12-2402

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE AUTHORS GUILD, INC., ASSOCIATIONAL PLAINTIFF, BETTY MILES, JOSEPH GOULDEN, AND JIM BOUTON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Respondents,

v.

GOOGLE INC.,

Defendant-Petitioner.

On Petition for Permission to Appeal From an Order Granting Certification of a Class Action, by the United States District Court for the Southern District of New York, No. 1:05-cv-08136-DC Before the Honorable Denny Chin

PLAINTIFFS' ANSWER IN OPPOSITION TO DEFENDANT'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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June 27, 2012

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RULE 26.1 DISCLOSURE STATEMENT

Associational Plaintiff, The Authors Guild, Inc., by its undersigned attorney, hereby states, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

Dated: June 27, 2012

/s/Michael J. Boni
Michael J. Boni

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

Rules

This Court should deny Google's Rule 23(f) petition seeking interlocutory review of Judge Chin's May 31, 2012 decision and June 11, 2012 order certifying the class (and plaintiffs Betty Miles, Joseph Goulden, and Jim Bouton as class representative plaintiffs) under Rule 23(b)(3). The decision (1) does not "effectively terminate the litigation," which will proceed on the merits, with Google preserving all appellate rights at the conclusion of the case, and (2) does not "implicate[] a legal question about which there is a compelling need for immediate resolution." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001).

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should this Court exercise its discretion to review interlocutorily the class certification decision here when (a) there are no fundamental conflicts between the representative plaintiffs and the class, and (b) common questions of law and fact predominate, including as to fair use, over any individualized questions?

COUNTERSTATEMENT OF THE CASE

This litigation arose from Google's business decision to gain a competitive edge over its rivals in the search engine market by making digital copies of millions of "offline" printed materials without permission of the copyright owners.

As part of this digitization project, Google unilaterally decided to copy not just works in the public domain, but also works still in-copyright. SA73-76.[1] Rather than obtaining licenses from copyright owners for the digital use of their printed works, Google entered into agreements with libraries to gain access to these works. A number of university libraries allowed Google to make digital copies of the books in the libraries' collections, including in-copyright books. In exchange, Google provided digital copies of the books to the libraries. SA73-87. Google refers to this massive copying campaign as its "Library Project."

Google currently maintains on its servers millions of complete digital copies of in-copyright books, and the libraries also maintain millions of complete digital copies of these books provided to them by Google. In response to search requests by users of its search engine, Google publicly displays expression from these copyrighted books. *Id*.

The instant case is brought under Section 106(1), (3) and (5) of the Copyright Act, challenging Google's unauthorized digital copying of entire printed books; Google's unauthorized distribution to libraries of complete digital copies of these books; and Google's unauthorized display of verbatim expression (so-called

[1] Citations to "SA" refer to Plaintiffs' Supplemental Appendix. Cites to "Add." and "A" refer, respectively, to Defendant's Addendum and Appendix.

"snippets") from these books on its commercial search engine in response to user requests.

Google does not challenge the findings or conclusions of the court below that the numerosity, typicality, commonality, and superiority requirements of Rule 23 are met here. Google's contention that this is a case about "indexing" is incorrect. Pet. 1, 3-4, 6. Book indices have been created for many decades by many entities without legal objection because these indices were created without a violation of Section 106 of the Copyright Act – i.e., the indices were created without the wholesale and unauthorized digital copying, distribution and display of books undertaken by Google in its Library Project. As Judge Chin found, "[e]very potential class member's claim arises out of Google's uniform, widespread practice" of copying, providing digital copies to libraries and displaying books without permission. Add. 29a.

STANDARD OF REVIEW

The parties submitted extensive briefing, exhibits and expert reports in support of and against class certification. ECF Nos. 989-91, 1000-04, 1008-10. Judge Chin held oral argument on class certification on May 3, 2012 and issued an opinion and order certifying the class under Rule 23(b)(3) on May 31, 2012 and June 11, 2012. Add. 1a-32a, 33a-35a.

