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Doug Lichtman joined the faculty at UCLA in 2007, after a tenured teaching career at the University of Chicago. His areas of specialty include patent and copyright law; telecommunications regulation; and general legal issues pertaining to technology firms and the Internet. Lichtman's academic work has been featured in journals including the *Journal of Law & Economics*, the *Yale Law Review*, and the *Harvard Business Review*. He also writes for mainstream publications like the *Wall Street Journal* and the *Los Angeles Times*. In addition to his academic pursuits, Mr. Lichtman maintains an active consulting practice, advising Fortune 100 clients on patent and copyright strategy. He is currently serving as Scholar in Residence at the Los Angeles office of Loeb & Loeb. Mr. Lichtman has undergraduate degrees in electrical engineering and computer science from Duke University, and a J.D. from Yale Law School.

GOOGLE BOOK SEARCH IS NOT FAIR USE¹

Douglas Lichtman

In more than a decade of writing legal scholarship, I have never before been tempted to write a paper focusing exclusively on a single case. Yet the pending copyright litigation over Google Book Search has prompted me to break my own unwritten rule. The reason, quite simply, is the undeniable allure of the accused infringement. Most copyright cases have an entirely different aura, featuring accused infringers whose actions are plainly selfish in nature. But the Google Book Search project promises this amazing resource through which all of us would be able search the world's books in much the same way that Google today allows us to search the Web. If courts and commentators can appropriately stand up for copyright even against such an alluring alleged infringer—if we can get the analysis right even when our first intuitions might be to ignore the law and simply cheer on Google in its widespread, unauthorized copying—then I think the copyright community will breathe a justified and important sigh of relief. After a decade where copyright law and its important role have been given short shrift in not only everyday life but also in much of the academic and legal commentary, the Google Book Search case stands simultaneously as both a chance and a challenge to finally and thoughtfully right the ship.

Google is in the process of creating an online search engine that allows users to search the full text of published books. To use the search engine, users enter a search term or phrase, and Google's computers then look for books that might use the term or phrase and hence might be of interest. The books about which there is controversy are books that Google obtains from various libraries. The libraries allow Google to borrow books from their collections, scan those books into electronic form and ultimately include the resulting electronic information in whatever databases Google builds in order to run its search service. The libraries do not hold copyright in the books and thus the libraries themselves have no power (from a copyright perspective) to authorize Google's use.

I. The Facts

Google scans the books it borrows in their entirety, and Google stores all of that information in a way that allows Google to respond to any search query that might

be submitted in the future. Thus, presumably, Google saves all or most of the text of every book in some sort of database. Users of Google Book Search, however, do not see the full text of a book unless the relevant copyright holder has given permission. Instead, Google returns what it describes as “snippets,” which seem to be excerpts that run only a few sentences long and contain the desired search terms. These excerpts in theory show the user enough information that the user can evaluate whether a given book is indeed of interest. Google has proprietary software that is designed to ensure that users cannot see too many excerpts from the same book, for example through repeated searching.

Google has publicly committed to leave certain books out of its database, including thesauruses and anthologies of short poems. Google unilaterally decides which books to leave out, but the idea is to exclude books where most of the value of the book comes from having the ability to access a small relevant excerpt at the right time. Google has not published a list of the books excluded, nor has it made public the details of how it selects these titles. Google also allows copyright holders to “opt out” of the Google Book Search program. Specifically, a copyright holder can notify Google that it would prefer to have a specific work removed from the database. Google presumably complies with these requests.

There are a number of services that compete with the Google service. Amazon, for example, has implemented and announced a variety of search-inside-the-book programs, including a voluntary program through which copyright holders can allow would-be customers to “look inside” a book prior to buying it, and an announced program that would (among other things) allow users to electronically search participating books after they have purchased the relevant book in paper form. The book publisher HarperCollins is also experimenting with electronic delivery. And even Google itself has launched a competing service—one that waits for permission from copyright holders, but upon receiving permission reports back larger excerpts. Many other services and products are similarly either available today or in various stages of negotiation and development.

II. The Case

Litigation is already underway over the Google Book Search project.² The result of that case will ultimately turn on the court’s interpretation of section 107 of the Copyright Act.³ Section 107 empowers a court to excuse, on public policy grounds, acts that would otherwise be deemed to impermissibly infringe a copyright holder’s exclusive rights.

Courts are required to consider four specific statutory factors when evaluating a fair use claim; however, courts are empowered to go beyond those factors and engage in a broader public policy analysis as appropriate.⁴ In the end, the idea is for courts to excuse infringement in instances where a “rigid application of the copyright statute... would stifle the very creativity which that law is designed to foster.”⁵ The fair use doctrine is thus enormously flexible, and by necessity it vests considerable discretion in each court.

