

# OPTING OUT: PROCEDURAL FAIR USE

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## ABSTRACT

*This article explores the advantages of opt-out plans, and identifies a critical shortcoming in Copyright's doctrine of Fair Use. The discussion is fueled by a current controversy: In December of 2004, Google, Inc. announced its plan to digitally scan thousands of copyrighted books as part of a massive new digital indexing service. Hedging against possible litigation, Google provided a free and easy opt-out procedure for authors who didn't want their books scanned. Despite this measure, two major authors' groups have sued Google, claiming the opt-out plan imposes an unfair burden. This article explores the fairness of established opt-outs in contract law, privacy law, and class action rules. Further, the discussion explores how Copyright already places similar burdens upon authors. Ultimately, these lessons are applied to the Google Book Search problem, and an important new Fair Use consideration is identified.*

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## INTRODUCTION

In December of 2004, Google, Inc. announced its plan to copy thousands of books protected by American copyright law.<sup>1</sup> Google Book Search (formerly the Google Print Library Project) would require years of labor, the world's most advanced scanning technology, and the cooperation of Harvard, Stanford, and Oxford Universities, as well as the University of Michigan and the New York Public Library.<sup>2</sup> What was not required, Google believed, was the express permission of copyright owners.

After being sued by The Author's Guild in September of 2005, Google offered a public explanation for why its massive copying project did not constitute "massive copyright infringement":<sup>3</sup> The project's purpose was to help people find books, not steal them.<sup>4</sup> When presented with a search query, Google's book search engine would look within its full-text database to locate pertinent titles. Relevant page snippets (only a few lines long) would be presented to the user, along with information about where to buy the books.<sup>5</sup> Google claimed their indexing system was protected fair use.<sup>6</sup>

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<sup>1</sup> Press Release, Google, Inc., Google Checks Out Library Books (Dec. 14, 2004), at [http://www.google.com/press/pressrel/print\\_library.html](http://www.google.com/press/pressrel/print_library.html).

<sup>2</sup> *Id.*

<sup>3</sup> Press Release, The Author's Guild, Author's Guild Sues Google, Citing "Massive Copyright Infringement" (Sept. 20, 2005), at [http://www.authorsguild.org/news/sues\\_google\\_citing.htm](http://www.authorsguild.org/news/sues_google_citing.htm).

<sup>4</sup> See Google Books Library Project – An enhanced card catalog of the world's books, at <http://books.google.com/googlebooks/library.html> ("The Library Project's aim is simple: make it easier for people to find relevant books – specifically books they wouldn't find any other way such as those that are out of print – while carefully respecting authors' and publishers' copyrights. Our ultimate goal is to work with publishers and libraries to create a comprehensive, searchable, virtual card catalog of all books in all languages that helps users discover new books and publishers discover new readers.").

<sup>5</sup> See *Id.* ("When you click on a search result for a book from the Library Project, you'll see the Snippet View which, like a card catalog, shows you information about the book plus a few snippets – a few sentences of your search term in context. You may also see the Sample Pages View if the publisher or author has given us permission or the Full Book View if the book is out of copyright.").

<sup>6</sup> See generally WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2nd ed. BNA Books, 1995). Fair use is a doctrine in American copyright

Supplementing Google's fair use claims, however, was an even more interesting justification: Any copyright holder who did not want her works included in Google's index could simply opt out of the project.<sup>7</sup> The search company pledged to honor such requests, and even created a webpage to facilitate the opt-out process.<sup>8</sup>

Against Google's hopes, the opt-out plan failed to extinguish the ire of many anxious authors. In September of 2005, the Author's Guild said that the opt-out plan "turned longstanding precedents in copyright law upside down, requiring owners to preemptively protect rights rather than requiring a user to gain approval for use of a copyrighted work."<sup>9</sup> Patricia Schroeder, president and CEO of the American Association of Publishers (APP), another group that filed suit against Google in October of 2005, claimed that the opt-out plan "shifts the responsibility for preventing infringement to the copyright owner rather than the user, turning every principle of copyright law on its ear."<sup>10</sup>

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law which permits the unlicensed reproduction of copyrighted works under certain circumstances. The Copyright Act lists the following four balancing factors for use in determining the presence of fair use:

- (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.

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

<sup>7</sup> *Information for Publishers About the Google Library Project*, (Google, Inc.), at [http://print.google.com/googleprint/publisher\\_library.html](http://print.google.com/googleprint/publisher_library.html) ("If you are a current Google Print publisher, you can simply upload a list of the books you don't want in Google Print . . . . If you're not a Google Print partner and want us to avoid your books, you'll need to provide us with a small amount of information about yourself as well as a list of the books you don't want in the Google Library . . . . We're happy to remove your book from our search results at any time, just as we do for publishers of websites. You'll need to . . . let[] us know which books to exclude.").

<sup>8</sup> *Google Print Library Project Exclusion Registration*, (Google, Inc.), at <https://print.google.com/publisher/exclusion-signup>.

<sup>9</sup> Edward Wyatt, *Writers Sue Google, Accusing It of Copyright Violation*, N.Y. TIMES, Sept. 21, 2005.

<sup>10</sup> Press Release, Association of American Publishers, Google Library Project Raises Serious Questions for Publishers and Authors (August 12, 2005) at <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=274>.

Traditionally, opt-out schemes like Google's wouldn't be influential in determining whether copying is protected by the doctrine of Fair Use.<sup>11</sup> In part, this is because the issue is somewhat new within the narrow context of copyright infringement. Only recently have projects such as Google's sought to systematically record such massive amounts of data owned by such a multitude of parties, that an opt-out plan would be useful. But as we consider the benefits that might come from Google's digital Library of Alexandria,<sup>12</sup> the questions are clear: To what degree should opt-out provisions influence copyright law? When – if ever – should copyright infer consent from notice followed by inaction? What are the social, legal, and economic strengths and weaknesses of opt-out programs? These questions are at the heart of a fascinating new realm of copyright law that will ultimately determine how our society indexes and accesses creative works.

The concept of opting-out has already been of great importance, both in substantive and procedural law. In contract law, the issue arises when an offeror imposes a burden on offerees to actively reject offers they don't wish to be bound to. American courts encountered this issue as early as 1893, when Justice Holmes rendered his decision in *Hobbs v. Massasoit Whip Co.*, which concerned whether a recipient of eel-skins had, through his silent failure to reject the goods, tacitly accepted to pay the seller. Holmes' finding of acceptance through silence is currently reflected in the Restatement of Contracts, which explicitly allows for acceptance through failure to opt out of an offer.<sup>13</sup> Known

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<sup>11</sup> The doctrine of fair use, for example, does not account for such procedures. 17 U.S.C. § 107 (1976).

<sup>12</sup> “The Royal Library of Alexandria was once the largest in the world. It is usually assumed to have been founded at the beginning of the 3rd century BC . . . .” Said to have been seeded with Aristotle's own private collection of books, it is rumored that all visitors to Egypt were once “required to surrender all books and scrolls in their possession; these writings were then swiftly copied by official scribes. The originals were put into the Library, and the copies were delivered to the previous owners.” Wikipedia contributors, “Library of Alexandria,” *Wikipedia: The Free Encyclopedia*, [http://en.wikipedia.org/wiki/Library\\_of\\_Alexandria](http://en.wikipedia.org/wiki/Library_of_Alexandria)

<sup>13</sup> See RESTATEMENT (SECOND) OF CONTRACTS, § 69 (1981) (“Acceptance by silence or exercise of dominion: Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance . . . . Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.”).

today as “negative option marketing,” the contractual opt-out is widely used by mail-order businesses that send consumers goods in the mail along with a demand to either return the goods or pay for them.<sup>14</sup>

The same issue has recently arisen in privacy law. For years, Americans have chosen to opt out of telephone solicitations by paying to have their phone numbers unlisted.<sup>15</sup> Aware of widespread distaste for telephone sales calls, the FTC created the National Do-Not-Call Registry, which has received over 100 million registrations to date.<sup>16</sup> The opt-out approach is also commonly used for solicitations sent via traditional mail. In fact, the Direct Mailing Association (DMA), a trade association of companies that use direct-mail advertising, has received over 3.3 million consumer requests not to receive solicitations in the mail.<sup>17</sup> These recent developments dealing with “informational privacy”<sup>18</sup> have important bearing on the Google opt-out issue. This paper will explore why many consider opt-out systems to be superior to opt-in systems with respect to the indexing and use of consumer data.<sup>19</sup>

The Author’s Guild’s lawsuit against Google ironically presents yet another domain where opting-out is a preferred mode

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<sup>14</sup> See, e.g., *Terms and Conditions of Membership to BMG Music Service*, (BMG Direct) at [http://www.bmgmusic.com/global/how\\_membership\\_works.jhtml](http://www.bmgmusic.com/global/how_membership_works.jhtml) (“If you want it, do nothing; it will be shipped to you automatically. If you don’t want it, respond online or through the mail by the date specified. If you receive an unwanted Featured Selection, return it within 10 days at our expense and we will credit your account.”).

<sup>15</sup> See, e.g., Jeff Sovern, *Opting In, Opting Out, Or No Options At All: The Fight For Control of Personal Information*, 74 WASH. L. REV. 1033, 1065 (“The percentage of consumers willing to pay for unpublished numbers varies from state to state. In California, fifty-five percent of residential telephone numbers are unlisted, while in New York, only twenty-four percent of residents have unpublished.”).