Interlocutory appeals under Rule 23(f) are "rarely" granted. *Sumitomo*, 262 F.3d at 140. A District Court's class certification determination is entitled to great deference, and evaluated under an "abuse of discretion standard." *Myers v. Hertz*, 624 F.3d 537, 547 (2d Cir. 2010). An abuse of discretion exists only where there is an error of law, clearly erroneous findings of fact, or a decision outside the "range of permissible decisions." *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 225 (2d Cir. 2006).

ARGUMENT

I. Adequacy of Representation

The District Court found that the "lead plaintiffs are adequate representatives," whose "copyright claims do not conflict in any way with the copyright claims of the other class members." Add. 27a.

A. Google's Survey Is Entitled To No Weight

Google contended below that, because some authors "feel" that "snippet" display benefits them, *nobody* can be an adequate representative for plaintiffs' display infringement claim. Google's Class Certification Brief, ECF No. 1000, at 8-10.[2] Google relied primarily on a survey it commissioned of 880 authors,

[2] In its Petition, Google proposes "separate *cases* involving small groups of works whose owners really do want their books excluded." Pet. 11 (emphasis added). In the District Court, Google argued that class members have "ample financial incentive and ability *to pursue their claims individually* given the

footnote continued

repeatedly extrapolating from this small sample of undisclosed persons to the entire class of authors here. *See, e.g.*, Pet. 1-3, 5, 9-11. Google's position is meritless.

Google fails to cite a single case in which a court has held that a survey of class members is relevant to whether the representative plaintiffs satisfy the adequacy requirement. It is unsurprising that Google's survey approach lacks support in the law, as it is plainly legally unsound.[3] Unlike, for example, a Lanham Act case, where the pivotal legal question frequently turns on consumer "perception,"[4] adequacy of representation under Rule 23 cannot be determined on

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availability of costs and attorneys' fees under the Copyright Act." Google Class Cert. Br., ECF No. 1000, at 28 (emphasis added). To the contrary, in the instant case, classwide resolution is superior to any other available methods for fairly and efficiently adjudicating the controversy, as it would "achieve economies of time and effort, resolving common legal and factual issues 'without sacrificing procedural fairness or bringing about other undesirable results.'" App. 31a (quoting *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104 (2d Cir. 2007)).

[3] Google's survey also has numerous methodological flaws, including: (a) the surveyors attempted to reach a total of 15,256 authors and received responses from only 880, *see* SA177-79, which is less than 6% of that total, let alone of the total authors in the proposed class. *See* SA172, 175, Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 245 (2d ed. 2000) ("If the response rate drops below 50%, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn."). Mr. Poret, Google's surveyor, testified that response rates should be in the 10-20% range. SA164, 170.

[4] *See Manual For Complex Litigation (Fourth)* § 11.493 (2004) ("[Q]uestioning a sample of individuals by opinion polls or surveys about such

footnote continued

the basis of "feelings" (which the survey asks about), but instead depends on whether there is an actual "fundamental conflict" between the class representatives and the absent class members. *In re Flag Telecom Holdings, Ltd. Sec. Litig*., 574 F.3d 29, 35 (2d Cir. 2009).

Google's misleading survey script does not disclose to its responding authors their status as potential absent class members in this litigation or that their responses would be used to support an argument that a class in which they may be a member should not certified. As Judge Chin found:

> Importantly, the survey did not ask the respondents whether they would want to be part of a law suit through which they might recover damages. Indeed, it is possible that some authors who "approve" of Google's actions might still choose to join the class action. Therefore, the court cannot conclude from the survey that the representative plaintiffs' interests are in conflict with any subset of class members.

Add. 29a.

Another court that examined arguments like Google's in the class certification context found that similar survey results were "meaningless" and "unpersuasive." *See In re Fedex Ground Package Sys., Inc., Emp't Practices Litig*., No. 05-MD-527, 2007 U.S. Dist. LEXIS 76798, at *18-19 (N.D. Ind. Oct. 15, 2007).