A common misconception is that the fair use doctrine excuses any infringing use that is socially valuable. That is a clear mistake. *Princeton University Press v. Michigan Document Services* provides a helpful example.⁶ The infringing products in that dispute were packets of photocopied materials. The packets were made up of excerpts from articles and books, those excerpts having been chosen by university professors for use in their specific university classes. The accused infringer was the copy center that duplicated the excerpts and ultimately sold those packets to students.

Clearly, the infringing products were socially attractive. They were products that facilitated classroom teaching, and they were produced at the direction of university faculty. Yet, the copy center that produced the packets was found guilty of copyright infringement and specifically had its fair use defense rejected.⁷

Why was the copy center denied the protection of the fair use doctrine? Because fair use is not an inquiry into whether the accused use is valuable. Instead, it is an inquiry into whether the owner of the infringed copyright should have influence over when and how the accused use takes place. To deny fair use in *Michigan Document Services*, then, was not to in any way speak ill of the infringing products at issue. Photocopied university materials are tremendously worthwhile products, and no one disputes that fact. To deny fair use was instead to decide that these beneficial but infringing products ought to fall under copyright holders' sphere of influence, with the relevant copyright holders having the right to influence who produces the packets, under what terms and how much everyone profits from that interaction.⁸

Two intuitive considerations guided the court in *Michigan Document Services* and indeed more generally seem to helpfully frame fair use analysis. The first of these intuitive considerations is the degree to which a finding of fair use would undermine the incentives copyright law endeavors to create. Copyright law in general recognizes rights in authors in order to motivate authors to create, disseminate and in other ways develop their work.⁹ Fair use is unattractive to the extent that it interferes with that goal.

Put differently, the issue here is whether repeated findings of fair use in a category like the one at issue would over the long run reduce author motivation to do things like create their work, share their work publicly and search for new related projects.¹⁰ If so, fair use is on this ground unattractive, as it undermines the very incentives copyright law endeavors to create.

The second intuitive consideration relevant to fair use analysis is the degree to which uses like the one at issue could survive without the protection of fair use. In *Michigan Document Services*, for instance, there was little doubt that university reproduction would continue regardless of whether fair use was recognized. With fair use, reproduction would take place under the combined control of the copy center and faculty member. Without fair use, copyright holders would for the most part license this use, anxious to earn the additional royalties associated with classroom adoption and cognizant of the fact that a faculty member can always assign other reading if a given copyright holder asks for an unreasonable price or imposes unreasonable terms. Either way, then, course materials would be created.¹¹

Contrast that example with an example involving a classic fair use, parody. A parody is a work that borrows from some preexisting work in order to poke fun at or in other ways critically comment on the original.¹² Copyright holders might refuse to authorize parodies in a world where permission is required. Parodies are thus an attractive candidate for fair use because fair use might be the only practical way to ensure that society gets them.¹³

Return now to Google Book Search. To the extent that Google invokes fair use to defend the entire Google Book Search program, that defense in my view fails. A finding that Google Book Search is fair use would clearly hurt authors. For instance, Google's scanning and storage activities expose authors to an increased risk that their works will leak out in pirated form. And Google's project more generally undermines an author's incentive to implement and profit from comparable or competing offerings. Moreover, a finding of fair use is not critical in terms of facilitating the creation of the book search engine, because a great deal of the project could be accomplished through negotiated, consensual transactions.

Were Google to concede infringement for many of the works at issue but invoke fair use only to more narrowly excuse its use of books in instances where the costs of identifying the relevant copyright holder is prohibitive, Google's claim would be strong. It is enormously difficult to acquire permission with respect to books that

are significantly old, or books for which the current ownership of rights is hopelessly unclear. As applied to that narrow class, Google might be right that the only way to use those books is to invoke fair use.¹⁴ Google could also fairly point out that the harm to that subclass of authors is small, because authors who are so difficult to identify are likely also not authors who are actively profiting from or marketing their work. The main weakness with this argument is that Google in practice makes no effort to distinguish these “orphan” works from the many works for which permission would be practical. A court might require Google to undertake reasonable efforts along these lines as a condition of any fair use finding.

In summary, then, Google’s fair use claim fails, in my view, because Google’s legal argument and its actual practices both sweep too broadly. Google has a narrow but strong claim with respect to certain works that it includes in its search database. But that narrow claim does not immunize the project more generally.