<sup>16</sup> *Statement of Federal Trade Commission Chairman Deborah Platt Majoras on the 100 Millionth Number on the National Do Not Call Registry*, (The Federal Trade Commission), at <http://www.ftc.gov/opa/2005/08/dncstatment.htm>; DNC Registrations as of Aug 16 2005 at [http://www.ftc.gov/opa/2005/08/050816dnc\\_registrations.pdf](http://www.ftc.gov/opa/2005/08/050816dnc_registrations.pdf)

<sup>17</sup> Sovern, *supra* note 15 at 1068.

<sup>18</sup> *Id.* at 1042 (quoting Jacob Sullum, *Secrets for Sale*, REASONS, Apr. 1992, at 29, available at <http://reason.com/9204/fe.sullum.shtml>).

<sup>19</sup> See generally Michael E. Staten, *The Impact of Opt-in Privacy Rules on Retail Credit Markets: A Case Study of MBNA*, 52 Duke L.J. 745 (2002).

of operation: class action lawsuits. It is almost comic to recognize that the very parties who call Google's opt-out scheme an unfair burden on authors have instituted a class action requiring authors who do not wish to sue Google to opt out. Like many class actions, the suit is governed by Rule 23(b)(3) of the Federal Rules of Civil Procedure<sup>20</sup>, which requires that all members of a class be sent notice explaining the nature of the claims and their freedom to opt out of the suit.<sup>21</sup> In contrast to the earlier federal rule requiring parties to opt in to class action suits, many believe that the current opt-out scheme has made class action lawsuits more powerful instruments of change.<sup>22</sup> The legal and sociological reasons supporting this rule shed light on how copyright law might handle the matter.

Finally, the opt-out question has been addressed in copyright law itself, under circumstances almost identical to the Google Book Search controversy. Currently, search engines, which operate by copying and indexing information online, utilize an opt-out scheme known as, "webcrawler exclusion."<sup>23</sup> Copyright holders who don't want their material indexed by search engines can place a special text file on their web server titled, "robots.txt," which stands as a gatekeeper, instructing automated search programs not to index some or all of a website's contents.<sup>24</sup> Today, this is the most common method of preventing unwanted copying by search engines.<sup>25</sup>

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<sup>20</sup> FED. R. CIV. P. 23(c)(2) (1998) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances . . . . The notice must concisely and clearly state in plain, easily understood language . . . . that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded.").

<sup>21</sup> See Class Action Complaint, *The Author's Guild v. Google* (Sept. 20, 2005), available at <http://news.findlaw.com/hdocs/docs/google/aggoog92005cmp.pdf> (showing the applicability of Rule 23(b)(3) to the action).

<sup>22</sup> See generally Steven T.O. Cottreau, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480 (1998).

<sup>23</sup> See generally MARTIJN KOSTNER, A STANDARD FOR ROBOT EXCLUSION (1994), at <http://www.robotstxt.org/wc/norobots.html>.

<sup>24</sup> *Id.*

<sup>25</sup> The robots.txt standard is widely known by website administrators. While it appears no formal empirical study has been performed on the matter, the popularity of robots.txt is recognized by major organizations, such as The Internet Archive, a prominent non-profit group. See, e.g., Removing Documents

Common threads connect all of the examples above: In each case, a centralized entity acts upon a large class of individuals; Rights are sacrificed, but only slightly so. Costs are balanced against conveniences, and burdens are placed on those who seem to best bear the load. This article will explore these themes, and define the factors that make opt-outs desirable. Focusing on social, legal, and economic considerations, Part I of this article will explore the issue with respect to contract and privacy law. In Part II, the success of opt-out class action rules will be analyzed. Part III will study the opt-out rule with respect to copyright, and Part IV will apply the lessons learned in previous sections to the Google Book Search issue. Ultimately, it will be argued that opt-out provisions should be considered as a new factor in fair use analysis.

## I. PRIVACY AND CONTRACTUAL OPT-OUTS

### A. *Contracts: Negative Option Agreements*

Opt-outs are built on the idea that sometimes, silence conveys acceptance. In the business world, this assumption has proven to be ripe for exploitation by opportunists. Nevertheless, American contract law continues to recognize silence as a legitimate mode of assent.

An early example of silence as acceptance dates from 1893, when Justice Holmes (then on the bench of the Supreme Court of Massachusetts) rendered his decision in *Hobbs v. Massasoit Whip Company*.<sup>26</sup> In this seminal case, the plaintiff, a purveyor of eel skins, made a shipment to the defendant, who never explicitly placed an order. The defendant had previously paid the plaintiff for unsolicited goods, but this time, the defendant kept the goods but refused to pay.<sup>27</sup> Finding the defendant liable, Justice Holmes stated that “conduct which imports acceptance or assent is

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From the Wayback Machine, at <http://www.archive.org/about/exclude.php> (“Robots.txt is the most widely used method for controlling the behavior of automated robots on your site . . . all major robots, including those of Google, Alta Vista, etc. respect these exclusions.”).

<sup>26</sup> 33 N.E. 495 (1893).

<sup>27</sup> *Id.*



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acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party.”<sup>28</sup>

Today, Section 69 of The Restatement (Second) of Contracts, states this principle as follows:

§ 69. Acceptance by Silence or Exercise of Dominion

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

- (a) where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
- (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
- (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.<sup>29</sup>

Silence as acceptance is also recognized in the Uniform Commercial Code (UCC), which governs commercial transactions between businesses in almost every state.<sup>30</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> The Restatement (Second) of Contracts, § 69.

<sup>30</sup> The Uniform Commercial Code (UCC), regulates commercial transactions in every state except Louisiana. UCC § 2-606(1)(b) provides that “acceptance of goods occurs when the buyer . . . fails to make an effective rejection” after having had a reasonable opportunity to inspect. A similar policy is expressed in § 2-327(1)(b), which states, “failure seasonably to notify the seller of election to return the goods is acceptance. . . .” This is a reasonable policy, because merchants have usually negotiated before the time of shipment, and “most relevant contract have been ironed out.” Avery Katz, “Transaction Costs and

By requiring action on the part of offerees, common law essentially imposes an opt-out. A well-known example of contractual opt-outs is the “negative option agreement.” This business device was introduced in 1926, when Maxwell Sackheim and Harry Scherman began the famous Book-of-the-Month Club.<sup>31</sup> The business plan was simple: First, consenting subscribers received advance notice of the monthly book. If they didn’t want to buy it, they opted out by mail or telephone – otherwise, the book arrived at the subscriber’s door, along with a bill.<sup>32</sup> Buyers were spared the time and trouble of searching for good books. For Sackheim and Scherman, the plan was a fantastically effective sales device, and launched The Book-of-the-Month Club to success.<sup>33</sup>

Today, negative option marketing is most popular with book, CD, and movie-of-the-month clubs, such as Columbia House and BMG, as well as cable, telephone and insurance companies.<sup>34</sup> By placing an affirmative duty on offerees to *avoid* accepting contracts however, negative option agreements create a high potential for fraud.<sup>35</sup> Since the time of Sackheim and Scherman,

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the Legal Mechanics of Exchange: When Should Silence in the Face of an Offer Be Construed as Acceptance?” 9 J. L. Econ. & Org. 77, 94 (noting that in such common cases, “requiring an affirmative acceptance . . . would add an unnecessary transaction cost”).

<sup>31</sup> See Peter Bowal, “*Reluctance to Regulate: The Case of Negative Option Marketing*” 36 Am. Bus. L.J. 377, 378. The Book-of-the-Month club wasn’t truly a club, but a business. The Franklin Library, established by Benjamin Franklin in 1731, is often cited as the nation’s first true book club. In exchange for ten shillings per year, subscribers enjoyed the grand literary treasures that their pooled resources could buy. See “A Brief History of the Library Company of Philadelphia” at <http://www.librarycompany.org/instance.htm>. Over time however, and with some notable exceptions such as Oprah Winfrey’s book club, the term, “book club” has come to refer to businesses that send consumers books by mail.

<sup>32</sup> See Bowal, *supra* note 31 at 378.

<sup>33</sup> *Id.* Maxwell Sackheim went on to become a highly regarded figure in the world of advertising. See generally MAXWELL SACKHEIM, MY FIRST SIXTY YEARS IN ADVERTISING (Prentice Hall 1970).

<sup>34</sup> See, e.g., *Terms and Conditions of Membership to BMG Music Service*, *supra* note 14.

<sup>35</sup> See, e.g., Children’s Book Publisher to Pay \$710,000 to Settle Charges it Violated Commission’s Negative Option and Telemarketing Sales Rule, at <http://www.ftc.gov/opa/2005/06/scholastic.htm> (June 21, 2005) (describing Scholastic Inc.’s agreement to settle after being charged with operating a

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many unscrupulous businesses have abused negative option agreements by providing consumers with inadequate and misleading information, or making it difficult and costly to opt out.<sup>36</sup> Victims of these scams have been bound to terms they never accepted, and goods they never wished for.

