use is severely undermined.

172. Parodies and news reporting are two such examples. *See, e.g., Campbell*, 510 U.S. 569.

173. Ringgold v. Black Entm't Television, 126 F.3d 70, 81 (2d Cir. 1995) (citing Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 929 n. 17, 931 (2d Cir. 1994)). Google's lawsuits are also in the Second Circuit.

174. "Back in 1993, President Clinton announced a bill to fund what was then so quaintly called the information superhighway. He talked about how it would let a classroom in Kansas access anything in the Library of Congress. Did publishers think that was just an abstract idea?" Kevin Maney, *Critics Should Grasp Google Projects Before Blasting Them*, USA TODAY, Nov. 9, 2005, at 3B.

175. "The existence of the [Book Search] Publisher Program, which involves licensing, demonstrates that the Library Project does not preclude lucrative licensing arrangements. By participating in the [Book Search] Publisher Program, publishers receive revenue streams not available to them under the Library Project." Jonathan Band, *Copyright Owners v. The Google Print Library Project*, 17 ENT. L.R. 2006, 21, 23 (2006).

factor. So too, the definition of "potential market" must have some boundaries. If the "potential market" definition becomes "any conceivable market" or "those markets the defendant or competitors would reluctantly pay for," this factor has become stacked against fair use. A better approach is something akin to the "traditional, reasonable or likely to be developed" approach taken in *Ringgold* and discussed above.[176] Such an approach gives appropriate substantive content to Factor 4 and simultaneously protects the spirit of copyright law and the fair use defense. Here, the book-database market cannot have been a traditional, reasonable or likely-to-be-developed market because it has been available to publishers for years, and they have taken no steps to enter it. Google's entrance may have sparked the publisher's desire to enter the market, but the failure to enter a potential market when the opportunity existed should have weight in the consideration of how "likely to be developed" it really was. Thus, this factor appears to favor Google.

G. Summary

Google's use appears to be a fair use. Factors 1 and 3 favor Google Book Search because it employs a highly transformative use that benefits society, because it was pursued in good faith through fair dealings, and because it uses only as much of the copyright-protected works as is required by the project. Factor 2 cancels itself out unless unequal weight is given to each type of work, and even then Factor 2 may come out as neutral. Under a nontraditional-ambivalent use analysis, however, Factor 2 would favor Google. Factor 4 should favor Google but results are unpredictable. Given the confusion over Factor 4, the court should craft new tools in determining what derivative markets receive protection. Under the "traditional, reasonable or likely to be developed"[177] analysis, Factor 4 favors Google. The statistics show that Factors 1 and 4 are the two most important, and Google has won at least Factor 1, with a real possibility of succeeding under Factor 4 as well. But given that no uses in the frequency analysis from Part II.A were deemed fair based solely on Factor 1, or even on Factors 1 and 3,[178] and 22 uses were held fair based on factors 1, 3 and 4, Google likely will need to prevail on Factor 4 to be held a fair use. Finally, in terms of copyright's spirit, Google's use is one that copyright law should encourage, one that is even listed in the Preamble to the Copyright Act,[179] and thus a finding of "fair use" is appropriate.

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176. *Ringgold*, 126 F.3d at 81.

177. *Id.*

178. *See* Table 2 *supra* Part II.A. Note also that only one use was held fair by winning even factors 1, 2 and 3, and Google's chances of success on Factor 2 are not high.

179. 17 U.S.C. § 107 (2000) (listing "scholarship" and "research").

III. THE PRECEDENT: EIGHT SIMILAR CASES

Google Book Search's existence likely turns on whether it is a fair use or not.[180] Google's fair use status may be controlled by a handful of prior decisions or cases. These cases range from those raising a similar point of law but nonbinding (for example, technology cases from other circuits) to binding cases with little to contribute (for example, Supreme Court technology cases that turn on other issues). This Part considers eight such cases, briefly discusses each, and applies them to Google Book Search in light of the discussion of the four factors above. The part concludes by considering what impact a ruling against Google's use might have on the Web, thereby setting the stage for Part IV's contemplation of the future.

A. *MP3.com*, *Napster*, and *Grokster*

UMG Recordings, Inc. v. MP3.com,[181] a case from the same district that Google is being sued in, appears to apply directly via its dicta. The court in *MP3.com* stated:

180. It is possible that other defenses will be raised, including the library exception under § 108 and a de minimis defense.

The Library Exception of § 108 is not a plausible defense because it does not apply to such partnerships. *See* NIMMER & NIMMER, *supra* note 4, § 13.05[E][2]. The library exception was created to allow libraries to make photocopies, both for internal use and for patrons. *Id.*, *see also* 17 U.S.C. § 108(a)(1)–(a)(3) (2000). Section 108(a)(1) specifically provides that the library exception only applies to those reproductions made "without any purpose of direct or indirect commercial advantage." 17 U.S.C. § 108(a)(1). Here, the purpose of the copy is of both direct commercial benefit—the library receives a complete copy back from Google, saving the library the cost of making its own digital copy—and indirect—the library provides the works to Google for a commercial purpose. More importantly, the library is not who is making the copy: Google is using its own personnel to scan each work in. *See* UM Library/Google Digitization Partnership FAQ, August 2005, http://www.lib.umich.edu/staff/google/public/faq.pdf (last visited Oct. 9, 2006). And if these restrictions were not damning enough, the library exception does not permit digital reproductions that are made available to the public outside the premises of the library. *See* 17 U.S.C. § 108(c)(2); *see also* NIMMER & NIMMER, *supra* note 132, § 8.03[E][1][c], at 8-45 n.63.26. For these reasons and others, Google does not qualify for the library exception of 17 U.S.C. § 108. And as discussed, for these same reasons, no library could create its own database if Google is unable to.

A claim of de minimis also does not apply to Google's use. Google is making complete copies of works and the best it could claim is that, as complete copying does not discount fair use, it also does not discount de minimis. In *Knickerbocker Toy Co. Inc. v. Azrak-Hamway International, Inc.*, the defendant used a complete copyright-protected work in a commercial purpose. 668 F.2d 699, 701 (2d Cir. 1982). But, because the use was strictly for internal purposes, it was held to not infringe. *Id.* at 702–03. The same could be held here: Google is using the complete scans internally to provide a product. However, the problems inherent in this defense are evident at a glance. One is that the defense is presumably called de minimis for a reason and Google's complete copying is not minimal in this sense. A second concern is that Google is not using it purely internally but as part of a service provided to its customers. A third analogizes to fair use: other internal uses have been deemed as unfair, such as the internal use of photocopies of scientific journals for research, so too is de minimis likely inapplicable. Finally, it would be problematic to give companies immunity to copyright for all their internal uses. Thus, a finding of *de minimis* in Google's case is very unlikely.

181. 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

> Any allegedly positive impact of defendant's activities on plaintiff's prior market in no way frees defendant to usurp a *further market that directly derives from reproduction of the plaintiffs' copyrighted works.* This would be so even if the copyrightholder [sic] *had not yet entered the new market* in issue, for a copyrightholder's [sic] exclusive rights . . . include the right, *within broad limits,* to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable. . . [P]laintiffs have indicated no objection *in principle* to licensing [their copyrighted products]. . .; they simply want to make sure they get the remuneration the law reserves for them as holders of copyrights on creative works.[182]

The same language could be applied, almost verbatim, to Google's use and pertains directly to the fourth factor always-anti-defendant problem discussed above. If the Google court adopts the reasoning of *MP3.com,* Factor 4 would favor the plaintiffs. Because Factor 4 carries great weight, perhaps this could turn the tide against Google's use being deemed fair.[183] However, Google is distinguishable from *MP3.com* as MP3.com was providing users with access to full copies of CDs, a crucial difference.[184] MP3.com's argument that making the copy available online was transformative was also dubious and rejected by the court.[185] It is also of note that MP3.com's service did not appear to advance any of the enumerated fair uses of § 107 while Google's advances scholarship and research. Finally, MP3.com's use offered minimal societal benefit, and the potential market of making full versions of songs available online was closer to a "traditional market" than Google's searchable, centralized database is. While the two cases are facially similar, the critical distinctions are at least that Google is not making available complete copies of the works, Google's use is transformative and the searchable book database is not a traditional market.