Fair use is an affirmative defense to a charge of copyright infringement. Its purpose is to “permit[] courts to avoid rigid application of the copyright statute when...it would stifle the very creativity which that law is designed to foster.”¹⁵ Fair use began as a flexible, judge-made doctrine. When federal copyright law was revised in 1976, however, fair use was codified in the statute at section 107. That codification was explicitly intended to re-state the then-existing law and not to expand or contract fair use in any way.¹⁶ Thus, even today, fair use retains the flexibility and comprehensiveness of an equitable doctrine.

III. The Details

The statutory provision that codifies fair use begins with a list of examples, stating specifically that “reproduction...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” is excused.¹⁷ The provision then goes on to identify four factors that must be considered when evaluating a claim of fair use. Those factors are:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.¹⁸

These factors are not exhaustive. Thus, courts can and do consider other factors when conducting a fair use inquiry, emphasizing facts that might not fit within the normal rubric but still seem important to understand the dispute at hand.¹⁹ Moreover, when considering the four explicit factors, courts do not merely count them up. Instead, courts combine these factors with other relevant information and conduct an appropriately flexible, case-specific policy analysis.²⁰ “The ultimate test of fair use...is whether the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.”²¹

Courts typically organize their fair use analysis by first considering each of the statutory factors and then, as needed, turning to other considerations. I adopt that same framework here and discuss each of the four statutory factors, apply them to the facts at hand, and then consider issues that do not fit well under those four headings.

III. A. The Purpose and Character of the Use

The first fair use factor is the purpose and character of the use. One issue typically raised with respect to this factor is whether the use is commercial. The intuition is that a profit-generating user can, and thus should, absorb the costs of complying with copyright law and compensating the original author.²²

There was a time when this consideration was significantly influential. In *Sony v. Universal City Studios*, for instance, the Supreme Court stated that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”²³ More recently, however, the Court has backed away from this strong stance, holding instead that “the commercial or nonprofit educational nature of a work is not conclusive” and is only one factor “to be weighed along with others in fair use decisions.”²⁴

The reason for this hesitation is simple: many commercial uses are at the same time strong candidates for fair use. Newspapers and television stations, for instance, are clearly for-profit entities engaged in for-profit uses. Yet, to the extent they commit copyright infringement, they typically do so in support of the news reporting and commentary functions that are explicitly endorsed in section 107.²⁵ The fact that an entity has a profit motive, then, turns out to not be particularly helpful in terms of distinguishing attractive from unattractive fair use cases. At best, the commercial nature of a use serves as a weak signal that the infringer has resources that could be used to reward or empower the original copyright holder, and that a requirement to do so would not substantially reduce the availability of the work in question.

A second and more important issue considered as part of the first factor is the question of whether the accused use is “transformative” in nature. A use is transformative if it is substantially different from the original work in terms of its purpose, meaning, or effect.²⁶ A transformative work does not merely supersede the original work. It is instead a work that has new features or brings new value.²⁷

Whether a work is transformative is important for two reasons. First, all else held equal, a transformative work is less likely to hurt the original author. If an infringing work has the same purpose, meaning or effect as does the original work, the infringing work likely will displace sales of the original. If the infringing work is sharply different along these dimensions, by contrast, sales could remain intact.²⁸

The second reason why it is important to consider whether a work is transformative is that a transformative work brings something valuable to society. The work is not merely redundant to that which society already had. It is new and has new meaning. The fact that a work is transformative, then, makes a finding of fair use marginally more attractive. Put differently, there is little reason to trump a copyright holder's exclusive rights if the only payoff is that society would get another work that is largely indistinguishable from the original one. By contrast, if society is at least getting something sufficiently new, there might be a case for a fair use finding, because getting something new is itself an attractive outcome.²⁹

Applying all this to the Google Book Search project, the commercial nature of the use is straightforward: Google clearly is a for-profit entity engaged in a profit-motivated use designed to promote Google's long-run financial interest. Indeed, if Google were spending this much money and not anticipating an ultimate return on the investment, Google's management team would likely be violating its fiduciary duty to Google's stockholders. The fact that Google is not at the moment explicitly cashing in on the infringing product is of little importance. Clearly, over the long run, Google will monetize its new search engine, perhaps by introducing advertisements, or by demanding a royalty on downstream book sales, or by using this new search capability to further distinguish the Google family of products from rival products offered by firms like Microsoft and Yahoo.³⁰

With respect to the transformative nature of the work, however, Google has a strong case that Google Book Search is transformative. The overall purpose of Google's infringement is to create a new and useful tool for locating information. I do not think that tells us much about whether a finding of fair use hurts author incentives. But

it does tell us that there is at least something to be gained by a finding of fair use. Google would, if protected by fair use, put into the world a product that is both socially valuable and meaningfully distinct from the works that are being infringed. In my view, that suffices to establish that the use is transformative.³¹

III. B. The Nature of the Copyrighted Work

The second explicit fair use factor is the nature of the copyrighted work in question. Under this factor, courts consider the creativity of the original work. If the original work falls into a highly creative category, such as fictional novels, fair use is deemed less compelling. If the original work falls on the less creative side of the spectrum, such as a biography, fair use is deemed more appropriate. The explanation is that “some works are closer to the core of intended copyright protection than others.”³² Put differently, on this view, copyright law is primarily concerned with the protection of creative, expressive work, and as a result fair use is less objectionable when it reduces the protection given to works that are not significantly creative or expressive.