American law has sought to curb these threats. Under the common law of the Restatement, and federal regulations, a buyer and seller must be involved in an ongoing relationship (such as a book-of-the-month club).<sup>37</sup> Federal regulations also require the seller to properly inform the buyer of payment obligations and how to easily opt out. The FTC's Prenotification Negative Option Rule<sup>38</sup>, which applies to negative option agreements offered by telemarketers, requires disclosure of:

all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment and the specific steps the customer must take to avoid charge(s).<sup>39</sup>

While this rule pertains only to the telemarketing industry, it reflects the general consumer protection principle that "[s]ellers must give consumers information about . . . terms and policies, clearly and conspicuously, in their promotional materials."<sup>40</sup>

Despite such regulation, some consumer protection advocates still object to negative option contracts and contend that

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deceptive negative option book plan, in violation of an FTC rule).

<sup>36</sup> See generally Bowal, *supra* note 31.

<sup>37</sup> See the Postal Reorganization Act, 39 U.S.C. §3009[d]), which prohibits offers in the form of merchandise from sellers unknown to buyers. The logic behind this policy can be traced back to the words of Justice Holmes in *Hobbs v. Massasoit Whip*, *supra* note 26.

<sup>38</sup> 16 C.F.R. § 310.3, available at <http://www.ftc.gov/ftc/legal.htm> (click on "FTC Rules" and navigate to view section 310.3 of 16 C.F.R.).

<sup>39</sup> *Id.* at § 310.3 a(1)(vii).

<sup>40</sup> "Prenotification Negative Option Plans" at <http://www.ftc.gov/bcp/online/pubs/products/negative.htm>. See also, Linda A. Goldstein, "Shining a Light on the TSR's New Negative Option Regulations," *Response Magazine*, April 2003 at 54.

the high potential for consumer fraud warrants a complete ban.<sup>41</sup> Why hasn't their view prevailed? The answer, discussed below, lies in the economic efficiency and fairness of opt-outs.

B. *Contracts: Analysis of Negative Option Agreements*

Unlike other opt-out examples in this article, negative option contracts directly concern the sale of goods. This presents an opportunity to rigorously explore the economics of opt-outs. The following model<sup>42</sup> will later be useful in exploring opt-outs in the world of copyright.

Consider a small mail-order book service. Suppose the most a buyer is willing to pay for a given book ( $v$ ), is twenty dollars. The seller, through her experience in sales, is aware of this value, and looks for a suitable price to charge ( $p$ ). In a strict opt-in system, "book-of-the-month" clubs as we know them wouldn't exist; Offer and acceptance would be required for each sale, compelling the seller to spend money to entice consumers. This search cost ( $s$ ) would involve advertising every monthly book to the public. Distributed, assume this cost amounts to ten dollars per-book. Interested buyers will incur a small communication cost, say, two dollars ( $r$ ) to tell the seller they wish to buy. As a result, buyers will only purchase if the book is equal to or less than eighteen dollars ( $p \leq v - r$ ). Similarly, the seller can only profit by charging more than ten dollars – their advertising expense ( $s < p$ ). In an opt-in system, a sale will only occur if the book costs between ten and eighteen dollars.

The picture is quite different under an opt-out regime. Here, we can imagine a typical book-of-the-month scenario. Unlike the opt-in arrangement, buyers need not be stirred into action by advertisements - they will "buy" books through total inaction. As a result, instead of spending ten dollars ( $s$ ) to find willing buyers, the seller need only spend a small amount, say, one dollar ( $w$ ), to inform customers of the monthly title, and how to opt-out. (This could be accomplished with an email). Buyers will

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<sup>41</sup> See generally Bowal, *supra* note 31 at 390.

<sup>42</sup> This model is adapted from one presented by Avery Katz of the University of Michigan in his 1993 article, "Transaction Costs and the legal mechanics of Exchange: When Should Silence in the Face of an Offer Be Construed as Acceptance?". Katz *supra* note 30, at 80-81.

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either keep the book and pay for it, or send a refusal ( $r$ , set at two dollars above). In this scenario, buyers will purchase whenever the book is equal to or less than twenty-two dollars ( $p \leq v + r$ ). The seller will profit by charging anything more than one dollar – the cost of informing customers ( $w < p$ ). Thus, sales will occur if the book costs between one and twenty-two dollars. This margin is clearly wider than the one created by the opt-in system, and will lead to more transactions. The following table illustrates both models.<sup>43</sup>

	Opt-out regime	Opt-in regime
Buyer does nothing	Buyer gains: $v - p$ Seller earns: $p - w$	Buyer gains: 0 Seller earns: $-s$
Buyer accepts		Buyer gains: $v - r - p$ Seller earns: $p - s$
Buyer rejects	Buyer gains: $-r$ Seller earns: $-w$	
Sale occurs when	$w \leq p \leq v + r$ $(1 \leq p \leq 20 + 2)$	$s \leq p \leq v - r$ $(10 \leq p \leq 20 - 2)$

$p$  = price of book (variable)  
 $v$  = maximum amount buyer is willing to pay (\$20)  
 $s$  = cost of advertising book to buyer (\$10)  
 $r$  = cost for buyer to communicate interest to seller (price to opt-in) (\$2)  
 $w$  = cost for seller to inform buyer how to opt-out (price to opt-out) (\$1)

Table 1: Cost comparison of negative option agreements

The conclusion that opt-outs result in more transactions is supported by empirical evidence. In a recent survey conducted by the FCC, seventy-two telephone operating companies selling wire maintenance plans reported an average acceptance rate of eighty percent under negative option selling plans, as compared with forty-five percent under normal selling conditions.<sup>44</sup> Similarly,

<sup>43</sup> For clarity, this model does not account for the advertising costs associated with enticing consumers to sign-up for opt-out services such as the book-of-the-month club presented here. This model assumes an existing subscriber base.

<sup>44</sup> Mark T. Spriggs and John R. Nevin, "Negative Option Selling Plans: Current

cable television companies have reported thirty-five to forty percent increases in channel subscriptions under negative option agreements.<sup>45</sup> Profits from these higher sales “can be retained as higher margins or passed through to buyers in the form of lower prices, which may increase sales volume even further if more price-sensitive buyers choose to purchase at the new lower price.”<sup>46</sup>

Of course, harm occurs when the price of opting-out is high. In these cases, consumers are bound to pay high prices for goods they don’t want. Federal regulations and state common law attempt to forbid such abuses while permitting negative option agreements to flourish where they are most valuable - when communication costs are low, and business search costs are high.<sup>47</sup>

### C. *Privacy: The National Do-Not-Call Registry*

In 1781, James Otis famously said, “[O]ne of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle.”<sup>48</sup> The notion of one’s home as a stronghold of privacy was later enshrined in the Fourth Amendment,<sup>49</sup> and has long been a pillar of the American identity. In the 1980s, however, a new technology threatened domestic privacy: Telemarketing. Armed with phone directories, troops of aggressive marketers interrupted the privacy of countless American homes. The practice was often invasive, annoying, and sometimes capable of harm.<sup>50</sup>

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Forms Versus Existing Regulations” 15 J. of Pub. Pol. & Marketing 227, 229 (quoting a 1998 FCC survey).

<sup>45</sup> Sovern, *supra* note 15, at 1092.

<sup>46</sup> Spriggs, *supra* note 44.

<sup>47</sup> See, e.g., The FTC’s Prenotification Negative Option Rule, *supra* note 38; The Restatement (Second) of Contracts, § 69, *supra* note 29.

<sup>48</sup> “In Opposition to Writs of Assistance by James Otis,” available at <http://www.bartleby.com/268/8/9.html>.

<sup>49</sup> “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV.

<sup>50</sup> See, e.g. Sovern, *supra* note 15 at 1069 (describing the pain of continuing to receive solicitations for women’s apparel after the death of his wife); See also Id, at note 191 (““sadness, shattered feeling, family rifts, grief, doubt, and devastation” cause by direct-mail ads which included handwritten notes from

The problem came to a head in the early 1990s, leading Congress to enact regulations which sought to lessen the number of unwanted sales calls.<sup>51</sup> The Telephone Consumer Protection Act, and the Telemarketing and Consumer Fraud and Abuse Prevention Act directed the FTC and FCC to create new rules and measures that regulated telemarketing more closely.<sup>52</sup> An early approach forbade businesses from calling people who had previously told those particular businesses not to call.<sup>53</sup> As telemarketing grew more widespread however, most consumers agreed that this “company specific” approach just didn’t go far enough.<sup>54</sup> In response, Congress promoted the National Do-Not-Call Registry, which allows people to opt out of receiving most types of telephone solicitations.<sup>55</sup>

The proposed do-not-call registry received overwhelming support from consumer groups, but some privacy advocates urged for an even more restrictive opt-in approach, which would prohibit “telemarketing to any consumer who ha[d] not expressly agreed to receive telephone solicitations.”<sup>56</sup> A fitting name might have been “The Please-Do-Call Registry.” Pointing to strong consumer support for opt-in systems in other contexts, advocates urged that the approach would “more effectively protect individuals’ rights and ensure that only those who wish to be called receive solicitations.”<sup>57</sup>

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direct mailer suggesting recipient try anti-aging creams, diet pills and the like; notes confused recipient into thinking someone they knew had sent them direct mailer’s ads”) (quoting Larson – citation required).