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matters as their observations, actions, attitudes, beliefs, or motivations provides evidence of *public perceptions*.").

In addition, Google's contention that its survey supports a finding that a majority of authors believe that they "benefit" from snippet display has no support in the record. Google's surveyor claims only that ***19%*** of the 880 authors surveyed "feel" that they "financially benefitted" from Google's scanning and display of books in search results. Poret Report at A37, A50. When asked why the survey asked about "feelings," Mr. Poret testified that it was "because I don't expect that someone on the phone is going – is going to know for sure how this has affected them" and "[w]e're interested in their perception of what the facts are." SA164, 166-67. Thus, on the basis of a survey that cold called and cold emailed a small number of authors and asked them their "feelings" or "perceptions," Google is seeking a ruling that plaintiffs are inadequate class representatives.

Google seeks this ruling despite the fact that its survey as a whole is misleading. As an example, the survey script includes a description of Google's scanning and display of snippets that misleadingly fails to disclose that Google's scanning is done without the permission of the authors or publishers of the books. A35-36. The description also explains incompletely that a "user who performs a search can see up to three short excerpts of the book containing the relevant search terms." A35. Yet Google's Daniel Clancy, Chief Engineer of Google Books for six years, admitted at his deposition that Google allows more than the display of three snippets per book. SA153, 156-58.

Evidence submitted by plaintiffs in the District Court shows that Google displayed to one user – making consecutive search requests within BALL FOUR (by plaintiff Jim Bouton) – about 37 different snippets, consisting of over **1900** words of verbatim expression. SA5-69. Further, as to all its users in *toto*, Google will show snippets over time of most of the text of its displayed Library Project books (except the small proportion it "blacklists"). *See* SA5-69, 153, 156-58, 180, 191-92.[5]

The survey script also misleadingly fails to disclose that Google provides complete digital copies of books to libraries without the permission of the authors or publishers. SA164-65. *See Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984) (surveys must be "fairly prepared and [their] results directed to the relevant issues.").

The finding of the District Court that it "cannot conclude from the survey that the representative plaintiffs' interests are in conflict with any subset of class members" is not an abuse of discretion.

[5] Some of the books copied in the Library Project are placed by Google into metadata-only view, where Google displays information such as the title and author, but no text. *See* SA180, 186-87. As to these books, as to which Google has produced a list, plaintiffs' claims are brought under Section 106(1) and (3) for unauthorized digital reproduction and distribution of the books, and not under Section 106(5) for unauthorized digital display.

B. That Some Class Members Feel They Have Benefitted from Google Books Does Not Create a Fundamental Conflict

"The conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental," and "speculative conflict should be disregarded at the class certification stage." *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001) (citations omitted), *overruled on other grounds by In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006). The testimony of Google witnesses reveals that Google has not even determined whether its display of "snippets" has actually (as opposed to speculatively) benefitted authors by leading to the sales of books, *see* SA153, 154-55, 159-60, 161, 162-63, and the survey responses are entirely speculative, as shown above. Google's alleged "conflict" is thus speculative, and certainly not "fundamental."

Google's argument regarding the speculative potential impact of a perceived future remedy (i.e., that "snippet" display will be prohibited) should similarly be disregarded at the class certification stage. *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) (noting that speculative "conflicts that may develop at the remedy stage" or the possibility of "differing interests at later stages of litigation" "do not present a valid reason for refusing to certify a class") (citations omitted); *accord Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006) (no conflict in certifying a class where the class representatives already knew the full

extent of their injury while other class members did not, where class members had the opportunity to opt out).

Google suggests repeatedly that the only equitable relief appropriate here is a "dismantling" of its Library Project. Pet. 8, 10, 11. It is premature to determine now the appropriate equitable relief, without a full presentation on the merits. In their Fourth Amended Class Action Complaint, plaintiffs requested injunctive and declaratory relief "(a) barring Google from continued infringement of the copyrights of the representative plaintiffs and the Class *and/or* (b) other equitable relief to redress any continuing violations of the Act." Fourth Amended Class Action Complaint, ECF No. 985, at 14 (emphasis added). Further, there are many types of equitable relief. *See, e.g., Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 932 (2d Cir. 1994) ("[T]his appears to be an appropriate case for exploration of the possibility of a court-imposed compulsory license.")