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.[186] and *A&M Records, Inc. v. Napster, Inc.,*[187] though recent technology-focused cases, are distinguishable from Google in several important regards. Both cases involved distribution of complete copyright-protected works via peer-to-peer networks, had substantial questions of bad faith and offered a less obvious public benefit than Google's use.[188] Both also had, though disputed by defendants, a more obvious effect on the market for the original works in question.[189] Because so

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182. *Id.* at 352 (emphasis added, internal quotations and citations omitted); *See also supra* Part II.F.1–.2 and the accompanying tables.

183. *See supra* Part II.A and accompanying tables; *see also* summary discussion *supra* Part II.G.

184. *MP3.com,* 92 F. Supp. 2d at 350.

185. *Id.* at 351.

186. 125 S.Ct. 2764 (2005).

187. 239 F.3d 1004 (9th Cir. 2001).

188. *Napster,* 239 F.3d 1004; *Grokster,* 125 S.Ct. 2764. Despite the similarity of the two facially, they are themselves quite distinct as the architecture of the peer-to-peer (commonly abbreviated as "p2p") network in Napster was very distinct from that of Grokster. *See Grokster,* 125 S.Ct. at 2770; *Napster,* 239 F.3d 1011–12.

189. *Grokster,* 125 S.Ct. at 2777; *Napster,* 239 F.3d at 1016–17.

many critical differences exist, the two cases offer little assistance to the Google lawsuits.

B. *Kirkwood* and *Roxbury Data Interface*

Returning to the transformative inquiry, *Infinity Broadcast Corporation v. Kirkwood*[190] has been cited recently as predictive that Google's use will be found an unfair use.[191] In *Kirkwood*, the retransmission of radio broadcasts to advertisers was held an unfair use because, in part, the defendant "merely repackage[d] . . . the original" and there was no "new expression, new meaning nor new message."[192] As the Second Circuit Court of Appeals went on to note, Kirkwood was simply rebroadcasting unaltered transmissions and the use of those transmissions by the subscribers to Kirkwood's service were not at issue.[193] In other words, Kirkwood's failure to add "new expression" meant his use was not transformative. Google's use, however, is distinct from the use in *Kirkwood*. Google does not merely retransmit originals, it instead reduces originals to searchable code that it provides in a database format. Google's users, unlike Kirkwood's subscribers, have no access to complete copyright-protected works because Google's use turns the books into a data mine. Not only does Google expressly abstain from simply "repackag[ing] or republish[ing] the original"[194] work, the defect of Kirkwood's use, it offers no comprehensive and direct access to the copyright-protected originals. In short, Google takes the originals and transforms them into a new product with new purpose and meaning. Thus, *Kirkwood* should not control the result for Google.

Despite the very modern questions posed by the technological aspects of Google's use, *New York Times Co. v. Roxbury Data Interface, Inc.* from 1977 is somewhat on point.[195] In *Roxbury*, a district court in New Jersey considered whether an index of names from the New York Times was a fair use.[196] The index in question, created by defendant Roxbury Data Interface, was actually an index of another index: plaintiff New York Times Company's index of the New York Times newspaper.[197] The defendants had read through the plaintiff's index and copied down page numbers and names, then sorted those names alphabetically, allowing a user to locate stories in the plaintiff's index based on the people connected to the story.[198] The court assumed the plaintiff's

190. 150 F.3d 104 (2d Cir. 1998).

191. *See* Hanratty, *supra* note 62, ¶¶ 18–21.

192. *Kirkwood*, 150 F.3d at 108 (internal quotations and citations omitted).

193. *Id.*

194. *Id.*

195. 434 F. Supp. 217 (D.N.J. 1977).

196. *Id.*

197. Interestingly, it was not just an in-print index: there was also an online version of the index. However, it was the plaintiffs—the copyright holders—who operated it, so it was not the subject of the fair use analysis, nor was it even infringed. *Id.* at 224.

198. *Id.* at 219–20.

copyright protection extended to the names in their index and analyzed the defendant's use under the fair use doctrine.[199]

The court concluded it was a fair use because all four factors favored the defendants.[200] While the court's conclusions that the name index advanced public interest and aided researchers certainly apply to Google, its analysis under Factor 4 is the most directly relevant to the Google Book Search Project. The court concluded:

> [D]efendant's index is not another version of plaintiff's index, but a work with a different function and form. . . . [N]o creative idea of plaintiffs' has been appropriated by defendants. [N]o list comparable to defendants' index can be found in the [plaintiff's] Times Index.[201]

The court's conclusion that the fourth factor favored the defendants was also informed by evidence that the plaintiffs had considered publishing a names index but decided the market was too small.[202] This distinguishes *Roxbury* from Google's case, as there is presumably the possibility of a large market for licensing books to be included in Google's database. Still, the *Roxbury* court's fourth factor analysis recognized the "different function and form" of the names index; it recognized that, though the names index involved copying of the plaintiff's works, "no creative idea . . . ha[d] been appropriated. . . ."[203] Although Google's copying does take the creative elements from the copied works, the difference is a technicality deriving from the advantages of digital technology, because the creative elements copied by Google are never made available to Google users (except in isolated snippets). Like in *Roxbury*, Google's copying was a technical violation of copyright law, but not a violation of its spirit.

C. Kelly v. Arriba Soft Corp.

Kelly v. Arriba Soft Corp.[204] is almost completely on point for a fair-use analysis of Google's Book Search Project use.[205] In *Kelly*, the defendant was using plaintiff's copyright-protected photos in his search engine. The images were reduced to thumbnail size and only the thumbnails were displayed when search results were returned. While at one point the full images were displayed, that issue was separately discussed from the thumbnail search engine

199. *Id.* at 221.

200. Under Factor 1, the commercial nature of the use was trumped by the "public interest in the dissemination of information" and the fact that the names index would "save researchers a considerable amount of time." *Id.* Under Factors 2 and 3, the defendant was held to have taken from a primarily factual work and only as much as was necessary for the use. *Id.* at 221–23. Finally, under Factor 4, the court concluded there was only minimal market injury based on no compelling evidence that the plaintiffs were going to publish a names index. *Id.* at 225.

201. *Id.*

202. *Id.*

203. *Id.* This concept is similar to the "innovativeness" analysis suggested *infra* Part IV.

204. 336 F.3d 811 (9th Cir. 2003).

205. *Id.* at 821–22.

issue. The defendant claimed his use was fair because the pictures were not replacing the original market but were instead a new use and thus transformative. The court found fair use because the use was transformative, its impact on the market was minimal or nonexistent, and it did not take place in a protected derivative market.[206]

If the court does not distinguish or decline to follow *Kelly*, Google's use will be a fair use. Google is doing just what *Kelly* allows: Arriba allowed searching for images and displayed a thumbnail version of the image (that is, a lower resolution, smaller version) after the search, and Google allows searching for phrases in books and displays a sort of thumbnail version (for example, snippets of text from the book) that does not come close to reproducing the original. The only difference between Google's use and that in *Kelly* is that Google keeps a permanent copy of the copyright-protected work while Arriba Soft made a full copy and then deleted it.[207] But this is a minimal difference, because Arriba Soft still *copied* the protected pictures. Additionally, this difference is best addressed by Factor 3 of the analysis: Arriba Soft could not keep a copy because no full copy was needed whereas Google may keep a copy because its search engine could not function without it. Using Factor 3 to address this concern is both proper and gives this factor a more substantive function in the fair use analysis.[208] Google is doing essentially the same thing that Arriba Soft was doing by putting copyright-protected works into a searchable database and, as a result, *Kelly* suggests that Google's use is fair.