<sup>51</sup> 47 U.S.C. s. 227, the Telephone Consumer Protection Act (TCPA) (1991); The Telemarketing and Consumer Fraud and Abuse Prevention Act (TCPA) (1994).

<sup>52</sup> See generally *Id.*

<sup>53</sup> See § 310.4(b)(1)(ii) of the TCPA (forbidding any telemarketer from calling a person when that person previously stated that he or she does not wish to receive calls). See also 47 C.F.R. 64.1200(a)-(f).

<sup>54</sup> See 16 C.F.R. pt. 310, Federal Register / Vol. 68, No. 19 at 4630 (January 29, 2003) (“most find even the initial call from a telemarketer or seller to be abusive and invasive of privacy.”).

<sup>55</sup> See generally The Federal Do-Not-Call Registry at <http://www.donotcall.gov>.

<sup>56</sup> See 16 C.F.R. pt. 310, Federal Register, *supra* note 54 at 4630 (“Consumer groups supported the creation of a national “do-no-call” registry, and some privacy advocates urged the Commission to take an even more restrictive “opt-in” approach by banning telemarketing to any consumer who has not expressly agreed to receive telephone solicitations.”).

<sup>57</sup> Do-Not-Call Comment by Electronic Privacy Information Center, 3 *at*

Rule-makers were not convinced. While an opt-in might protect more consumers against unwanted calls, the FCC felt that “establishing such an approach would be overly restrictive on the telemarketing industry.”<sup>58</sup> In public forums held by the FTC, the point was raised several times that an opt-in system would “dramatically increase[] costs for businesses” by requiring them to communicate to millions of potential customers in order to find those who would want to receive calls.<sup>59</sup> In contrast, consumers could register for free on the opt-out do-not-call registry, and businesses would be given access at a low cost. Further, it was recognized that an opt-in system would deprive many consumers of the opportunity to learn about products of possible interest to them.<sup>60</sup>

Fortunately, it seems the rule-makers were right. With over 100 million registrations to date and high consumer satisfaction, the National Do-Not-Call registry stands as an “enormously popular” success.<sup>61</sup> The analysis below explores the particular features of telemarketing that lend it so well to opting out.

#### D. *Privacy: Analysis of Telemarketing Opt-Outs*

Consider a business that wishes to use telemarketing. Under an opt-in “please-do-call” approach, the business would need to spend a large amount of money to search for customers who wish to be contacted. These expenses might include

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<http://www.ftc.gov/os/comments/dncpapercomments/04/epicetal.pdf> (“EPIC”). See also Do-Not-Call Comment by National Consumers League at <http://www.ftc.gov/os/comments/dncpapercomments/04/ncl.pdf>

<sup>58</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 (CG Docket No. 02-278, FCC 03-153), (July 3, 2003) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-153A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf)

<sup>59</sup> Federal Trade Commission Rulemaking Workshop, Session 1: Wednesday, June 5, 2002, 65 at <http://www.ftc.gov/bcp/rulemaking/tsr/020605xscript.pdf>

<sup>60</sup> See *Id.* (“The original question you asked was about why not have specific opt-in for calls, and I guess the simple answer to that is that the Commission in that approach is trying to do too much and that in doing too much it is dramatically increasing costs for businesses and reducing services for consumers.”).

<sup>61</sup> Annual Report to Congress for FY 2003 and 2004: Implementation of the National Do Not Call Registry, FTC, 3, at <http://www.ftc.gov/reports/donotcall/051004dncfy0304.pdf>



television advertisements, magazine inserts, or soliciting of past customers.<sup>62</sup> Alternatively, in the current opt-out regime, interested consumers don't need to be motivated to opt in – they receive calls by default. Here, businesses are spared high search costs, and need only spend a small fee to access the National Do-Not-Call Registry.<sup>63</sup>

One might mistakenly conclude that when a high percentage of individuals wishes to opt out, an opt-in telemarketing rule is more desirable. The argument goes as follows: If only five percent of consumers wish to be called at home, why not place the burden of choice on the few rather than the many? This reasoning, however, ignores the fact that opt-ins require businesses to spend large sums of money in advertising.<sup>64</sup> In fact, it would be most expensive to locate the smallest groups of interested consumers. By spending more money searching for potential customers, businesses are left with less money to serve existing customers. This could lead to lower quality goods and services, higher prices, or, if search costs are high enough, an abandonment of telemarketing altogether. In contrast, the cost savings provided by an opt-out could lead to continued telemarketing and possibly lower prices, greater shareholder returns, and higher-quality goods and services.

The advantages of telemarketing opt-outs are even more dramatic when viewed from a social perspective. Assume three classes of affected individuals: (1) Those who know they want to be called by telemarketers, (2) those who know they do not want to be called, and (3) those who are apathetic. Under an opt-in or opt-out regime where “opting” is free, the burden on groups (1) and (2) is arguably too negligible to form the basis of a compelling argument for either mode of operation.<sup>65</sup> The truly important

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<sup>62</sup> At this point, it might be better for the company to simply advertise their products rather than advertise why consumers should opt-in to a telemarketing sales service.

<sup>63</sup> See Q&A for Telemarketers and Sellers About the Do Not Call Provisions of the FTC's Telemarketing Sales Rule at <http://www.ftc.gov/bcp/online/pubs/alerts/dncbizarlr.htm#paying> (“Data for up to five area codes is free. The annual fee is \$56 per area code of data (after five), with a maximum annual fee of \$15,400 for the entire U.S. database.”).

<sup>64</sup> See generally Jared Strauss, *The Do-Not-Call List's Big Hang-Up*, 10 Rich. J. L. & Tech. 27 (2004), at <http://law.richmond.edu/jolt/v10i4/article27.pdf>

<sup>65</sup> Opting out is essentially free, while complaining about opting out can become

individuals comprise group (3). Under the National Do-Not-Call Registry's current opt-out scheme, these parties still receive sales calls. Presumably, some eventually grow annoyed enough to opt out. However, some in this group eventually benefit – telemarketing may inform them of a service or product interests them. The opt-out system provides these individuals with a benefit where the opt-in system does not. While opting in shifts the miniscule “burden” of choice away from those adverse to telemarketing, it does at a great cost to businesses and consumers.

In sum, the National Do-Not-Call Registry illustrates that when the cost of “opting” is low and business search costs are high, opt-outs are the most economically efficient and socially desirable mode of choice.

#### E. *Conclusion: Economic Benefits*

This section does not advocate the virtues of telemarketing or book-of-the-month clubs. Rather, the goal here has been to demonstrate two examples from the business world where the opt-out succeeds. Like Google Book Search, both telemarketing and negative option agreements implicate the legal rights of a large number of individuals, while benefiting many in the process. A lack of regulation would permit these businesses to violate personal rights, while opt-in enrollment would freeze valuable economic activity. Opt-out is a fair and functional compromise because it saves businesses high transaction costs while respecting the rights of those who want no involvement.

## II. CLASS ACTION OPT-OUTS

The Author's Guild and the American Association of Publishers claim that Google's opt-out plan shifts an unfair burden onto authors. In seeking to eliminate this burden, the Author's Guild has remarkably and paradoxically replicated it in the form of an opt-out class action lawsuit.<sup>66</sup> Pondering the oddness of this

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expensive. Under either regime, individuals in these groups will easily have their way.

<sup>66</sup> See Class Action Complaint, *The Author's Guild v. Google*, *supra* note 21 (discussing the applicability of Federal Rule of Civil Procedure 23(b) to the

situation, one is reminded of M.C. Escher's impossible staircases, on which one travels upward forever until their wits grow frail. The true reason for this contradiction however, lies in the power and equity of opt-out enrollment in the class action arena.

#### A. *The History of Class Action Opt-Outs*

At the birth of class suits during the sixteenth and seventeenth centuries,<sup>67</sup> parties did not fluidly join or leave classes by personal choice. This was because legal 'classes' were usually preexisting communities, such as villagers, parishioners, or manorial tenants.<sup>68</sup> Individual grievances (or liabilities) were derivative in nature<sup>69</sup> and decrees applied to the community as a whole. Naturally then, judgments in some cases were binding even on community members who didn't participate.<sup>70</sup> In *Brown v. Vermuden*<sup>71</sup> for example, a vicar sued for the right to tithe from all miners in his parish. The miners appointed four representatives to defend the suit and ultimately lost. Some years later, a miner disputed his duty to pay the tax, based on the fact that he had not been a party to the earlier action. The Chancellor held the minor by the earlier decree, explaining that to do otherwise would result

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action).

<sup>67</sup> See generally Geoffrey C. Hazard, "An Historical Analysis of the Binding Effect of Class Suits," 146 U. Pa. L. Rev. 1849, 1862-1885 (describing the evolution of class suits, beginning in the early seventeenth century). This detailed and fascinating article provides the backbone for much of the historical discussion in this section.

<sup>68</sup> See Stephen C. Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action," 77 Colum. L. Rev. 866, 872 ("[E]very sixteenth and seventeenth-century case of group litigation I have found involves the members of rural agricultural communities – manorial tenants, villagers, and parishioners.").

<sup>69</sup> *Id.* at 871 ("Seventeenth-century group litigation is not about the legal rights of aggregated individuals but about the incidents of status flowing from membership in an agricultural community not yet part of a market economy.")