Google relies on *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003), which found conflicts in an antitrust class action between direct purchasers who passed on to their customers the amounts they were overcharged by defendants and direct purchasers who did not pass on the overcharges. Pet. 10-11 (also citing its progeny).

Unlike in *Valley Drug*, where some class members actually passed on overcharges and some did not, Google's proffered evidence as to a conflict

between class members is merely speculative. Further, Google clearly intends to argue *on the merits* that its uses were fair as to *all* books in the Library Project. SA202, 204-15. Google is thus using *Valley Drug* to avoid class certification because of alleged conflicts between class members' "feelings" as to snippet display, while clearly intending to argue on the merits that all class members benefit from such display. This alone demonstrates why speculative conflicts should be disregarded when assessing the adequacy of representative plaintiffs.

The Court in *Freeland v. AT&T Corp.*, 238 F.R.D. 130 (S.D.N.Y. 2006), ruled similarly where, although defendants argued that some members benefitted and some did not from their challenged practices, the court held that the named plaintiffs were adequate representatives because "they possess the same interest and suffer the same [alleged] injury as the class members." *Id*. at 142.

Google also fails to give any weight to the fact that putative class members in a class action certified under Rule 23(b)(3) can opt out under 23(c)(2). The opt-out provision "is an important method for determining whether alleged conflicts are real or speculative." 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3:30 (4th ed. 2002).

Even if Google could show that some absent class members would prefer not to sue Google or feel they have benefitted from its practices, "[a]dequacy is not undermined where the opposed class members' position requires continuation of

an allegedly unlawful practice." 1 William B. Rubenstein, *Newberg on Class Actions* § 3:64 (5th ed.) (citing *Ruggles v. WellPoint, Inc.*, 272 F.R.D. 320, 338 (N.D.N.Y. 2011)); *Srail v. Village of Lisle*, 249 F.R.D. 544, 552 (N.D. Ill. 2008) ("[A] judge may not refuse to certify a class simply because some class members may prefer to leave the violation of their rights unremedied.") (citations omitted).

Finally, Google argues that sixty-four academic authors believe they derive a benefit from snippet display and, therefore, plaintiffs are inadequate to represent academics. Pet. 6. This argument is based on the academics' vantage points as users of Google's search engine, not from the position of class members whose copyright interests are undeniably affected in the same way as the named plaintiffs.

Judge Chin's finding that the representative plaintiffs are adequate representatives of the class is not an abuse of discretion. Google's petition raises no issue as to adequacy of representation "about which there is a compelling need for immediate resolution." *Sumitomo*, 262 F.3d at 139.

II. Predominance

Predominance is established under Rule 23(b)(3) if the legal or factual questions that can be resolved through generalized proof are "more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002).

In its petition, Google argues that it has a "distinct fair use defense as to individual works." Pet. 12. Google, however, did not make book-by-book determinations in its Library Project. To the contrary, Google copied in bulk the millions of book its library partners provided, regardless of content.[6] Moreover, Google displays snippets from these books using uniform guidelines. *See* SA180, 191-92. The District Court found that Google "copied and made search results available en masse," Add. 18a, and that "[e]very potential class member's claim arises out of Google's uniform, widespread practice…. Whether this practice constitutes copyright infringement does not depend on any individualized considerations." Add. 29a-30a.