D. Recent Google Cases and the Web

Two recent cases also provide guidance in Google's lawsuit: *Field v. Google, Inc.*[209] and *Perfect 10 v. Google, Inc.*[210] Both cases involved caching of Web content: *Field* involved caching copyright-protected Web pages,[211] and *Perfect 10* involved caching thumbnails from an adult Web site in the Google Image Search.[212] Again, the first and fourth factor analyses are the most interesting.

The court in *Field* concluded Google's caching was a fair use for several reasons. Under Factor 1, the court noted that Google's cache serves a different purpose than the original Web pages by enhancing information-gathering techniques on the Internet.[213] Under the fourth factor, the court, citing the

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206. *Id.*

207. *Id.* at 816.

208. As the statistics in Part II.A illustrate, the potency of Factor 3 is currently limited in comparison to Factors 1 and 4. This might help reduce the disparity.

209. 412 F. Supp. 2d 1106 (D. Nev. 2006).

210. 416 F. Supp. 2d 828 (C.D. Cal. 2006).

211. *Field*, 412 F. Supp. 2d at 1110–14.

212. *Perfect 10*, 416 F. Supp. 2d a 831–35. *Perfect 10* also involved the Image Search more generally, but it is the thumbnails portion that is most instructive here because Google Book Search is not participating in the displaying of whole copyright-protected works as Google was in Perfect 10. *Id.*

213. *Field*, 412 F. Supp. 2d at 118.

Supreme Court in *Sony*, noted that "a use that has no demonstrable effect upon the potential market for, or value of, the copyrighted work need not be prohibited *in order to protect the author's incentive to create*."[214] This is an important implication: the author's incentive was not harmed by the use in *Field*. The court then went on to consider plaintiff Field's derivative market argument:

> Field contends that Google's caching functionality harmed the market for his works by depriving him of revenue he could have obtained by licensing Google the right to present "cached" links for the pages containing his works. Under this view, the market for a copyrighted work is always harmed by the fair use of the work. . . . The Supreme Court has explained that the fourth fair use factor is not concerned with such syllogisms. Instead, it only considers the impact on markets "that the creators of original works would in general develop or license others to develop." [citation omitted][215]

Just as an author's incentive to create is not reasonably related to licensing revenue from caching, neither is it related to licensing revenue from Google's Book Search database. As discussed above, allowing a plaintiff to develop an interest in licensing the market after the defendant's use is already under way reduces fair use to a theoretical but rarely available defense. Thus, if the court adopts the analysis from *Field*, Factor 4 would favor Google.

On the other side of *Field* stands *Perfect 10*, where caching thumbnails was held an unfair use, in partial conflict with *Kelly*. Under Factor 1, the *Perfect 10* court concluded the use was not purely transformative:

> [T]he thumbnails here closely approximate a key function of [Perfect 10's] full-size originals, at least to the extent that viewers of [Perfect 10's] photos of nude women pay little attention to fine details.
>
> . . . .
>
> But that does not end the analysis, because Google's use is simultaneously consumptive as well. In early 2005, *after it filed suit against Google*, [Perfect 10] entered into a licensing agreement . . . for the sale and distribution of [Perfect 10] reduced-size images for download to and use on cell phones.[216]

Noting the "truism" that search engines like Google Image Search "provide great value to the public," [217] the court still concluded that Factor 1 favored Perfect 10. This conclusion, based on the "consumptive" analysis, foreclosed analysis under Factor 4, where the cell phone market caused the factor to favor unfair use.[218]

Applying *Perfect 10* to Google's case, the Book Search project might not be a fair use because just as Perfect 10's entering into a licensing agreement

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214. *Id.* (quoting *Sony*, 464 U.S. at 450) (emphasis added) (internal quotations omitted).

215. *Id.* at 1121 n.9.

216. *Perfect 10*, 416 F. Supp. 2d at 847, 849.

217. *Id.* at 848.

218. *Id.* at 851.

for cell phone downloads created a traditional or reasonable market, so too could the plaintiffs defeat the Book Search by entering into an agreement with Yahoo! or Microsoft. Or perhaps the licensing scheme Google already offers to publishers would alone show the existence of a market. This approach, in the same breath, would control Factors 1 and 4, thereby determining the fair use analysis as a whole. *Perfect 10* may thus foreshadow the end of all truly comprehensive image search engines.[219]

What about the indexing of copyright-protected content on the Web? As Google has noted,[220] search engines make complete copies of copyright-protected Web sites in their indexing processes. If this is a fair use—and it is unclear how the Web would function if it were deemed unfair—is Google's Library Project use also necessarily fair? Courts are somewhat divided: caching Web pages was recently held a fair use,[221] while caching thumbnail images was not.[222] Part of the problem in comparing indexing the Web to indexing books is that the operation of the Web is almost indistinguishable from search engines. Except for a few other mechanisms,[223] the public relies entirely on search engines to traverse it. Because of the great social utility of allowing this practice, it is hard to conclude that such a use is unfair. Google Book Search only stands to *become* this socially useful; it is easy to conclude that copying books is not allowed under fair use but copying Web pages is permissible because it is too late to change. Should the court choose to restrict or disallow Google Book Search, it will need to be careful not to be so broad in its ruling that it has "profound negative effects on future innovators of technology" or otherwise cripples the Web.[224]

IV. THE FUTURE: A NEW FAIR USE

A. Life After Gozer

Whether Google's use is deemed fair or foul, copyright will live to protect another day. While Google's use should be deemed fair, it is also important that the courts handling the case patch the areas of the fair use doctrine that the Google Projects reveal as wanting. In particular, given the true uniqueness of

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219. Just as users could download adult pictures, so too could they download any other copyright-protected picture. Unless search engines could negotiate licenses for the billions of images under copyright, they could not operate except to display images out of copyright. This would be unfortunate, as shutting down image searches does not prevent infringement: users can always find the full-size, copyright-protected images with a Web-text search and use a simple program to scale the images down to thumbnail size.

220. Posting of Susan Wojcicki, *supra* note 113; *see also* Danny Sullivan, Indexing Versus Caching & How Google Print Doesn't Reprint, http://blog.searchenginewatch.com/blog/051021-113341 (last visited Oct. 9, 2006).

221. *Field*, 412 F. Supp. 2d at 1123.

222. *Perfect 10*, 416 F. Supp. 2d at 851 (suggesting that the critical element persuading the court to hold thumbnail caching an unfair use was that there was a market for them as wallpapers on cell phones in the United Kingdom).

223. Some examples are user groups, hyperlinks, and Web rings.

224. Vaidhyanathan, *supra* note 32.

Google's project, either the courts or Congress should consider taking this opportunity to do something new with copyright law.

B. Fair Use Modifications

The statistics in Part II indicate what courts have done previously, but the question remains what they should do in the future. Copyright law is not infallible and, as has happened repeatedly in the past, new technology reveals areas in need of repair. Congress and the courts that handle the Google Book Search lawsuit should consider patching these areas; the modifications below are some possible options.

One modification that might be made is changing how courts handle Factor 3. It is clear, for example, that even though Factor 3 has a high correlation with the end result, it is still not a real player in the analyses given the predominance of Factors 1 and 4.[225] As discussed above in Part II.E, Factor 3 should not be merely a pass-fail test for defendants but should instead be recognized as a factor that *favors* fair use when only the proportion needed has been used and the use is otherwise fair. Courts should go further, however. Courts could, for example, treat Factor 3 as a blue-pencil opportunity.[226] Instead of denying an otherwise fair use because the use was not in proportion to what is required, courts could issue conditional fair-use holdings—conditioned on the defendant's using less of the work. If an infringing use would qualify as a fair use but for the fact that the use took too much, the court could prohibit its use and award any damages applicable while allowing future, reduced use. For example, if Google were displaying entire works on its results page, the court could prohibit such a display, award any damages, but not prohibit Google from displaying three-line snippets of the works in the future.