<sup>70</sup> Hazard, *supra* note 67 at 1865 ("While it is risky to interject modern analysis into pre-modern situations, it does appear that Chancery in the late seventeenth and early eighteenth centuries felt reasonably confident about the fairness of adjudicating rights of absentees where the absentees belonged to a preexisting group and some members of the group were before the court as litigants.").

<sup>71</sup> 1 Ch. Cas. 272, 22 Eng. Rep. 796 (Ch. 1676). *Brown v. Vermuden* is widely-cited in works explaining the evolution of class suits.

in suits “infinite and impossible to be ended.”<sup>72</sup> This early account shows how claim preclusion (*res judicata*) resulted from the treatment of a preexisting group as a sort of “set or entity for procedural purposes.”<sup>73</sup>

Despite such early cases, equity courts became uncertain of the fairness in allowing a suit to proceed with absent class members (a question of joinder of necessary parties),<sup>74</sup> and whether absentees should be bound after a judgment (a question of *res judicata*).<sup>75</sup> During the nineteenth century, these concerns were soothed to some extent by the legal fiction that absentees impliedly authorized representatives when those representatives belonged their community.<sup>76</sup>

Questions of personal choice in class membership during this period first appeared in suits involving unassociated parties, such as creditors or legatees.<sup>77</sup> As these were not preexisting groups, it seemed a strain to find implied authorization to representation on the part of absentees. As a result, decrees in such cases were often “binding only on those absentees who had, prior to the litigation, some connection with the representative concerning the matter in litigation”<sup>78</sup> - In effect, those who opted to associate themselves with the representative.

While a complete study would require volumes, it can succinctly be said that the ability of absentees to define their membership both prior to, and following judgment remained muddy and unsettled through much of the eighteenth and nineteenth centuries.<sup>79</sup> In 1838, Justice Joseph Story attempted to crystallize the confusion by defining three types of classes: “where the question is one of ‘common or general’ interest, where a

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<sup>72</sup> *Id.*

<sup>73</sup> Hazard, *supra* note 67 at 1865.

<sup>74</sup> *Id.* at 1866 (“Toward the latter part of the eighteenth century, Chancery began to apply the Necessary Parties Rule with greater inflexibility.”).

<sup>75</sup> See generally Hazard et. al., *Civil Procedure* (5th ed. Foundation Press 2001) at 646 (explaining *res judicata*).

<sup>76</sup> See Hazard, *supra* note 67 at 1877 (explaining that suits were allowed to go forward with absent parties, if “the representatives appearing as parties were expressly or impliedly authorized by the absentees to sue or defend in their behalf”).

<sup>77</sup> See generally *Id.* at 1866-1878 (discussing creditor and legatee bills).

<sup>78</sup> *Id.* at 1878.

<sup>79</sup> *Id.* at 1877 (“The preclusive effect of a representative suit in English Chancery practice thus stood unsettled in the early nineteenth century.”).

voluntary association is involved, and where the parties are so numerous that, without regard to any other criterion, it is impracticable to join them.”<sup>80</sup> Unfortunately, Story’s definitions often overlapped and muddled questions of *res judicata* further.<sup>81</sup>

Built upon Justice Story’s work, the Federal Rules of Civil Procedure of 1938 inherited many of the same uncertainties. Rule 23 of originally permitted classes:

[w]hen the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.<sup>82</sup>

Under this formulation, absentees in type (1) or (2) suits could not define their membership, while absentees in type (3) suits had the right to opt in, before *or after* a judgment had been rendered.<sup>83</sup>

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<sup>80</sup> *Id.* at 1879 (quoting JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS §97, at 97-98 (2d ed. 1840)).

<sup>81</sup> *Id.* at 1878-1882 (noting that “Story’s treatment of the binding effect of a class suit decree is tentative and indeed puzzling. His analytical system consists of categories that overlap. . .”).

<sup>82</sup> FED. R. CIV. P. 23 (1938) (repealed 1966).

<sup>83</sup> *See, e.g., American Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 547 (1973) (“A recurrent source of abuse under the former Rule law in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation – the position for so-called ‘one-way

Opting in after a judgment, a practice which became known as “one-way intervention,” amounted to placing bets on a horse race after it had run. A leading example of this behavior is *Union Carbide & Carbon Corp. v. Nisley*,<sup>84</sup> decided in 1961. In that case, thirty-six named miners sued for themselves and 350 unnamed miners, seeking damages for antitrust monopoly violations. Only after the jury found in favor of the plaintiffs were the absentee miners identified and asked to come forward with claims for specific damages. Presumably, a negative judgment would not have been binding on these unnamed parties.

In an attempt to correct the unfairness of one-way intervention, the Supreme Court Advisory Committee transformed Rule 23(b)(3) in 1966 from an opt-in to an opt-out. The revised rule states:

“In any class action maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.”<sup>85</sup>

The Advisory Committee’s Note accompanying this revision explains that the opt-out approach served a dual purpose: It provided a means to prevent one-way intervention,<sup>86</sup> while also lessening the likelihood of *res judicata* questions after the judgment.<sup>87</sup> Distinguished Judge, Marvin Frankel, famously

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intervention’ – aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.”).

<sup>84</sup> 300 F.2d 561 (CA,1961).

<sup>85</sup> FED. R. CIV. P. 23(c)(2).

<sup>86</sup> See John. E. Kennedy, “Class Actions: The Right to Opt Out,” 25 Ariz. L. Rev. 3, 17 n82 (explaining the one-way intervention basis for the rule).

<sup>87</sup> See 39 F.R.D. 69, 105-106 (1966) (discussing the issue of *res judicata*

summed-up Rule 23's opt-out by saying it appeared to be "patterned after the highly successful procedures of the Book-of-the-Month Club."<sup>88</sup> This change had an instant and dramatic impact on class formation, and is a "key premise for many of the basic principles that shape the b(3) action."<sup>89</sup>

#### B. *Collective Action Benefits*

The opt-out approach in class action proceedings has benefits beyond curtailing one-way intervention. Statistics indicate that most people, either through apathy or lack of information, do not reply to notice letters. A 2004 survey of class action suits between 1993 and 2003 reported that "on average, less than 1 [one] percent of class members opt-out and about [one] percent of class members object to class-wide settlements."<sup>90</sup> While it depends on the particular case, it is generally assumed that most who fail to opt out do so out of lack of motivation.<sup>91</sup> (These ambivalent parties are analogous to the disinterested group discussed in the telemarketing section earlier in this article). If a class suit only involved those opted-in, this ocean of ambivalent parties would be completely lost, possibly leaving the number of supporters "too

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disputes after judgment). *See also American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) ("The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments."); *Sarasota Oil Co. v. Greyhound Leasing & Financial Corp.*, 483 F.2d 450 (10th Cir. 1973); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 391-92 n136 (1967) ("In the Preliminary Draft the right to opt out was not unqualified; the court could deny it to a class member whose inclusion was found essential to fair adjudication.").

<sup>88</sup> Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967). Here, we might say an even better analogy would be found in the National Do-Not-Call Registry, which, like class actions, presents an opt-out obligation that doesn't stem from prior consent. *See also* Kenedy, *supra* note 86 at 18 (noting that book-of-the-month clubs present opt-out burdens premised on prior consent).

<sup>89</sup> Theodore Eisenberg and Geoffrey Miller, "The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues," 57 Vand. L. Rev. 1529, 1531.

<sup>90</sup> *Id.* at 1532.

<sup>91</sup> *See Id.* at 1561-1562 (attributing "overwhelming inaction displayed by class members" to "apathy").

small to attract a lawyer for the group.”<sup>92</sup> The Supreme Court articulated this point in *Phillips Petroleum Company v. Shutts*,<sup>93</sup> stating:

Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff’s claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required in the Constitution.<sup>94</sup>

A simple example illustrates how the opt-in approach would hobble the class device:<sup>95</sup> Imagine if a corporation negligently constructed a product that wronged one million people each out of one dollar. In an opt-in regime, few would bother spending the time and effort to reply to notice. Ultimately, the few who opted-in would lack the necessary mass to make the corporation pay for the wrong it had committed. The same scenario under an opt-out regime would produce an army of silent litigants nearly one million strong – large enough to correct the wrong and deter future harm.

### C. *Supportive of 14th Amendment Procedural Due Process*

The Supreme Court has also recognized the power of opt-out to establish personal jurisdiction over litigants in state court. In *Shutts*, a party’s failure to respond to an opt-out justified a state court’s jurisdiction over him, even though he did not possess minimum contacts. The underlying theory suggested by the Court

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<sup>92</sup> John Bronsteen, “Class Action Settlements: An Opt-In Proposal,” 2005 U. Ill. L. Rev. 903, 909.

<sup>93</sup> 472 U.S. 797 (1985).

<sup>94</sup> *Id.* at 812-813.