A second consideration sometimes included in a discussion of this fair use factor is the question of whether the original work is sufficiently available to the public. A work that is out of print, for example, might on this argument be more vulnerable to a fair use defense.³³ The intuition here is two-fold: first, fair use might be the only way to facilitate use of an otherwise unavailable work; and, second, a finding of fair use might not much undermine author incentives in a situation where the author has himself already stopped promoting or otherwise offering his work to potential licensees.

Application of this unavailability concern is complicated, however, and courts have varied in their approach. In *Basic Books v. Kinko's Graphics*, the court noted that it might be more important to deny fair use as applied to out-of-print works because the royalties at issue in the litigation “may be the only income” the relevant authors will earn.³⁴ In *Princeton University Press v. Michigan Document Services* and separately in *American Geophysical Union v. Texaco*, two courts recognized that, by denying fair use, copyright law can support the development of intermediaries like the Copyright Clearance Center that facilitate licensing and in that way make more work accessible.³⁵ The influential Nimmer treatise, meanwhile, makes a related point: an out-of-print work will come back into print whenever demand is high enough and costs are low enough, but those conditions might “never arise if competitors may freely copy the out-of-print work.”³⁶

Applying all this to Google Book Search produces a mixed result. Some of the

infringement that takes place as part of the project would likely be favored under the second fair use factor, either because the books being infringed are more informational than creative, or because the books are out of print and/or otherwise inaccessible for licensing. However, to the extent that Google scans books that are largely creative, or to the extent that Google scans books that are in fact available for consensual licensing, the second fair use factor would likely favor the copyright holders.

Interestingly, note that Google does not separate books along these dimensions when it engages in its infringing activities. It could. Google's partner libraries surely sort their collections in ways that distinguish novels from biographies. And it would be easy for Google to check, prior to scanning, whether a given book is in print or is otherwise available for licensing through its author, publisher, or a licensing intermediary. This failure on Google's part might be deemed to forfeit Google's otherwise legitimate claim to a partial victory under factor two.

The third explicit fair use factor is the amount and substantiality of the portion used. As a general rule, the more the infringer takes, the more this factor weighs against a finding of fair use. The intuition is the obvious one: the extent of the copying is a good proxy for the harm imposed on the copyright holder. If an infringer takes only a tiny segment of a copyrighted work, the odds are low that the taking will much undermine the author's ability to exploit his own full contribution. If the infringer takes the bulk of the work, the opposite logic applies. In this sense, this third factor in some ways echoes the considerations raised under the first factor's test for transformative use and the fourth factor's test for the economic significance of the copying.

III. C. The Amount and Substantiality of the Portion Used

There are exceptions to the general rule stated above. For instance, copying a small amount from the original work might still be problematic under this factor if what was taken turns out to be "essentially the heart" of the work.³⁷ Conversely, copying the entire work might not weigh against fair use in a case where the only way to accomplish the infringing use is to copy at that scale.³⁸

The Google Book Search project obviously involves the scanning of entire books, and thus to some degree the third factor will weigh against a finding of fair use. This is appropriate because it is the existence of these full copies that leads to one of the harms that most concerns copyright holders: full copies might accidentally leak out. That distinguishes the aforementioned cases where copying of the full work was excused. In those cases, full copies were made, but there was never much risk that those full

copies would fall into the hands of unrelated parties. Here, the risk is significantly more pronounced.

Pushing in the opposite direction, however, note that while a workable search engine could be built through a process that used less than the full text of the relevant books, the charm of the Google project is that its search engine can search any word or phrase in the book. That is what makes Google's search index better than conventional alternatives. There are many indexes that sort books based on keywords or other organization themes that are chosen ahead of time by the organizing party. Google's index is unique in that it allows the user to dynamically define the keywords that will then be used to retroactively sort the books. That feature could not be achieved without Google having access to the full text of the works.³⁹

Putting all of that together, I doubt that the third factor should or will much move a court's analysis one way or the other. As I suggest above, the third factor is largely redundant to the analysis conducted under the first and fourth statutory factors. I suspect that the third factor will, therefore, not be paid much attention. The other two are in this case much more helpful in terms of sharpening the core public policy issues at stake.