This adaptation would both make the court's task easier by reducing the number of factors it must balance against each other, and it would also ensure that otherwise-fair uses are not forbidden solely because a bit more than necessary has been used. It also would address a somewhat curious problem: what happens when only Factor 3 weighs against a fair use finding? Some courts have allowed the use because the other factors all favored fair use.[227] The copyright holder would suffer in such an instance because the other factors

225. *See, e.g.*, Amsinck v. Columbia Pictures Indus. Inc., 862 F. Supp. 1044 (S.D.N.Y. 1994); Sandoval v. New Line Cinema Corp., 973 F. Supp. 409 (S.D.N.Y. 1997) (holding that defendant's use was fair because it prevailed on Factor 4, even though it lost on Factor 3 and others).

226. A "blue-pencil" approach, borrowed from contract law, is one where terms are "blue-penciled" into a contract or "blue-penciled" out of it. Essentially, "blue-penciled" is just a term for "modifying." *See* BLACK'S LAW DICTIONARY 183 (8th ed. 2004) (defining "blue-pencil test. A judicial standard for deciding whether to invalidate the whole contract or only the offending words.").

227. *See, e.g.*, Duffy v. Penguin Books USA, Inc., 4 F. Supp. 2d 268 (S.D.N.Y. 1998); Lucent Info. Mgmt., Inc. v. Lucent Techs., Inc., 5 F. Supp. 2d 238 (D. Del. 1998); *see also* list of cases, *supra* Part II.A and note 68.

would overwhelm Factor 3 in the analysis; blue-penciling would allow the court to reduce the use to an appropriate amount.

Turning to another factor, the court might take this chance to craft new tools to interpret Factor 4. Because Factor 4 receives so much weight in the analysis, as the statistics and court opinions show, this would be a powerful modification of the fair use analysis. Copyright, at its core, rewards creativity and innovation. One such modification therefore is that the courts could begin to treat "substantially innovative" uses as favoring Factor 4, as such creative uses are unlikely to be thought of by copyright holders (that is, the uses are not "traditional" or "likely to be developed"). If adopted, "innovation" should not be given presumptive force because there may be cases where an innovativeness inquiry will not solve the issue. Saying that something is innovative is, however, in effect saying that it is not "reasonable or likely to be [developed]" because it is a creative thought that, by definition, others are unlikely to think of.

Turning to Factor 2, it was previously noted that this factor draws a distinction between factual and fictional works; this distinction is somewhat odd in the fair use analysis. The fair use defense is, after all, only invoked when a copyright-protected work is at issue. So why protect copyrighted fictional works more than factual works, especially in so shorthand a manner as giving it an entire factor?[228] It is certainly the case that different types receive different fair use treatment: factual works are more prone to a finding of fair use.[229] The argument for this theory consists of something like this: (1) factual works are less expressive than creative works, (2) copyright protects only expression, (3) fair use should be available more often to copiers of less expressive works and thus (4) the fair use analysis should have a factor that tips towards fair use when the works in question are factual. But isn't this argument made of straw? Factual works may generally be less expressive (for example, phone books) than creative works as a rule of thumb, but should that really allow for a shorthand determination that factual works get less protection against fair use? The *facts* within those works get less (indeed, no) protection; but should expression in such works, such as it is, get less protection? Thus, Factor 2 may inappropriately favor fictional works in a fair use analysis. However, given the minimal weight it is accorded in the analysis, this may be of little practical difference.

Another Factor 2 modification would be to broaden it to include the type-consistency inquiry suggested above.[230] By allowing Factor 2 to favor uses that are "ambivalent" towards fact-fiction distinctions, the fair use test would

228. It may be a simple answer or, perhaps, an *a priori* statement. Either way, courts have not elaborated why those works that are "closer to the core of intended copyright protection," *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994), deserve to win this factor if, indeed, bright-line tests are to be eschewed.

229. "[R]aw facts may be copied at will. This result is neither unfair nor unfortunate" because if facts could not be copied at will, copyright's goal of promoting science would be frustrated. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 350 (1991) (citing *Baker v. Selden*, 101 U.S. 99, 103 (1880)).

230. *See* discussion *supra* at Part II.D.

be better suited for situations like Google's. And, on the off-chance that a café built out of copyright-protected works is ever opened, the test would be better equipped to address it. More realistically, fair use would also be prepared for the wave of type-blind technological innovations that Google's use may herald the arrival of.

Another possible modification—the most important contemplated here—would be to give the benefit conferred on society by the use more weight in the fair use arena. As discussed above, fair use presently does not require contemplation of how beneficial a use is to the public.[231] If copyright is truly meant to reflect the balancing of author protection against societal advancement, the two must be put on equal footing in the analysis. Author protection, that is, economic gain, is given its own factor and, further escalating the disparity, it is Factor 4, arguably the most important in a court's consideration.[232] It may even have two factors, because Factor 1 contains the "commercial" element. Societal benefit should be a required contemplation in the fair use analysis and, to reflect the spirit of copyright's balancing goal, it should be given equal weight as remuneration to the author. One way to accomplish this is to put the analysis of public benefit in Factor 4. Under this approach, Factor 4 would either favor or disfavor fair use depending on the balance between societal benefit and economic harm to the author. This approach has been recognized by both the Second[233] and Ninth Circuits.[234] Another method would be to give societal benefit its own factor and consider it in the aggregate analysis. Here, it was analyzed under Factor 1, but this creates at least two problems. First, it dilutes the potency of the "transformative" inquiry, which is arguably the most important aspect of the Factor 1 analysis at present. Second, it also adds *another* prong to the Factor 1, which is already the most complicated, containing three other elements.[235] So while considering societal benefit in Factor 1 is preferable to not considering it at all, the Ninth Circuit's approach, or giving societal benefit a factor of its own, is preferable. Without some modification, the economic interest of the author is given a disproportionate weight that is incongruent with copyright law's goals.

Turning from factor-specific suggestions to the aggregate fair use analysis, it is worth noting that the factors should be considered in light of each other but not unnecessarily conflated. As the Supreme Court in *Campbell* prescribed, the four factors should not "be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."[236] But exploring and weighing them together does not

231. *See* discussion Part II.C.

232. *See* discussion Part II.F.

233. *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

234. Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 805–06 (9th Cir. 2003). The Ninth Circuit has also analyzed societal benefit under the first prong. *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F. 3d 811, 820 (9th Cir. 2003); *Sony Computer Entm't Am., Inc. v. Bleem, L.L.C.*, 214 F.3d 1022, 1027 (9th Cir. 2000).

235. The four elements are commercial use, transformative use, propriety of defendant's behavior, and societal benefit. *Supra* note 82.

236. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

require allowing, for example, an author's right to remuneration in a derivative market under Factor 4 to influence the analysis of how beneficial a use is to society under Factor 1.[237] Each factor should be reviewed on its own merits because a sure result when the factors are heavily mixed is confusion and unpredictability. To borrow yet another metaphor from the Ghostbusters-inspired title of this article, mixing the factors is "crossing the streams;" generally, it's something to be avoided.[238] In more legalistic terms, it damages the potency of each factor's analysis by allowing a subsequent or proceeding factor to undercut it. This should be avoided because the factors will be compared in the aggregate balancing: if Factor 1 will be compared to Factor 4 in the final balancing test, why allow Factor 4 to also control the outcome of Factor 1 even before balancing? Letting a factor reveal qualities of another factor[239] is one thing; letting it control it is another. The distinction is plainly hair thin, but nonetheless useful.

Finally, turning back to Google's lawsuits, the Book Search illuminates a more general conflict that could itself serve as an article topic: copyright law is concerned primarily with the means, not the ends, of infringement while fair use is addressed primarily to the ends. The right Google is infringing is the right to copy (and, debatably, the right to prepare a derivative work). But it is using these copies in an indirect manner; it is not selling the copies to users or "rebroadcasting"[240] the copyright-protected books in a digital format. Instead, it is a convoluted, attenuated use: it mixes the copyright-protected works with its own developed search engine and, through the utility that only this mix brings, Google is able to sell advertising space on its Web page. The concern is primarily over the means Google is using to do so: scanning books. Several

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237. *See, e.g.*, *Hanratty*, *supra* note 62. To respond to this specific claim, allowing Factors 1 (purpose and character of use) and 4 (effect on potential market) to conflate is problematic. All Factor 4 offers as an analysis of societal benefit is that, if a right to compensation exists under it, the societal benefit should still have to be paid for by the infringing user. While this juxtaposition may fairly be made, it is more appropriate instead to note that societal gains favor fair or unfair use and the impact on the potential market favors fair or unfair use. Then, the weight of each factor is considered in an aggregate analysis of whether the use is fair. By keeping these analytical steps distinct, the fair use analysis is both less error prone and more transparent. A second alternative is to conduct this societal benefit analysis in Factor 4 and immediately juxtapose the two. The end result is the same: public benefit is determined then economic harm and finally the two are compared. Doing otherwise allows economic harm to the author to undercut Factor 1 while still ruling the day in Factor 4, an undesirable "double whammy" given the advance-the-arts, pro-public purpose of copyright law.