<sup>95</sup> See Bronsteen, *supra* note 92 at 909 (illustrating a similar example).



was that class members who do not reply to opt-outs implicitly submit themselves to the jurisdiction of the tribunal.<sup>96</sup>

The right to opt out also supports the due process rights of absentees in class suits. In *Shutts*, the Supreme Court explicitly refused to provide additional protections “to protect what must be the somewhat rare species of class member who is unwilling to execute an ‘opt-out’ form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so.”<sup>97</sup> Conversely, where opt-out rights are not provided, violations of due process have been found.<sup>98</sup>

It is important to note that the right to opt out alone does not fulfill due process. It is but one thread in a tapestry of guarantees that, together, give body to procedural due process in class suits. Specifically, Rule 23(a) ensures congruence between the named representative parties and the absent parties by demanding that the “claims or defenses of the representative parties [be] typical of the claims or defenses of the class,” and that they adequately represent the class.<sup>99</sup> Further, the detailed notice requirements of Rule 23 play an essential role in the opt-out process.

#### D. *Opting Out as a Check on Counsel*

Finally, some commentators posit that opt-outs act as a market check on the quality of counsel’s representation.<sup>100</sup> Unlike strict opt-ins, opt-outs give counsel an incentive to provide good representation at the outset of a case, to avoid class attrition.<sup>101</sup> A court relying on this theory would be less burdened to scrutinize the adequacy of class counsel or representatives.<sup>102</sup>

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<sup>96</sup> *Shutts*, supra note 93 at 812-14 (discussing the issue of due process and implicit submission to the tribunal).

<sup>97</sup> *Id.* at 813.

<sup>98</sup> See, e.g., *Molski v. Gleich*, 307 F.3d 1155, 1165 (9th Cir. 2002); *West World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 241 (C.D. Cal 2003).

<sup>99</sup> FED. R. CIV. P. 23(a).

<sup>100</sup> See Eisenberg, supra note 89 at 1536.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

E. *Conclusion: Social Benefits*

From small agricultural community disputes to massive corporate litigations, the law has struggled to treat absentees fairly. The problem has been most thorny in cases where potential litigants have a choice of class enrollment. The 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure flipped the membership decision from an opt-in to an opt-out largely to curtail the unfair practice of one-way intervention. But the benefits of opting out far surpassed this modest goal: By marshaling the masses that don't respond to class notification, the opt-out system enables justice to operate where it could not before. Further, the opt-out system (combined with its accompanying notice requirements) works to ensure procedural due process. Finally, opting-out acts as a market check on representative counsel.

But an even deeper lesson can be learned: While earlier discussions of substantive law (privacy and contract) showed a benefit to businesses, the adoption of opt-outs in this area of procedural demonstrates a benefit to society. The fact that opting out can serve both economic and social goals will be crucial in analyzing Google Book Search, which itself possesses this duality.

### III. COPYRIGHT OPT-OUTS

A. *Registration, Deposit and Notice as Opt-Outs*

American Copyright law has always placed affirmative duties on authors. The requirements of registration and notice have changed since the original Copyright Act of 1790, but remain important to all authors who value and seek to protect their rights. It might be a surprise to hear these measures called "opt-outs," but fundamentally, that's just what they are: Affirmative duties that authors must perform to repel infringement.

In the original Copyright Act of 1790, the requirements of formal registration and deposit were exhaustive and burdensome. Commenting on the matter, the former Register of Copyrights, Barbara Ringer, wrote that "[t]he most obvious and distinctive feature of the Act of 1790 is its extreme emphasis on compliance with formalities. . . . The 1790 Act displays an obsession with punctilios that goes beyond anything in any earlier copyright

legislation anywhere.”<sup>103</sup> A quick look at the Act demonstrates this point: Section 3 detailed the specific wording that had to be used upon recordation of deposit,<sup>104</sup> and specified that within two months of publication, authors were to publish a copy of their registration record in a newspaper for a period of four weeks.<sup>105</sup> Failure to satisfy such requirements resulted in forfeiture of copyright.<sup>106</sup>

The burden of registration and deposit only grew with time. In fact, the 1846 Act required a specific procedure by which authors had to deposit multiple copies of their work with both the Smithsonian and the Library of Congress.<sup>107</sup> Subsequently, the 1909 Act established submission of the correct number of deposit copies as a predicate both for obtaining registration (in section 11) and for the commencement of an infringement suit (in section 13).<sup>108</sup>

Notice requirements have also historically been burdensome. Introduced in the revised Copyright Act of 1802, detailed statements of notice originally had to be about one hundred words in length.<sup>109</sup> It was not until 1874 that a shorter form (consisting of the word, “Copyright,” the year of registration and the author’s name) was introduced.<sup>110</sup> The 1976 Act introduced the recognizable symbol, © (the letter C inside a circle),

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<sup>103</sup> JOYCE ET. AL. COPYRIGHT LAW, 417 (6th ed., LexisNexis) (hereinafter, Copyright).

<sup>104</sup> Copyright Act of 1790, § 3 (“And the clerk of such court is hereby directed and required to record the same forthwith, in a book to be kept by him for that purpose, in the words following . . . ‘District of --- to wit: *Be it remembered*, that on the --- day of --- in the --- year of the independence of the United States of America, A.B. of the said district, hath deposited in this office the title of a map, chart, book or books . . . the right whereof he claims as author or proprietor . . . in the words following to wit: [insert the title] in conformity to the act of the Congress of the United State entitled ‘An act for the encouragement of learning, by securing the copies of maps, chart, and book, to the authors and proprietors of such copies, during the time therein mentioned.’”).

<sup>105</sup> *Id.* (“And such author or proprietor shall, within two months from the date thereof cause a copy of the said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks.”).

<sup>106</sup> Copyright, *supra* note 103 at 417.

<sup>107</sup> *Id.* at 448.

<sup>108</sup> *Id.* at 449.

<sup>109</sup> *Id.* at 435.

<sup>110</sup> *Id.*

along with the year of publication and the name of the author.<sup>111</sup> Until the 1970s, notice requirements were enforced with absolute strictness. As with registration, “technical failure to satisfy notice requirements when a work was published could work immediate, permanent forfeiture of all copyright protection under both state and federal law.”<sup>112</sup>

Today, copyright formalities are more flexible, but still crucial for authors who wish to protect their rights. For example, although the notice requirement is now optional (a result of the U.S.’s attempt to conform to international standards), lack of notice can lead to lowered statutory damages.<sup>113</sup> Similarly, while formal registration and deposit are no longer strict requirements for copyrightability,<sup>114</sup> both are demanded of authors who wish to bring infringement suits.<sup>115</sup>

It is plain to see that Congress has long compelled authors to affirmatively assert their rights. Legislative history shows that a primary reason behind this policy was to maximize the number of works in the public domain. A House Report printed in 1976 explicitly stated that historically, a principal function of notice was that “[i]t has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting.”<sup>116</sup> Maximizing the effectiveness of a system by involving those who do not assert their rights is a concept that has appeared in every section of this article. This theme will later be discussed with respect to Google Book Search. For now, however, history makes one thing boldly clear: Authors have always had to act to inhibit infringement.

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 436

<sup>113</sup> See 17 U.S.C. § 401(d), § 402(d) (“If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then *no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages . . .*”) (emphasis added).

<sup>114</sup> *Id.* at § 408.

<sup>115</sup> *Id.* at § 411 (“[N]o action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title.”).

<sup>116</sup> H.R. Rep. No. 94-1476 at 143-44, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5759-60

B. *'Robots.txt' as an Opt-Out*

Authors must affirmatively act to protect their copyrights online. In its youth, the Internet was much like the untamed American West.<sup>117</sup> It was a place of great promise, but very difficult to navigate. Users could only visit websites they already knew the names of (i.e., <http://www.ebay.com>), but were unable to easily locate new websites. This problem gave birth to the business of Internet directories and search engines. Like intrepid explorers of the old west, search computer programs journeyed out onto the digital frontier, and made records of all the websites they found. Internet users could then find new websites by telling search engines just what they were looking for.

To be useful, however, search engines had to copy some of the content they found online. This clearly raised a copyright dilemma: How could search companies make information easier to find without trammeling on the copyrights of website owners? Although online photographs and literary works are fixed in digital form, they enjoy the full protections of Copyright.<sup>118</sup> That a work might be stored on a sheet of parchment, a magnetic tape, a compact disc, or a web server's hard drive makes little difference for purposes of copyrightability.<sup>119</sup>

Ultimately, the problem was solved with an opt-out scheme known as, Robot Exclusion Headers ("REH").<sup>120</sup> The technology

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<sup>117</sup> Many people have likened the early Internet to the frontier west, both for its sense of promise and lawlessness. The phrase "electronic frontier" was most famously adopted by The Electronic Frontier Foundation, a nonprofit organization which seeks to preserve personal freedoms in the digital domain. The Electronic Frontier Foundation was founded in 1990 by Mitch Kapor, former president of Lotus Development Corporation, John Perry Barlow, Wyoming cattle rancher and lyricist for the Grateful Dead, and John Gilmore, an early employee of Sun Microsystems. *A History of Protecting Freedom Where Law and Technology Collide*, (The Electronic Frontier Foundation), at <http://www.eff.org/about/history.php>.

<sup>118</sup> A work need not be readily perceivable for copyright protection to exist. What matters is that a work can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a). See also, *Apple Computer, Inc. v. Franklin Computer Corp* 714 F.2d 1240 (3rd Cir. 1983).