A. Google Now Inconsistently Argues that the Court's Decision Prejudices Its Ability to Submit Book-By-Book Evidence

Although Google has the burden of going forward and the burden of proof on its affirmative defense of fair use, *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir. 1998), Google did not argue in the District Court that it intended to put on book-by-book evidence. Instead, Google argued that *plaintiffs* were required to come forward with proof of market harm for each individual work:

[6] Google copied each and every book unless (a) Google had already copied it or scheduled it to be copied at another library; (b) the book was physically not fit to be copied, or (c) Google had received a specific request from a copyright owner not to scan the book. *See* Reply Memorandum of Law in Support of Plaintiff's Motion for Class Certification, ECF No. 1008, at 21-22 (citing testimony, portions under seal).

> Plaintiffs contend that the economic interests of authors are harmed by the display of snippets of their works. In order to prove that point, *Plaintiffs would be required to put in evidence in support of that proposition*. For example, a plaintiff might demonstrate a dip in book sales for a book that was included in snippet view, and argue that the dip was the result Google's conduct, rather than other factors such as diminishing interest in the subject matter of the book. This requires an individualized inquiry.

Google Class Cert. Br., ECF No. 1000, at 21-22 (emphasis added).

However, Google's premise that plaintiffs are required to present book-by-book evidence is legally incorrect. The fourth fair use factor examines "the effect of the use upon the potential market for or value of the original work." To negate fair use, the Supreme Court has stated that "one need **only** show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'" *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)) (bold emphasis added; italics added by *Harper & Row*); *accord Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).[7]

[7] The potential markets to be considered include those "that creators of original works would in general develop or license others to develop." *See Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (quoting *Campbell*, *supra*, 510 U.S. at 592); *Am. Geophysical Union*, 60 F.3d at 930 (courts should consider "traditional, reasonable or likely to be developed markets" when assessing the fourth fair use factor).

Plaintiffs stated in their opening and reply class certification briefs that they would rely on common evidence as to fair use. ECF No. 990 at 18-19, No. 1008 at 26-27. Plaintiffs proffered evidence that (1) a finding of fair use will harm all class members by legitimizing widespread digital copying, distribution and display of verbatim expression from books without permission, thus impeding the development of collective licenses for the digital uses of books and excerpts from books by search engines and other online businesses, *see* SA120-52, Report of Daniel Gervais; and (2) if Google's unauthorized uses are found to be "fair," other website operators will be permitted to create online book databases, but with insufficient security to prevent widespread piracy of copyrighted books. Conversely, if Google's unauthorized uses are found not to be fair, licenses will be required for such uses, and rightsholders can require in such licenses that financial responsibility for the risks of unauthorized display be fairly allocated between the parties to the license. *See* SA97-119, Report of Benjamin Edelman.

Even after plaintiffs proffered this common evidence, Google did not assert anywhere in its later-served contention interrogatory responses[8] that it intended to put on book-by-book evidence as to fair use. *See* SA202, 204-15. Despite Google's

[8] Plaintiffs' expert reports were served with their reply brief in support of class certification on April 3, 2012. Google's Responses and Objections to Plaintiffs First Set of Interrogatories were served on April 27, 2012 and provided by plaintiffs to the District Court at the May 3, 2012 class certification argument. SA197, 200-01.

clearly stated intention in its interrogatory responses to argue *on the merits* that its Library Project is a fair use as to all books, Google now asserts inconsistently in its Petition *as to class certification* that: "Google must be given the opportunity to show that it did not harm the market for an individual book." Pet. 14. As Google puts it, "the district court's decision forces Google to make its fair use defense with one arm tied behind its back." Pet. 18.

Yet, Google has failed to provide a single example of evidence that it would proffer to show lack of market harm for a particular book. Google also failed to do so in the District Court, and instead argued that plaintiffs – not Google – would purportedly need to provide book-by-book evidence of harm under the fourth factor. Google's argument differs from its position on the merits, and should be accorded no weight.[9]

B. Google's Argument That Its Fair Use Defense Precludes Class Certification Is Otherwise Without Merit

Because of Google's uniform policies and practices across the millions of books it copied, distributed and displayed in its Library Project, any assessment of

[9] Arguments by defendants as to adequacy of representation should be viewed with skepticism "because a defendant makes the 'conflicts' argument in the guise of ensuring adequate representation for the class, where in reality, the defendant seeks to avoid class certification altogether." *In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, No. 04-5525, 2008 U.S. Dist. LEXIS 36719, at *22 n.14 (E.D. Pa. May 2, 2008); *accord In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-6030, 2006 U.S. Dist. LEXIS 16619, at *24 (D.N.J. Apr. 4, 2006).

the "fairness" of Google's uses of these books must be based on the common evidence about such practices.