238. Ghostbusters fans following the analogy of Google as Gozer from the movie might point out that, if I hold true to my analogy, we *should* cross the streams here.

239. This occurs with Factor 3, for instance, revealing that an infringing use that copies and distributes an entire work is likely to supersede that work in the original marketplace. This does not really conflate the factors, but rather considers the aspect of the infringing use itself that happens to be analyzed under Factor 3. Thus, Google Book Search copies the entire work—a negative under Factor 3 until aligned with the concomitant need to use the whole work to accomplish Google's (legitimate) purpose. If Google also made the entire work available electronically, the Factor 3 elements (entire copying) would be relevant as well to Factor 4 and tend to negate fair use.

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

examples illustrate this oddity.[241] The ultimate point, however, is that only fair use recognizes and protects the ends. Thus, if Google's end is something copyright should encourage, fair use alone can protect it.

Copyright law is fundamentally a question of who should be compensated for what. It involves the ugly question "who should be paid for this thing the defendant has made?" Sometimes, the answer will be the author. Other times, the answer will be the defendant. But the inquiry must never be reduced to "could the author be paid for this" because the answer will always be a resounding yes. Google's use is a productive, societal-benefiting use that should be encouraged and that is a hallmark of technological advancement: "[e]veryone with a teenage kid is worried the younger generation may believe that all knowledge is on Google. . . . But what this does . . . is take [kids] to Google, which takes [them] to the library."[242]

If for some reason Google's use is deemed unfair under existing copyright law, the law should change. One scholar has noted that "[c]opyright law is [a] child of technology."[243] But if technology is copyright's father, societal benefit is its mother. And like any legal framework aimed at advancing the public interest, if it is unable to accommodate that goal, there is a problem that merits reconstruction. Google's use raises innovative copyright concerns, but the child must be mindful of its elders, learn from the marriage between its father

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241. If Google had instead scanned the works into a database that returned only titles of books, would that be an infringement? Google would in effect be using a copyright-protected work for internal purposes that lead to a commercial product, but the user would never see those works. In *Knickerbocker Toy Co. v. Azrak-Hamway International, Inc.*, a toy maker used a picture of a toy in designing its own toy. 668 F.2d 699, 701 (2d Cir. 1982). This was permitted as de minimis use. *Id.* at 703. Here, though de minimis is hard to accept given the systematic and complete copying of works, the result is notable. Surely the fault in Google's use cannot be that it is displaying snippets as search results.

What if Google had existed 100 years ago? Instead of a search engine, it might have invited clients to write to it with the precise topics of inquiry (for example, search terms). Google could then go to the library, read the books and then (after many hours of work) write back with snippets of text and the titles of the works they came from. This looks like a fair use; is the dispositive difference that in the instant case Google has made copies of the works? What if Google had simply hired people to memorize entire books or make handwritten copies? The result is the same to the author: why should the physical copying matter? *Cf.* Jessica Litman, *Revising Copyright Law for the Information Age,* 75 OR. L. REV. 19, 36–40 (1996) (arguing that while "copying" was an acceptable proxy for assigning rights without overly curtailing public rights to access works, it is much less so today because digital technology renders "copying" involved with nearly every use).

Consider finally a futuristic example. Google waits 100 years to offer this service. In the future version, instead of copying the books, Google uses one of its orbital satellites to fire a beam down that scans the contents of all of the books. No copy is made but the same product results as under the current Book Search Project: search engine users can see snippets of the books the Google satellite identified. Now the copying element has been removed from the question and replaced with "beaming:" but is it a fair use?

242. Hafner, *At Harvard, supra* note 121, at C1 (quoting Sidney Verba) (internal quoting omitted).

243. Paul Goldstein, *Copyright in the New Information Age*, 40 CATH. U. L. REV. 829, 829 (1991).

technology and mother society, and evolve in a way that still protects authors. Denying access to a modern Library of Alexandria is no such evolution.

The dispute between Google and its in-court detractors is one over compensation. The abstract question "who deserves to make money" is rarely helpful to analysis. Authors and publishers currently deserve to be compensated and to be compensated as well as capitalism provides. But their right to compensation ceases somewhere. If that cessation is not at Google's fundamentally transformative use—if taking the components of a copyright-protected work and using them in a completely different, society-benefiting manner is not protected—then copyright law advances only one goal: copyright holders' profit pursuits. This death of the second goal, societal benefit, would cripple the doctrine and something new would have to rise from its ashes.

Copyright holders will benefit from Google's service—they will even benefit monetarily through shared advertising revenues. This lawsuit is about wanting more money than copyright holders are entitled to under copyright law. While the law may at times protect such desires, it should not encourage them. It is possible there could come a day when Google is a harbinger of mass copyright infringement, a towering Copyright Destructor, but that day as of yet lives only in the realm of fiction. Fortunately, copyright law is not controlled by even three-hundred foot creatures of fiction. And, conveniently for the judges sitting in the Southern District of New York, the facts are that the law is on Google's side.

Google is not Gozer the Destructor; Google's use is a fair use.

APPENDIX A

Table of Cases

CASES	Factor 1	Factor 2	Factor 3	Factor 4	Holding	Notes on cases
A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Circ. 2001).	Unfair	Unfair	Unfair	Unfair	Unfair	
Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F. Supp. 2d 84 (S.D.N.Y. 2003).	Fair	Unfair	Neutral	Fair	Fair	
American Geophysical Union v. Texaco, Inc, 60 F.3d 913 (2d Cir. 1994).	Unfair	Fair	Unfair	Unfair	Unfair	
Narell v. Freeman, 872 F.2d 907 (9th Circ. 1989).	Unfair	Unfair	Unfair	Fair	Fair	
Antioch Co. v. Scrapbook Borders, Inc., 291 F. Supp. 2d 980 (Dist. Of Minnesota 2003).	Unfair	Unfair	Unfair	Unfair	Unfair	
Arica Inst., Inc. v. Palmer, 970 F.2d 1067 (2d Circ. 1992).	Fair	Fair	Fair	Fair	Fair	
Barban v. Time Warner, Inc., 2000 U.S. Dist. LEXIS 4447 (S.D.N.Y. 2000).	Fair	Unfair	Fair	Fair	Fair	
Batesville Servs. v. Funeral Depot, Inc., 2004 U.S. Dist. LEXIS 24336 (S.D. of Indiana 2004).	Unfair	Neutral	Unfair	Fair	Unfair	
Belmore v. City Pages, Inc., 880 F. Supp. 673 (D. Minn. 1995).	Fair	Unfair	Unfair	Fair	Fair	
Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Circ. 2006).	Fair	Unfair	Neutral	Fair	Fair	
Blanch v. Koons, 396 F. Supp. 2d 476 (S.D.N.Y. 2005).	Fair	Unfair	Fair	Unfair	Unfair	