<sup>119</sup> *Id.*

<sup>120</sup> See generally MARTIJN KOSTNER, A STANDARD FOR ROBOT EXCLUSION (1994), at <http://www.robotstxt.org/wc/norobots.html> (detailing the robot exclusion standard).

is less exotic than the name implies. REHs are brief computer commands which tell search engines what they shouldn't copy from websites. Copyright owners who don't want their material indexed store these commands in a text file named, "robots.txt" which lies at the top-level of a web server's directory structure. Today, this is the most common method of preventing unwanted copying by search engines.<sup>121</sup>

A quick concrete example of an REH can be found at photo.net, the popular photography website:

```
Disallow: /pvt
Disallow: /shared
Disallow: /photodb
Disallow: /bboard
Disallow: /learn
Disallow: /travel
Disallow: /tv
Disallow: /gallery122
```

The "disallow" command is read by almost all search engines as the website owner's desire to opt-out of having their data copied,<sup>123</sup> and the short words preceded by the "/" character are the names of protected folders.

As the example shows, authors can be very specific in telling search engines exactly what not to index. For example, a website operator who has two folders, "public journal" and "private diary" can list the latter folder in her robots.txt file to prevent it from being copied. By not naming the "public journal" folder, the website owner silently consents to it being copied.

This illustrates a unique advantage of the opt-out in the context of indexing systems. Often, copyright holders may wish to have some –but not all– of their material included. If web search engines were forced to operate by means of a strict opt-in, it is hard to imagine that such fine-grain choices would be possible. An opt-in in this realm would require search engines to painstakingly and perpetually contact website operators, to ask for permission to

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<sup>121</sup> See *infra* note 25. See also, Eric J. Feigin, *Architecture of Consent: Internet Protocols and Their Legal Implications*, 56 STAN. L. REV. 901, 934 (2003-2004).

<sup>122</sup> <http://photo.net/robots.txt>.

<sup>123</sup> Kostner, *supra* note 120.

index copyrighted material. For practical purposes, strict opt-in would be the death of online search.

#### IV. GOOGLE BOOK SEARCH

Before analyzing the opt-out issue in Google Book Search, it is valuable to explore briefly the purpose and significance of the project itself. A major weakness in traditional book catalogues and indices is the fact that readers often don't know how a book has been categorized. Ignorant of this fact, readers are left to play guessing games to find what they are looking for. The same problem exists when searching for information within a single work.

Google Book Search solves this problem in a novel way. Rather than requiring readers to guess the proper category that a work has been assigned to, Google's index allows users to find books based on any word or phrase that appears in text. Users enter phrases into the index, and the system presents a list of all books that contain those words, as well as vendors selling those titles.<sup>124</sup> Although some authors ask Google to display a few full pages from their books to help entice readers, most books are not readable in any true sense.<sup>125</sup> All that is provided to help users understand the context in which their search appears is a one or two-line snippet of text surrounding their search terms.<sup>126</sup> By allowing the public to locate printed works based on such specific criteria,<sup>127</sup> the project promises to revolutionize the way people find books.

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<sup>124</sup> See Google Books Library Project, *supra* note 5 (explaining how Google Book Search operates).

<sup>125</sup> *Id.* Users are not able to read full pages or even paragraphs of copyrighted works. Instead, "snippets" of text are presented to give the user a sense of context when viewing an indexed work.

<sup>126</sup> *Id.*

<sup>127</sup> The way an individual conceptualizes information affects the way they search for it. Often, indexes reflect one's unique appreciation and memory of that work. This fact has been recognized by authors and woven into fictional narratives. For example, in "The Adventure of the Sussex Vampire," written by Sir Arthur Conan Doyle, the detective Sherlock Holmes searches aloud through his own index of past matters:

"Voyage of the Gloria Scott," he read. "That was a bad business... Victor Lynch, the forger. Venomous lizard or gila.

Despite its vast potential as a sales vehicle, some authors object to Google Book Search. These authors claim that, because the index relies on the full text of books, it impermissibly infringes on their copyrights.<sup>128</sup> Google's early response to these fears was to establish a simple opt-out system.<sup>129</sup> Authors troubled by the inclusion of their works within the Google index can easily visit a website and request removal.<sup>130</sup> Authors can also opt out prior to having their works indexed.<sup>131</sup> The opt-out procedure is free, easily accessible online, and Google's instructions are clear.<sup>132</sup> In response, two large authors' groups have instituted class action lawsuits, claiming Google's opt-out system represents an unfair burden.<sup>133</sup>

It's likely that this legal dispute will center on whether Google's index is protected by the doctrine of fair use.<sup>134</sup> Traditional fair use analysis involves the weighing of four factors: (1) the purpose of the defendant's use, (2) the nature of the plaintiff's copyrighted work, (3) the amount and substantiality taken by the defendant, (4) the effect of defendant's use on the market for the plaintiff's work.<sup>135</sup> These four factors focus on the substantive fairness of a defendant's use, but they do little to

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Remarkable case, that! Vittoria, the circus belle. . . .Vipers.  
Vigors, the Hammersmith wonder. Hullo! Hullo! Good old  
index. You can't beat it."

Another example appears in the book, "Cat's Cradle," wherein the author Kurt Vonnegut suggests that indexing reflects an individual's unique perceptions, and that a great deal can be learned about a person by the way he indexes a book. It seems the fact that we store information differently often leads us down different paths in searching for new information.

<sup>128</sup> See, e.g., Press Release, The Author's Guild Sues Google, Citing "Massive Copyright Infringement" (Sept. 20, 2005), *supra* note 3.

<sup>129</sup> See *Information for Publishers*, *supra* note 7.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Press Release, The Author's Guild, "Author's Guild Sues Google, Citing "Massive Copyright Infringement" (Sept. 20, 2005), *supra* note 3; Press Release, The Association of American Publishers, "Publishers Sue Google Over Plans To Digitize Books – Google Print Library Violates Publishers' and Authors' Rights" (Oct. 19, 2005), *available at* <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=292>.

<sup>134</sup> See Jonathan Band, *The Google Print Library Project: A Copyright Analysis*, *at* <http://www.policybandwidth.com/doc/googleprint.pdf>.

<sup>135</sup> See 17 U.S.C. § 107.



evaluate the procedural fairness of an opt-out plan. This article has demonstrated that in several major areas of law –including copyright– the fairness of opt-outs weighs heavily against the unfairness of activities that some find objectionable. As the discussion below will show, Google Book Search is a strong case for the inclusion of procedural considerations in fair use.

A. *Lessons from Contract and Privacy Law*

This article began with a discussion of negative option agreements used by mail order businesses. Introduced by the Book-of-the-Month Club in the 1920s and still widely in use, this form of marketing places an unusual burden upon consumers to affirmatively communicate their desire not to accept goods and services. Negative option agreements have a demonstrated potential to harm contractual freedoms.

The National Do-Not-Call Registry is a more recent example of a similar scenario in the realm of telemarketing. Where negative option agreements burden contractual freedom, telemarketing threatens privacy. The older practice utilizes the postal system, while the more recent system exploits the power of the telephone.

Despite their potential for harm, both negative option contracts and telemarketing remain legal. As examined earlier, this is largely due to the fact that both systems utilize opt-outs. Consumers presented with negative option offers can easily communicate their refusals to merchants. Similarly, anyone can register their telephone number for free on the National Do-Not-Call Registry to avoid receiving calls from telemarketers.<sup>136</sup> Both opt-out procedures are free, easily accessible, and simple to use. The fairness of this procedure dilutes the unfair and objectionable aspects of both business practices.<sup>137</sup>

Further, opt-outs benefit consumers by involving those who, through apathy or indifference, do not assert themselves. Some subset of individuals in this ambivalent group is likely to eventually benefit from the goods or services they are offered.<sup>138</sup>

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<sup>136</sup> See The Federal Do-Not-Call Registry, *supra* note 55.

<sup>137</sup> See *infra* pp. 8-14.

<sup>138</sup> The presumed strength behind telemarketing lies in its ability to sell items to consumers who wouldn't otherwise purchase those goods.

This involvement directly benefits businesses, possibly leading to secondary benefits in the form of lower prices, and higher quality goods and services.

Finally, opt-outs in the negative option and telemarketing domains save businesses search costs. Under opt-in regimes, businesses are more likely to spend money motivating potential consumers to involve themselves. As the formal economic model presented in Section I illustrates<sup>139</sup>, the cost of motivating the public can be high, and it can safely be assumed that the process takes time. If these transaction costs outweigh a business's desired profits, valuable business activity will be lost. In contrast, opt-out systems spare businesses transaction costs by automatically introducing products and services to those who wouldn't otherwise feel motivated enough to opt in. Our legal system recognizes the fact that these benefits to consumers and businesses far outweigh the nominal burden of opting out.

Comparing these examples to Google Book Search, we follow the historical trend in communications technology from the postal system to the telephone to the Internet. Like earlier examples, Google is a business acting upon a large number of individuals.<sup>140</sup> Where negative option marketing threatened contractual rights and telemarketing threatened privacy rights, Google's activity places a burden on copyrights. Functionally, Google's opt-out is similar to the National Do-Not-Call Registry. Like that service, the opt-out form is presented on a webpage that has been widely publicized.<sup>141</sup> The form is easy to find, easy to use, and free. Further, it permits both prospective and retrospective opt-outs. Understandably, Google confirms the identity of copyright holders who opt-out.<sup>142</sup> No matter how substantively objectionable Google Book Search might appear to authors, the opt-out procedure is certainly fair by comparable standards. With these fundamental similarities in mind, we now

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<sup>139</sup> See *infra* p. 13.