III. D. The Effect on the Plaintiff's Potential Market

The fourth explicit factor listed in section 107 is the effect on the potential market for, or value of, the copyrighted work. This is relevant because a use that interferes with the value of the original work likely undermines the incentives that copyright law is designed to create in the first place. That is, the whole idea behind copyright law is to encourage authors to create, disseminate, and in other ways promote their work by promising authors certain exclusive rights. The more a fair use finding would reduce the value of those exclusive rights, the more disruptive that fair use is to the copyright system, and hence the less attractive the fair use defense.

When evaluating the fourth factor, courts consider "not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original."⁴⁰ That is, the fourth factor does not merely look to see whether this infringer would, through its actions alone, substantially impose author harm. The factor more broadly considers whether actions in this category, if repeated by a large number of unrelated infringers, would cause substantial author harm.

That harm, meanwhile, includes harm to “potential” markets. Thus the fourth factor is implicated not merely when the infringing use might reduce sales of the original work in its current form, but more generally when the infringing use might interfere with future exploitation of the work in other forms.⁴¹ Relevant markets under the fourth fair use factor include markets that the author has not yet entered.⁴² One influential line of cases holds that any market can count as long as it is a “traditional, reasonable, or likely to be developed” market.⁴³

Courts and scholars sometimes worry that this fourth factor is circular.⁴⁴ After all, if fair use is denied in a given case, then the infringer in that case would himself likely pay the author some sum in exchange for the right to continue the infringement. Can that potential payment really count under factor four, the result being that in almost every case factor four would, at least to a small degree, weigh against a finding of fair use?⁴⁵

The answer is that factor four actually should in every dispute weigh at least slightly against a finding of fair use. This is not to say that fair use should be denied in every case. Instead, my point is that, in almost every case, fair use does reduce author incentives. Other considerations might then swamp that concern; but factor four is designed to highlight the degree to which a finding of fair use would hurt authors, and framed that way there is no reason to exclude from the calculus the losses associated with the very use being litigated.⁴⁶

On the facts of Google Book Search, the fourth factor weighs strongly against a finding of fair use because there are at least four types of cognizable harm.

First and most obviously, Google imposes a substantial harm on authors when it scans, transmits and stores complete electronic copies of previously non-electronic books. The harm here comes in the form of a security risk. Google’s electronic copies could leak out not only during the initial scanning process but also later in time, when the electronic copies are stored indefinitely in Internet-accessible databases. Google surely has security precautions in place to prevent the electronic versions from leaking out. However, there is no reason to believe that Google’s security precautions are appropriate from a copyright holder’s perspective.⁴⁷ Put differently, copyright holders are harmed here because electronic duplication introduces new and substantial risks, and yet Google’s project allows copyright holders no say over how those risks should be managed or what should happen in the event the risks mature into a substantial security breach.

Google would likely respond by suggesting that courts can evaluate Google's security precautions and make any fair use finding contingent upon a showing of adequate security. That is in part an attractive middle ground. Factor four analysis, however, cautions against that approach. After all, the question here is whether "unrestricted and widespread conduct of the sort engaged in by the defendant" would impose substantial author harm. In my view, if authors are told that anyone can scan, transmit and store full copies of their books for use in index-like products, and that the only protection is after-the-fact judicial evaluation of the relevant infringer's security precautions, I suspect that authors will rightly expect that their work will leak out. Courts are just too slow and too far removed from technical details to meaningfully regulate security issues of the sort implicated here.

Second, for at least some of the works being copied, Google's act of providing snippet access will directly undermine the market for the original works. A technical dictionary, a thesaurus, an anthology of short poems and a book of famous quotations are each valuable in large part because users are at any given time interested in only a specific short snippet excerpt. If Google provides those very excerpts via its online search engine, the value of these books will be sharply reduced.

As I mentioned earlier, Google itself has acknowledged this and made a public commitment not to provide even snippet access to these sorts of works. As with the security issue, however, that solution is unsatisfying both because Google's judgment might not align with authors' judgment, and because again the proper analysis here is to consider not merely whether authors would be harmed if forced to trust Google on this matter but more generally whether authors would be harmed if snippet access of this sort were to become a widespread practice, run by possibly trustworthy firms like Google but also by a wide range of actors with varying degrees of honorable motivation.

Third, Google's project directly undermines author opportunities to pursue projects that are similar to and/or partially competitive with Google Book Search. For instance, both Amazon and the publisher HarperCollins have announced their own services that would include electronic book access and/or book search capabilities. If Google is allowed to compete with those services under the protection of fair use, authors will have a harder time earning profits from and otherwise being successful with these other programs.