CASES	Factor 1	Factor 2	Factor 3	Factor 4	Holding	Notes on cases
Bond v. Blum, 317 F.3d 385 (4th Circ. 2006).	Fair	Neutral	Unfair	Fair	Fair	
Castle Rock Entertainment v. Carol Publishing Group, Inc., 150 F.3d 132 (2d Circ. 1998).	Unfair	Unfair	Unfair	Unfair	Unfair	
College Entrance Exam Board v. Pataki, 889 F. Supp. 554 (N.D.N.Y. 1995).	Neutral	Unfair	Unfair	Unfair	Unfair	
Columbia Pictures Industry, Inc. v. Miramax Films Corp., 11 F. Supp. 2d 1179 (C.D. Cal. 1998).	Unfair	Unfair	Unfair	Unfair	Unfair	
Compaq Computer Corp. v. Ergonome Inc., 387 F.3d 403 (5th Circ. 2004).	Unfair	Fair	Fair	Fair	Fair	
Compaq Computer Corp. v. Procom Tech. Inc., 908 F. Supp. 1409 (S.D. Tex. 1995).	Unfair	Neutral	Unfair	Unfair	Unfair	
Craft v. Kobler, 667 F. Supp. 120 (S.D.N.Y. 1987).	Fair	Unfair	Unfair	Unfair	Unfair	
Dahlen v. Mich. Licensed Bev. Ass'n, 132 F. Supp. 2d 574 (E.D. of Michigan 2001).	Unfair	Neutral	Fair	Unfair	Unfair	
Davis v. The Gap, Inc., 246 F.3d 152 (2d Circ. 2001).	Unfair	Unfair	Unfair	Unfair	Unfair	
Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Circ. 1997).	Unfair	Unfair	Unfair	Unfair	Unfair	
Duffy v. Penguin Books USA, Inc., 4 F. Supp. 2d 268 (S.D.N.Y. 1998).	Fair	Fair	Unfair	Fair	Fair	

Elvis Presley Enterprises, Inc. v. Passport Video, 357 F.3d 896 (9th Circ. 2004).	Unfair	Neutral	Unfair	Unfair	Unfair	
FMC Corp. v. Control Solutions, Inc., 369 F. Supp. 2d 539 (E.D. of Pennsylvania 2005).	Unfair	Fair	Unfair	Unfair	Unfair	* Not express on factual element, but discussion earlier in case focuses entirely on factual.
Field v. Google, Inc., 412 F. Supp. 2d 1106 (Dist. of Nevada 2006).	Fair	Fair	Neutral	Fair	Fair	
Financial Information, Inc. v. Moody's Investor's Services, Inc., 751 F.2d 501 (2d Circ. 1984).	Unfair	Fair	Unfair	Unfair	Unfair	
Fisher v. Dees, 794 F.2d 432 (9th Circ. 1986).	Fair	Fair	Fair	Fair	Fair	
Gordon v. Nextel Communs., 2001 U.S. Dist. LEXIS 25048 (E.D. of Michigan 2001).	Fair	Fair	Fair	Fair	Fair	
Greaver v. National Ass'n of Corporate Dirs., 1997 U.S. Dist. LEXIS 20856 (Dist. of Columbia 1997).	Unfair	Unfair	Unfair	Unfair	Unfair	
Gulfstream Aero. Corp. v. Camp Sys. Int'l, Inc., 428 F. Supp. 2d 1369 (S.D. Georgia, Savannah Division 2006).	Unfair	Fair	Unfair	Fair	Fair	
Higgins v. Detroit Educational Television Foundation, 4 F. Supp. 2d 701 (E.D. Mich. 1998).	Fair	Unfair	Fair	Fair	Fair	
Hofheinz v. A&E Television Networks, 146 F. Supp. 2d 442 (S.D.N.Y. 2001).	Fair	Unfair	Fair	Fair	Fair	

Hofheinz v. AMC Productions, Inc., 147 F. Supp. 2d 127 (E.D.N.Y. 2001).	Fair	Unfair	Fair	Fair	Fair	
Hofheinz v. Discovery Communs., Inc., 2001 U.S. Dist. LEXIS 14752 (S.D.N.Y. 2001).	Fair	Unfair	Fair	Fair	Fair	
Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Circ. 1986).	Fair	Unfair	Unfair	Fair	Fair	
Images Audio Visual Productions, Inc. v. Perini Building, Co., 91 F. Supp. 2d 1075 (E.D. Mich. 2000).	Unfair	Unfair	Unfair	Unfair	Unfair	
Infinity Broadcasting Corp. v. Kirkwood, 150 F.3d 104 (2d Circ. 1998).	Fair	Unfair	Unfair	Unfair	Unfair	
Iowa State University Research Foundation, Inc. v. American Broadcasting Cos., 621 F.2d 57 (2d Circ. 1980).	Unfair	Unfair	Unfair	Unfair	Unfair	
Jackson v. Warner Brothers, Inc., 993 F. Supp 585 (E.D. Mich. 1997).	Fair	Unfair	Fair	Fair	Fair	
Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Circ. 2002).	Fair	Fair	Fair	Fair	Fair	
Leibowitz v. Paramount Pictures, Corp., 137 F.3d 109 (2d Circ. 1998).	Fair	Unfair	Neutral	Fair	Fair	
Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Circ. 1992).	Fair	Unfair	Fair	Fair	Fair	
Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Circ. 2004).	Fair	Fair	Unfair	Fair	Fair	

Lindal Cedar Homes, Inc. v. Ireland, 20004 U.S. Dist. LEXIS 18878 (Dist. of Oregon 2004).	Unfair	Neutral	Unfair	Unfair	Unfair	
Lish v. Harper's Magazine Found., 807 F. Supp. 1090 (S.D.N.Y. 1992).	Unfair	Unfair	Unfair	Fair	Unfair	
Los Angeles News Service v. CBS Broadcasting, Inc., 313 F.3d 1093 (9th Circ. 2002).	Fair	Fair	Neutral	Fair	Fair	
Los Angeles News Service v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Circ. 1997).	Unfair	Fair	Unfair	Unfair	Unfair	
Los Angeles News Service v. Reuters Television Intern., Ltd., 149 F.3d 987 (9th Circ. 1998).	Unfair	Fair	Unfair	Unfair	Unfair	
Los Angeles News Service v. Tullo, 973 F.2d 791 (9th Circ, 1992).	Unfair	Fair	Unfair	Unfair	Unfair	
Lotus Dev. Corp. v. Borland Int'l, 831 F. Supp. 223 (Dist. Of Massachusetts 1993).	Unfair	Fair	Unfair	Unfair	Unfair	
Lucent Information Management, Inc. v. Lucent Technologies, Inc., 5 F. Supp. 2d 238 (D. Del. 1998).	Fair	Fair	Unfair	Fair	Fair	
MasterCard Int'l Inc. v. Nader 2000 Primary Comm., Inc., 2004 Dist. LEXIS 3644 (S.D.N.Y. 2004).	Fair	Unfair	Neutral	Fair	Fair	
Mathieson v. Associated Press, 1992 U.S. Dist. LEXIS 9269 (S.D.N.Y. 1992).	Fair	Unfair	Fair	Fair	Fair	
Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Circ. 2003).	Fair	Unfair	Fair	Fair	Fair	

McGowan v. Cross, Copy L. Rep. (CCH)P27,085 (4th Circ. 1993).	Fair	Fair	Unfair	Fair	Fair	
Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc., 312 F.3d 94 (2d Circ. 2002).	Unfair	Unfair	Unfair	Unfair	Unfair	
Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995).	Unfair	Unfair	Fair	Fair	Unfair	* Court very terse on Factors 1 and 2
Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998).	Unfair	Unfair	Unfair	Unfair	Unfair	
Micro Star v. Formgen Inc., 154 F.3d 1107 (9th Circ. 1998).	Unfair	Unfair	Unfair	Unfair	Unfair	
Monster Communications, Inc. v. Turner Broadcast Systems, Inc., 935 F. Supp. 490 (S.D.N.Y. 1996).	Fair	Neutral	Fair	Fair	Fair	
N.Y. Mercantile Exch., Inc. v, Intercontinental Exchange, Inc., 389 F. Supp. 2d 527 (S.D.N.Y. 2005).	Fair	Neutral	Fair	Fair	Fair	
Narell v. Freeman, 872 F.2d 907 (9th Circ. 1989).	Fair	Unfair	Fair	Fair	Fair	
National Ass'n of Government Employees/Intern. Broth. of Police Officers v. BUCI Television, Inc., 118 F. Supp.2d 126 (Dist. of Massachusetts 2000).	Fair	Fair	Fair	Fair	Fair	
National Rifle Ass'n of America v. Handgun Control Federation of Ohio, 15 F.3d 559 (6th Circ. 1994).	Fair	Fair	Fair	Fair	Fair	