<sup>140</sup> Currently, Google is the world's most popular search engine. As their website states: "Google is the world's largest search engine and through its partnerships . . . response to more search queries than any other service online." Google Corporate Information: Quick Profile at <http://www.google.com/intl/en/corporate/facts.html>

<sup>141</sup> *Google Print Library Project Exclusion Registration*, *supra* note 4.

<sup>142</sup> *Id.* Not doing so could lead to the dishonest practice of competing authors removing each other's books from Google Book Search to hinder sales.

consider whether Google's opt-out shares the economic benefits of previous examples.

Google Book Search's opt-out appears to present benefits to businesses and consumers by securing the involvement of apathetic individuals. Authors who might feel initially ambivalent toward Google Book Search have the opportunity to be included by default. Just as in previous examples, some of these individuals will benefit from the service - perhaps through increased sales and exposure online. This additional involvement will promote greater book sales, and make Google's index a stronger system for other authors. In turn, this will likely lead to secondary economic benefits for Google and advertisers.

By providing authors with the right to opt out, as opposed to requiring an opt-in, Google avoids the cost of locating and contacting thousands of copyright holders. The time and money it would take to locate authors and convince them to opt-in would likely weaken the book index considerably. If these transaction costs were higher than Google's desired profits, the book index itself would likely be abandoned. Thus, an opt-in could result in the end of a valuable service.

Google Book Search is the most recent in a series of opt-out business plans that have threatened substantive legal rights. The fairness of this opt-out plan is a counterweight against its allegedly unjust use of copyrighted works. As in telemarketing and negative option agreements, Google's opt-out benefits business and consumers by guaranteeing the involvement of indifferent parties, preventing needless search costs.

#### B. *Lessons from Class Action Rules*

Turning to class action suits, we shift focus from economic to social benefits. As discussed in Section II, a major reason behind the 1966 switch from opt-in to opt-out class action enrolment rules was the problem of one-way intervention.<sup>143</sup> However, the societal benefits of opting-out in the class action arena far surpass this humble goal. As in the business context, opt-out enrollment creates collective action benefits by including those

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<sup>143</sup> See *infra* p. 22.

who don't respond to class notifications. This added inertia makes opt-out class action suits powerful tools of justice.

Google Book Search possesses a similar potential to benefit society. As the index grows, readers will have an unprecedented opportunity to learn about books by means not previously available to them. Researchers will be able to pinpoint subject matter that was traditionally hard to find. The technology will also vastly broaden the horizons of younger readers more comfortable with search engines than old-fashioned library indexes.

Publishers and authors will reap advantages as well. As Tim O'Reilly, the well-known publisher of computer books, recently wrote in a op-ed piece for the New York Times:

A search engine for books will be revolutionary in its benefits. Obscurity is a far greater threat to authors than copyright infringement, or even outright piracy . . . . Google promises an alternative to the obscurity imposed on most books. It makes that great corpus of less-than-bestseller accessible to all. By pointing to a huge body of print works online, Google will offer a way to promote books that publishers have thrown away, creating an opportunity for readers to track them down and buy them.<sup>144</sup>

As in class action suits, this force for social good can only operate successfully with the collective action benefits that come from opting-out. Under an opt-in regime, Google would be forced to spend large sums of money searching for and communicating with rights holders. At the very least, this lost time and money would make Google Book Search a less powerful tool for society. These costs might be so expensive as to make the project nonviable. The massive loss to readers and copyright holders would vastly overshadow the single paltry benefit an opt-in would give reluctant authors.

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<sup>144</sup> Search and Rescue, Tim O'Reilly, New York Times, September 28, 2005

C. *Precedent in Copyright Law*

Contrary to the Association of American Publishers' claim that Google Book Search turns traditional copyright law "on its ear,"<sup>145</sup> copyright law has long placed burdens on authors to assert their rights. The formal notice, deposit and registration requirements demand authors to affirmatively act in order to enjoy the full benefits of their copyrights. Although these requirements have been weakened since their inception, they still place a duty on those interested in defending their copyrights.

Even more striking is the fact that opting-out is the primary way copyright holders protect their online works from indexing systems like Google's. Using Robot Exclusion Headers, authors can specify which material they don't want search engines to copy. The indexing of online works would probably not be feasible under any other arrangement.

The argument that Google Book Search should adopt an opt-in suggests that copyright law should afford authors of printed works greater protection than authors of online works already receive. It's unclear why this should be so. While some might argue that those who publish their works online somehow assume the risk of being indexed, this does not seem to be so: Both online and print authors share their work with the public, and digital works are in no way less worthy of copyright protection. The only true difference between works published online and those published on paper lies in a method of distribution. There is no reason why this fact should lead to disparate treatment of two otherwise identical groups. Ultimately, it is clear that the burden to affirmatively act is rooted in copyright's history, and has already been adopted in a context nearly identical to Google Book Search.

D. *Procedural Fair Use*

In the situations reviewed in this article, the opt-out is more than a mere courtesy or a gift to those who want no involvement. It is a major force of legitimacy and fairness. Without the opt-out procedure, many of the activities discussed in previous sections would be deemed unfair.

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<sup>145</sup> Press Release, Association of American Publishers, Google Library Project Raises Serious Questions for Publishers and Authors, *supra* note 10.

Google Book Search is a clearly analogous situation. Here, a central actor acts upon a large group of individuals. The rights of some are slightly encumbered in the face of economic and social benefits. At the heart of this project lies an opt-out.

However, the fair use doctrine, which will most likely be the major test of Google Book Search's legality doesn't account for procedures like opting-out. The fair use doctrine requires a court to consider:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>146</sup>

These factors point to fairness in substance, but do not account for fairness in procedure. With no legislative framework in place, the danger exists that courts will ignore opt-outs, or treat the procedure inconsistently, or as an afterthought. As the examples from this article demonstrate, opt-outs can be central to the legitimacy of business practices – not side notes.

Copyright law must consider and weigh the procedural fairness of opt-outs. Ideally, this could be accomplished through an amendment to the Copyright Act. The inclusion of procedural fairness in Section 107 would make it clear that, like other fair use factors, opt-outs counter-balance what otherwise might be considered objectionable uses of copyrighted material. Because opting out deals with the nature of a defendant's use, it might be appended to the first fair use factor. Thus, an updated version of factor (1) might appear as:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, and including the existence of mitigating procedures such as opt-outs.

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<sup>146</sup> 17 U.S.C. § 107

Ultimately, the inclusion of this new factor would provide courts with a clear means of measuring a critically important aspect of a defendant's use of copyrighted material.

In time, more businesses are likely to index analog works by means similar those employed by Google. Much like the early days of telemarketing, company specific opt-out procedures might place an unfair burden on rights holders to opt out from a multitude of databases. To solve this problem, one can imagine a centralized opt-out procedure similar to the National Do-Not-Call Registry. A national "Do-Not-Index" registry of this sort would provide rights holders with an easy means of opting out of multiple indexing projects. Copyright holders could either sign up online, or simply indicate their preference when registering their work.

For future works, opting out would be even easier to accomplish. The analog equivalent to a "robots.txt" statement would forgo the need to register future works in an opt-out database. Just as copyright holders provide notice with the © (the letter C inside a circle) figure, the desire not to have a work copied for indexing purposes could be indicated with a ⊗ (slash in a circle) symbol. This symbol (or one like it) would be an extremely cheap and serviceable means of opting-out.

#### E. *Conclusion*

Opting out has been adopted in several major areas of the law. It adds fairness and legitimacy to marketing and sales practices, while generating economic activity valuable to businesses and consumers. Properly administrated, it does so at little or no cost to those who wish to opt out. By marshaling the masses that don't respond to class notification, the opt-out system is also a tool for justice in the class action area. Opting out is rooted in copyright's history and has already been adopted in the online context.

There is a common structure to all of the scenarios reviewed in this article. In each case, a central actor threatens the rights of a large class of individuals. Negative option agreements interfere with contractual rights. Telemarketing infringes privacy rights. Class action procedures implicate due process considerations. In all such cases, however, those who fear harm

have an easy means of avoiding it, and rules have been developed which dictate standards for notice and proper administration, ensuring that opt-outs are fair and relatively costless.

The present situation concerning Google is closely analogous. The importance of opt-outs in contract, privacy, and class actions demonstrates that Google's opt-out program is more than a courtesy to authors; it substantially adds to the fairness and legitimacy of Google Book Search. While some authors complain of the burden an opt-out imposes, copyright law has long placed burdens on authors through formal registration, notice and deposit requirements. Further, opting out is already a dominant mode of choice in protecting works published online.

The quality of a meal cannot be determined solely by its ingredients, but how those ingredients are prepared. The same is true in determining the legitimacy of large-scale business and legal actions - fairness is a product of both substance and procedure. Recognizing this, major areas of the law endorse opt-outs. Google Book Search is not the first, and certainly will not be the last digital indexing service to raise copyright concerns. The controversy stirred by this project exposes copyright's lack of recognition for fair procedures like opt-outs. Valuable economic activity and important social gains will be realized through the recognition in copyright law of procedural fair use.