Fourth and finally, there is the purely circular harm: if Google's fair use defense is

rejected, Google will surely take steps to include authors in the design of the book search project and also to include authors in some of the financial gains the service makes possible. As I note above, this circular harm is a controversial consideration, but in my view the circular harm is rightly included in the factor four calculus. Again, the question under factor four is the degree to which a finding of fair use would limit author control and author profit, thereby undermining author incentives. Google's refusal to include authors in the decision-making process and its decision to deny authors any share of Google's revenues is therefore plainly relevant. If Google Book Search is even half as successful and socially important as its proponents predict, the royalties at issue in this case alone could significantly increase author incentives to write, disseminate and otherwise invest in their work.

The four statutory factors play a central role in almost any fair use analysis. However, fair use also welcomes consideration of other relevant public policy issues. Here, then, I briefly consider two issues that the parties might raise along these lines.

III. E. Additional Considerations

The popular commentary on Google Book Search emphasizes the fact that Google's search engine will likely increase demand for books. That argument resonates. By making it easier for people to identify books that might be of interest, a comprehensive search engine should in the aggregate increase book demand. This should be especially true for books that serve a niche market. Those books are hard to find in conventional ways because they are not sufficiently known or advertised, but Google's content-based search engine should compensate for those limitations, increasing the likelihood that interested readers will find these niche offerings.

III. E.1. Google Book Search Benefits Authors

That said, the fact that the Google project might in one way benefit copyright holders does not significantly change the overall fair use analysis. After all, this fact tells us only that authors are better off in a world where Google's project is fair use as compared to a world where no one builds book search engines at all. That, however, is not the relevant comparison. Instead, the fourth factor of the fair use inquiry asks about the degree to which authors are worse off in a world where fair use takes away their ability to license the use or pursue it themselves. Clearly, authors would be better off if they could negotiate their own deal with Google, or pursue their own versions of the search technology, rather than merely receiving whatever sales benefit the project happens to offer them by default.

None of this should be surprising. All sorts of infringing work benefits authors, and yet authors nevertheless routinely keep their right to say no. Movies that are based on books, for example, typically increase demand for the underlying books. Still, there is no question that the people who produce those movies must ask permission from, and negotiate financial details with, the relevant copyright holders. The reasons are the very ones I have considered at length here: author incentives are at stake in the question of whether or not a movie should fall under the copyright holder's sphere of influence; and, because movies really do create value that can be shared by both the movie producer and the relevant book author, it seems likely that movies will still be made even if fair use is denied.

III. E. 2. Google Allows Copyright Holders to Opt Out

The popular commentary also has been taken with the argument that Google's use should be deemed fair because Google allows copyright holders to opt out of the program. Specifically, the relevant copyright holder can notify Google that he does not want a particular book included in the database, and Google has promised to respect that request.

This opt-out offer certainly makes the Google project more attractive than it would otherwise be, but again my suspicion is that this feature will not and should not significantly influence the overall analysis. The reason is the fundamental insight that fair use considers "not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original."⁴⁸ An opt-out works well in a world where Google is the only infringer. Authors could in that case at low cost find out about the Google project and communicate their desire to be left out if need be. This would be efficient, in fact, because the costs to authors in finding Google would likely be much smaller than the costs Google would incur were it required to find each individual copyright holder.

When the analysis shifts to focus on the possibility of countless Google-like opt-out programs, however, the conclusions reverse. In a world with a large and ever-changing list of opt-out programs, authors would be forced to invest substantial sums finding each opt-out program and notifying each about their desire to participate. The problem would be even worse if some of those opt-out programs were designed strategically to make things difficult on authors, for instance imposing high standards of proof before acknowledging that an opt-out really came from the correct copyright holder.

(Infringers have an incentive to do just that, because in an opt-out system infringers benefit if authors find it too expensive to actually engage in the mechanism of opting out.)

Overall, then, the problem with opt-out is that it does not scale. This is one reason why copyright more generally is defined as a permission-based, opt-in system. The opt-in approach gives copyright holders meaningful control over potential infringements. Opt-out, by contrast, is an expensive proposition that would substantially erode the value of copyright rights.⁴⁹

As I have emphasized repeatedly, fair use analysis is inherently subjective. My own view is that the fair use defense should be and will be rejected in the context of the Google Book Search project. My goal here, however, has been to explain the underpinnings of my position, so that my rationales and understandings can be compared against analysis put forward by others who might to varying degrees disagree with my conclusions.