New Era Publications Int'l ApS v. Carol Pub. Group, 904 F.2d 152 (2d Circ. 1990).	Fair	Fair	Fair	Fair	Fair	
Newport-Mesa Unified Sch. Dist. v. Cal. Dep't of Educ., 371 F. Supp. 2d 1170 (C.D. Cal. 2005).	Fair	Fair	Fair	Fair	Fair	* Caveat- If adverse market materializ es, can review FU analysis.
Nihon Keizai Shimbun, Inc., v. Comline Business Data, Inc., 166 F.3d 65 (2d Circ. 1999).	Unfair	Unfair	Unfair	Unfair	Unfair	
Norse v. Henry Holt & Co., 847 F. Supp. 142 (S.D.N.Y. 1994).	Fair	Unfair	Fair	Fair	Fair	
Nunez v. Caribbean International News, Corp., 235 F.3d 18 (1st Circ. 2000).	Fair	Fair	Neutral	Fair	Fair	
NXIVM Corp. v. Ross Institute, 364 F.3d 471 (2d Circ. 2004).	Fair	Unfair	Fair	Fair	Fair	
Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031 (N.D. of Georgia 1986).	Unfair	Unfair	Unfair	Unfair	Unfair	
Pacific & Southern Co. v. Duncan, 744 F.2d 1490 (11th Circ. 1984).	Unfair	Fair	Unfair	Unfair	Unfair	
Palmer v. Garner, Copy. L. Rep. (CCH)P29, 148 (D. of Oregon 2006).	Unfair	Fair	Unfair	Unfair	Unfair	
Paramount Pictures Corp. v. Carol Publishing Group, 11 F. supp. 2d 329 (S.D.N.Y. 1998).	Unfair	Unfair	Unfair	Unfair	Unfair	
Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. of California 2006).	Unfair	Unfair	Neutral	Unfair	Unfair	
Playboy Enters. v. Frena, 839 F. Supp. 1552 (M.D. of Florida 1993).	Unfair	Unfair	Unfair	Unfair	Unfair	

Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (N.D. Cal. 1996).	Fair	Neutral	Fair	Fair	Fair	
Pro Arts, Inc. v. Hustler Magazine, Inc., 787 F.2d 592 (6th Circ. 1986).	Fair	Neutral	Fair	Fair	Fair	
Psihoyos v. National Examiner, 1998 U.S. Dist. LEXIS 9192 (S.D.N.Y. 1998).	Unfair	Unfair	Unfair	Unfair	Unfair	
Religious Tech. Ctr. V. Lerma, 1996 U.S. Dist. LEXIS 15454 (E.D. of Virginia 1996).	Unfair	Unfair	Unfair	Fair	Unfair	
Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70 (2d Circ. 1997).	Unfair	Unfair	Fair	Unfair	Unfair	
Robinson v. Random House, Inc., 877 F. Supp. 679 (N.D. Cal. 1995).	Unfair	Fair	Unfair	Unfair	Unfair	
Rogers v. Koons, 960 F.2d 301 (2d Circ. 1992).	Unfair	Unfair	Unfair	Unfair	Unfair	
Rubin v. Brooks/Cole Publishing Co., 836 F. Supp. 909 (Dist. Of Massachusetts 1993).	Fair	Fair	Unfair	Unfair	Fair	* Caveat-future use will not be fair
Sandoval v. New Line Cinema Corp., 973 F. Supp. 409 (S.D.N.Y. 1997).	Neutral	Unfair	Unfair	Fair	Fair	
Schiffer Publ'g, Ltd. V. Chronicle Books, LLC, 2004 U.S. Dist. LEXIS 23052 (E.D. of Pennsylvania 2004).	Unfair	Neutral	Unfair	Unfair	Unfair	
Sega Enterprises, Ltd. v. Maphia, 948 F. Supp. 923 (W.D. Mich. 1994).	Unfair	Unfair	Unfair	Unfair	Unfair	
Sega Enters. V. Accolade, Inc., 1993 U.S. App. LEXIS 78 (9th Circ. 1993).	Fair	Fair	Unfair	Fair	Fair	

Shell v. City of Radford, 351 F. Supp. 2d 510 (W.D. Virginia 2005).	Fair	Unfair	Fair	Fair	Fair	
Softel, Inc. v. Dragon Medical & Scientific Communs., 1992 U.S. Dist. LEXIS 9502 (S.D.N.Y. 1992).	Unfair	Fair	Unfair	Fair	Unfair	
Sony Computer Entertainment America, Inc. v. Bleem, LLC., 214 F.3d 1022 (9th Circ. 2000).	Fair	Fair	Fair	Fair	Fair	
Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596 (9th Circ. 2000).	Fair	Fair	Unfair	Fair	Fair	
Sundeman v. Seajay Society, Inc., 142 F.3d 194 (4th Circ. 1998).	Fair	Unfair	Fair	Fair	Fair	
Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Circ. 2001).	Fair	Unfair	Neutral	Fair	Fair	
Television Digest v. United States Tel. Ass'n, 841 F. Supp. 5 (Dist. of Columbia 1993).	Unfair	Fair	Unfair	Unfair	Unfair	
Toho Co. v. Williams Morrow & Co., 33 F. Supp. 2d 1206 (C.D. Cal. 1998).	Unfair	Unfair	Unfair	Unfair	Unfair	
Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330 (9th Circ. 1995).	Unfair	Unfair	Unfair	Unfair	Unfair	
Twin Peaks Productions, Inc. v. Publications Intern., Ltd. 996 F.2d 1366 (2d Circ. 1993).	Unfair	Unfair	Unfair	Unfair	Unfair	
UMG Recordings, Inc., v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).	Unfair	Unfair	Unfair	Unfair	Unfair	

United Tel. Co. v. Johnson Publ'g Co., 855 F.2d 604 (8th Circ. 1988).	Unfair	Fair	Unfair	Unfair	Unfair	
Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence, 78 U.S.P.Q.(BNA) 1538 (S.D.N.Y. 2005).	Fair	Unfair	Fair	Unfair	Unfair	
Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 342 F.3d 191 (3d Circ. 2003).	Unfair	Unfair	Fair	Unfair	Unfair	
Wade Williams Distrib., Inc. v. ABC, 2005 U.S. Dist. LEXIS 5730 (S.D.N.Y. 2005).	Fair	Unfair	Fair	Fair	Fair	
Wall Data Inc. v. Los Angeles County Sheriff's Dept., 447 F.3d 769 (9th Circ. 2006).	Unfair	Unfair	Unfair	Unfair	Unfair	
Weissman v. Freeman, 868 F.2d 1313 (2d Circ. 1989).	Unfair	Neutral	Unfair	Unfair	Unfair	
Williams v. Columbia Broad. Sys., Inc., 57 F. Supp. 2d 961 (C.D. Cal. 1999).	Fair	Unfair	Fair	Fair	Fair	
Williamson v. Pearson Educ., 2001 U.S. Dist. LEXIS 17062 (S.D.N.Y. 2001).	Fair	Fair	Fair	Unfair	Fair	
Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130 (S.D.N.Y. 1990).	Fair	Unfair	Fair	Fair	Fair	
Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 18 (1st Circ. 2000).	Fair	Neutral	Neutral	Fair	Fair	
Wright v. Warner Books, Inc., 953 F.2d 731 (2d Circ. 1991).	Fair	Unfair	Fair	Fair	Fair	