IV. Concluding Remarks

Two points warrant final emphasis. First, on the side of the copyright holders, the most important point is that Google's project really does undermine the long-term value of their work. Copyright holders will find it difficult to control and profit from similar projects if Google is allowed to pursue its project without their permission; and there is no reason to cripple authors' future in that way. After all, even without fair use, Google or some similar firm will be able to build exactly this sort of useful tool. Permission is not a death knell for innovation. It is instead a way to make sure the copyright rights remain meaningful even as technologies and needs change.

Second, on Google's side, the most important response is that for certain works permission is impractical. The copyrighted work might just be too old, or the contracts that originally allocated the copyright rights might today be lost or impenetrable. Obviously, where permission is not practical, a legal rule requiring permission is unwise. The result would be to functionally bar the downstream use, and to do so in a setting where there likely is no active copyright holder ready to benefit from that extra control. Admittedly, a court might reasonably require that Google take steps to distinguish orphan works from works that are more actively being cared for. But, that issue to one side, fair use is attractive as applied to genuine orphan works.

Endnotes

¹ This article is excerpted from a larger, in-progress treatment of the fair use doctrine. Comments welcome at lichtman@law.ucla.edu.

² See Press Release, Authors Guild, Authors Guild Sues Google, Citing "Massive Copyright Infringement" (Sept. 20, 2005).

³ 15 U.S.C. § 107 (2000).

⁴ See *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (describing fair use as an "equitable rule of reason"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (same).

⁵ *Stewart*, 495 U.S. at 236 (quoting *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

⁶ *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156 (1997).

⁷ *Id.* at 1385-90 (discussing fair use).

⁸ See, e.g., *id.* at 1387 (discussing how a permission-based copyshop system would work).

⁹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." (citations omitted)).

¹⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984).

¹¹ See *Michigan Document Servs.*, 99 F.3d at 1387 (discussing permission fees); *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 7 (S.D.N.Y. 1992) (discussing the Copyright Clearance Center as an example of an intermediary that helps entities like copycenters clear necessary permissions).

¹² See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

¹³ See *id.* at 1178 (emphasizing the "unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions"). There are obviously other reasons why a given use might not adequately flourish in the absence of a fair use defense. For instance, it might be that the costs of negotiating permission are so high that a given infringing use will not be undertaken even though the relevant copyright holders would agree to permit the use if asked. Similarly, there might be some market failure in the market for the infringing good such that demand would be inefficiently low. In that case, the infringer would not be willing to pay enough for his use, and thus the use might not take place at appropriate levels in a permission-based system. My point in the text is therefore a broad one: fair use analysis ought to consider whether a denial of fair use might lead to an inefficient undersupply of the infringing work, no matter whether that undersupply is caused by copyright holders who decide not to license or some other economic or social factor.

¹⁴ My hesitation in this sentence comes only because it is easy to imagine the creation of a rights clearinghouse that would facilitate licensing of even these hard-to-license works. Indeed, enormous social value would be created were such a clearinghouse to be established, because that clearinghouse could then facilitate all sorts of uses of these works above and beyond the index use that Google is here litigating. For now, however, such a clearinghouse does not exist. It would therefore be relevant to a court's analysis only if the court believed that, by denying fair use in this case, the court could increase the likelihood that such a clearinghouse would come into existence.

¹⁵ *Campbell*, 510 U.S. at 577 (citations omitted).

¹⁶ See H.R. Rep. No. 94-1476, at 66 (1976); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) ("The statutory formulation of the defense of fair use in the Copyright Act of 1976 reflects the intent of Congress to codify the common-law doctrine.").

¹⁷ 17 U.S.C. § 107 (2000).

¹⁸ *Id.*

¹⁹ See *Castle Rock Entm't v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) ("[T]he four listed statutory factors in §107 guide but do not control our fair use analysis and are to be explored, and the results weighed together, in light of the purposes of copyright." (citations and quotations omitted)).

²⁰ See, e.g., *Harper & Row Publishers, Inc.*, 471 U.S. at 560 (there is "no generally applicable definition [of fair use]" and "each case raising the question must be decided on its own facts" (quotations omitted)); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) ("The fair use test remains a totality inquiry, tailored to the particular facts of each case.").

²¹ *Castle Rock Entm't*, 150 F.3d at 141 (citations and quotations omitted).

²² See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 886 F. Supp. 1120, 1129 (S.D.N.Y. 1995) (a "commercially exploitative use" is "one in which the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material"); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (even if the infringer does not actually profit from his bad act, "commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made [merely] to save the expense of purchasing authorized copies.").

²³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

²⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994).

²⁵ See *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 425 (S.D.N.Y. 1986) ("[P]ublishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers. And a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship.").

²⁶ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720 (9th Cir. 2007); *Campbell*, 510 U.S. at 579.

²⁷ *Campbell*, 510 U.S. at 579.

²⁸ *Id.*

²⁹ See, e.g., *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992) (“The first factor...asks whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer.”). One caveat to the above summary: some courts recognize a work as transformative only if the work is different from the original work in an expressive way. These courts do not accept evidence of just any new “purpose, meaning, or effect”; instead, they require a new expressive purpose, a new expressive meaning, or a new expressive effect. The rationale is that copyright law itself is designed to encourage expressive outputs and indeed itself refuses to protect valuable non-expressive works like databases and directories. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Some courts therefore think it appropriate to similarly distinguish expressive from non-expressive work under the first fair use factor. Specifically, these courts refuse to recognize as transformative a work for which the new contribution is informational, organizational, or in some other way valuable but not expressive. See, e.g., *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998) (concluding that retransmission of radio broadcast over telephone lines is not transformative despite the fact that the retransmission was for an entirely different, albeit non-expressive, purpose).

³⁰ Although, again, some courts will disagree, objecting that Google's use might be valuable, but it is not expressive. See, e.g., *Roy Export Co. v. Columbia Broad. Sys. Inc.*, 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982) (broadcast of unsponsored television program is still commercial because the broadcaster “stood to gain at least indirect commercial benefit from the ratings boost which it had reason to hope would... result” from airing the infringing program).

³¹ See *Perfect 10, Inc.*, 487 F.3d at 720-21 (search engine's infringement of copyrighted images found to be a transformative use despite informational nature of the use); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) (same).

³² *Campbell*, 510 U.S. at 586.

³³ S. Rep. No. 94-473, at 64 (1965).

³⁴ *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991).

³⁵ See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1387 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156 (1997); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930-31 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).

³⁶ 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §13.05[A][2][a] (1978).

³⁷ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985). In a famous case along these lines, a magazine purloined a tiny portion of an unpublished manuscript, but still the third fair use factor was deemed to favor the copyright holder because the copied words represented the excerpts that would-be readers were likely most interested in seeing. *Id.* (“The portions actually quoted were selected...as among the most powerful passages in those chapters.”).

³⁸ In *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), for instance, the infringer copied the entirety of a software program in order to study how certain aspects worked. The court put “very little weight” on the amount of copying, however, both because the complete copy was not actually used after the learning was complete, and because there was no reasonable alternative means by which to dissect the program anyway. *Id.* at 1526-27.

³⁹ The third fair use factor is similarly complicated as it applies to the snippets that Google offers to its users. Snippets in this context are in a very real sense the heart of each work. They are chosen based on the user’s own search terms, and they are designed to show the user the exact part of the book that the user is most interested in seeing. Thus there is a very real analogy to be drawn to the Harper & Row case cited above. In both this case and that one, the size of the infringement is not a good proxy for its economic or artistic significance; the takings in both situations are small but tremendously well targeted.

⁴⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citations and quotations omitted).

⁴¹ Thus, in *Campbell v. Acuff-Rose*, the Supreme Court very nearly excused under the fair use doctrine a musical parody that happened to be written as a rap. The Court remanded to the lower court, however, for fear that the existence of a rap parody might significantly interfere with the original author’s ability to license non-parodic rap versions in the future.

⁴² *Campbell*, 510 U.S. 569.

⁴³ *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994).

⁴⁴ See, e.g., *id.* at 930 n.17.

⁴⁵ I say “in almost every case” rather than “in every case” because, in some cases, transaction costs would make it impossible for the accused infringer to pay even if the infringer wanted to.

⁴⁶ See *Am. Geophysical Union*, 60 F. 3d at 931 (“The vice of circular reasoning arises only if the availability of payment is conclusive against fair use.”).

⁴⁷ Discovery will reveal more information relevant to this discussion. For now, however, the already public contract between Google and the University of Michigan makes clear the mismatch between Google’s incentives and author incentives. Google’s contract imposes very few limitations on what Michigan does with the electronic copy of each book that Google provides to Michigan. Had the relevant copyright holders written the contract, surely

they would have more carefully articulated Michigan's obligations to make sure that those electronic copies do not end up freely available on the Internet or in other ways abused.

⁴⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

⁴⁹ It is possible to imagine that intermediaries would arise to search for new opt-out projects and opt out on behalf of participating copyright holders. That would reduce the overall costs of the opt-out approach, but it would be a complete waste from a social welfare perspective. In essence, the intermediaries would be re-creating the opt-in approach currently in place, but doing so in a more cumbersome and costly manner.