APPENDIX B

Coded Data

Court Cases					FAIR														
Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
-1	-1	-1	-1	-1															
1	-1	0	1	1							Y								
-1	1	-1	-1	-1															
-1	-1	-1	1	1				Y											
-1	-1	-1	1	-1															
1	1	1	1	1															Y
1	-1	1	1	1										Y					
-1	0	-1	1	-1															
1	-1	-1	1	1							Y								
1	-1	0	1	1							Y								
1	-1	1	-1	-1															
1	0	-1	1	1							Y								
-1	-1	-1	-1	-1															
0	-1	-1	-1	-1															
-1	-1	-1	-1	-1															
-1	1	1	1	1														Y	
-1	0	-1	-1	-1															
1	-1	-1	-1	-1															
-1	0	1	-1	-1															
-1	-1	-1	-1	-1															
-1	1	-1	-1	-1															
1	1	-1	1	1									Y						
-1	0	-1	-1	-1															
-1	1	-1	-1	1															
1	1	0	1	1									Y						
-1	1	-1	-1	-1															
1	1	1	1	1															Y
1	1	1	1	1															Y
-1	-1	-1	-1	-1															
-1	1	-1	1	1												Y			
1	-1	1	1	1										Y					
1	-1	1	1	1										Y					
1	-1	1	1	1										Y					
1	-1	1	1	1										Y					
1	-1	-1	1	1							Y								
Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
-1	-1	-1	1	-1															
1	-1	-1	-1	-1															
-1	-1	-1	-1	-1															
1	-1	1	1	1										Y					
1	1	1	1	1															Y
1	-1	0	1	1							Y								
1	-1	1	1	1										Y					
1	1	-1	1	1									Y						
-1	0	-1	-1	-1															
-1	-1	-1	1	-1															
1	1	0	1	1									Y						
-1	1	-1	-1	-1															
-1	1	-1	-1	-1															
-1	1	-1	-1	-1															
-1	1	-1	-1	-1															
1	1	-1	1	1									Y						
1	-1	0	1	1							Y								
1	-1	1	1	1										Y					
1	-1	1	1	1										Y					
1	1	-1	1	1									Y						

Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
-1	-1	1	1	-1															
-1	-1	1	1	-1															
-1	-1	-1	-1	-1															
-1	-1	-1	-1	-1															
1	0	1	1	1										Y					
1	0	1	1	1										Y					
1	-1	1	1	1										Y					
1	1	1	1	1															Y
1	1	1	1	1															Y
1	1	1	1	1															Y
1	1	1	1	1															Y
-1	-1	-1	-1	-1															
1	-1	1	1	1										Y					
1	1	0	1	1									Y						
1	-1	1	1	1										Y					
-1	-1	-1	-1	-1															
-1	1	-1	-1	-1															
-1	1	-1	-1	-1															
Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
-1	-1	-1	-1	-1															
-1	-1	0	-1	-1															
-1	-1	-1	-1	-1															
1	0	1	1	1										Y					
1	0	1	1	1										Y					
-1	-1	-1	-1	-1															
-1	-1	-1	1	-1															
-1	-1	1	1	-1															
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-1	-1	-1	-1	-1															
1	1	-1	-1	1					Y										
0	-1	-1	1	1				Y											
-1	0	-1	-1	-1															
-1	-1	-1	-1	-1															
1	1	-1	1	1									Y						
1	-1	1	1	1										Y					
-1	1	-1	1	-1															
1	1	1	1	1															Y
1	1	-1	1	1									Y						
1	-1	1	1	1										Y					
1	-1	0	1	1							Y								
-1	1	-1	-1	-1															
-1	-1	-1	-1	-1															
-1	-1	-1	1	-1															
-1	-1	1	-1	-1															
-1	-1	-1	-1	-1															
-1	1	-1	-1	-1															
1	-1	1	-1	-1															
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1	-1	1	1	1										Y					
-1	-1	-1	-1	-1															
-1	0	-1	-1	-1															
1	-1	1	1	1										Y					
1	1	1	-1	1								Y							
1	-1	1	1	1										Y					
1	0	0	1	1							Y								
1	-1	1	1	1										Y					
Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
					0	0	0	2	1	0	9	1	9	22	0	1	0	1	9
SUMFAIR																			

Court Cases					UNFAIR														
Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
-1	-1	-1	-1	-1															Y
1	-1	0	1	1															
-1	1	-1	-1	-1										Y					
-1	-1	-1	1	1															
-1	-1	-1	-1	-1															Y
1	1	1	1	1															
1	-1	1	1	1															
-1	0	-1	1	-1						Y									
1	-1	-1	1	1															
1	-1	0	1	1															
1	-1	1	-1	-1												Y			
1	0	-1	1	1															
-1	-1	-1	-1	-1															Y
0	-1	-1	-1	-1														Y	
-1	-1	-1	-1	-1															Y
-1	1	1	1	1															
-1	0	-1	-1	-1										Y					
1	-1	-1	-1	-1														Y	
-1	0	1	-1	-1							Y								
-1	-1	-1	-1	-1															Y
-1	-1	-1	-1	-1															Y
1	1	-1	1	1															
-1	0	-1	-1	-1										Y					
-1	1	-1	-1	-1										Y					
1	1	0	1	1															
-1	1	-1	-1	-1										Y					
1	1	1	1	1															
1	1	1	1	1															
-1	-1	-1	-1	-1															Y
-1	1	-1	1	1															
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1	-1	1	1	1															
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1	-1	1	1	1															
1	-1	-1	1	1															
Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
-1	-1	-1	-1	-1															Y
1	-1	-1	-1	-1														Y	
-1	-1	-1	-1	-1															Y
1	-1	1	1	1															
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1	-1	0	1	1															
1	-1	1	1	1															
1	1	-1	1	1															
-1	0	-1	-1	-1										Y					
-1	-1	-1	1	-1								Y							
1	1	0	1	1															
-1	1	-1	-1	-1										Y					
-1	1	-1	-1	-1										Y					
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-1	1	-1	-1	-1										Y					
1	1	-1	1	1															
1	-1	0	1	1															
1	-1	1	1	1															
1	-1	1	1	1															
1	1	-1	1	1															

Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
-1	-1	-1	-1	-1															Y
-1	-1	1	1	-1					Y										
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-1	-1	-1	-1	-1															Y
1	0	1	1	1															
1	0	1	1	1															
1	-1	1	1	1															
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1	1	1	1	1															
1	1	1	1	1															
1	1	1	1	1															
-1	-1	-1	-1	-1															Y
1	-1	1	1	1															
1	1	0	1	1															
1	-1	1	1	1															
-1	-1	-1	-1	-1															Y
-1	1	-1	-1	-1										Y					
-1	1	-1	-1	-1										Y					
Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
-1	-1	-1	-1	-1															Y
-1	-1	0	-1	-1									Y						
-1	-1	-1	-1	-1															Y
1	0	1	1	1															
1	0	1	1	1															
-1	-1	-1	-1	-1															Y
-1	-1	-1	1	-1								Y							
-1	-1	1	-1	-1									Y						
-1	1	-1	-1	-1										Y					
-1	-1	-1	-1	-1															Y
1	1	-1	-1	1															
0	-1	-1	1	1															
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-1	-1	-1	-1	-1															Y
1	1	-1	1	1															
1	-1	1	1	1															
-1	1	-1	1	-1						Y									
1	1	1	1	1															
1	1	-1	1	1															
1	-1	1	1	1															
1	-1	0	1	1															
-1	1	-1	-1	-1						Y									
-1	-1	-1	-1	-1															Y
-1	-1	-1	-1	-1															Y
-1	-1	-1	-1	-1															Y
-1	-1	-1	-1	-1															Y
-1	1	1	-1	1										Y					
-1	-1	1	-1	-1												Y			
-1	-1	1	-1	-1									Y						
1	-1	1	1	1															
-1	-1	-1	-1	-1															Y
-1	0	-1	-1	-1										Y					
1	-1	1	1	1															
1	1	1	-1	1															
1	-1	1	1	1															
1	0	0	1	1															
1	-1	1	1	1															
Factor 1	Factor 2	Factor 3	Factor 4	Holding	1	2	3	4	12	13	14	123	124	134	23	24	34	234	1234
					0	0	0	0	1	3	1	2	3	16	0	2	0	3	2[illegible]
SUMUNFAIR																			