Google concedes in its Petition that it will not present any individualized evidence as to the first fair use factor ("the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"). Pet. 2; Google Class Cert. Br., ECF No. 1000, at 18.

The second, third and fourth factors also do not present individualized issues (as Google's interrogatory responses illustrate). The second fair use factor focuses on "the nature of the copyrighted work." Plaintiffs and Google agree that the relevant legal categories for assessing the "nature of the copyrighted work" under the second factor are whether books are fiction or non-fiction, or in-print and out-of-print. *See* SA202, 205, 209, 213. Judge Chin found that this factor may be "evaluated on a sub-class-wide basis," with the Court determining "whether the defense applies to a particular type of book, obviating the need to evaluate each book individually." Add. 30a. *See also Am. Geophysical Union.*, 60 F.3d at 915 (in a copyright class action, a sampling of works was reviewed to analyze whether a defendant's institutional, systematic reproduction of copyrighted material for archival purposes constituted copyright infringement or fair use).

The third fair use factor focuses on "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." Google does not

dispute that it copied entire books for its own uses, and also provided entire digital copies of these books to libraries. SA73, 78, 79-80, 82-83. These uniform practices by Google plainly present common issues of law and fact. *See Am. Geophysical Union*, 60 F.3d at 926 (copying of entire work militates against a finding of fair use). Google asserts in its Petition that its "snippet" display presents individual issues because some snippets are longer than others, but this argument misses the mark. Pet. 14-15. Google uniformly makes the entire text of most Library Project books searchable and available for snippet display to its collective users (with the exception of a small percentage of "blacklisted" portions from each book). *See* SA5-69, 153, 156-58, 180, 191-92.

In *Infinity Broadcast Corp.*, 150 F.3d at 109, the Second Circuit found militating against fair use the fact that the "collective" action of a "plurality of subscribers" to the defendant's radio retransmission service would likely cause the defendant to transmit "most" of a copyrighted radio program. So too, here, the likelihood that Google will eventually display most of the verbatim expression from its Library Project books to its users collectively presents a common issue that militates against a finding of fair use.

Further, Google asserted in its interrogatory responses as to the third factor that its uses were "transformative," thereby justifying the amount of copying it

engaged in. SA202, 205, 209-10, 213-14. This is clearly a common merits question.

Similarly, under the fourth factor, Google has stated its intention to prove, as to all books, that "[t]he effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified." SA202, 206. This is evidence common to the class. Plaintiffs' evidence under the fourth factor will also be common to the class. *See* page 15 *supra*.[10]

Google's "fair use" defense clearly presents numerous common questions of fact and law, and does not require a book-by-book analysis. So "long as a sufficient constellation of common issues binds class members together, variations in the sources and application of [a defense]" do not prevent class certification. *In re Visa Check*, 280 F.3d at 138 (alteration in original).

These common questions, together with the common questions as to copyright infringement, statutory damages[11] and injunctive relief, clearly

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[10] Google asserted, *inter alia*, that a "snippet is not a market substitute for a Book," and "[t]he effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified." SA202, 214-15.

[11] In this case, plaintiffs and the Class have elected to seek the statutory damages minimum of $750 per work. As such, any award of damages will not require a work-by-work damages inquiry.

predominate over any individualized questions. Plaintiffs and the class here are "'allegedly aggrieved by a single policy of defendants,'" and this case – which involves a massive digitization campaign by Google involving millions of books – presents "precisely the type of situation for which the class action device is suited.'" *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006) (citing *In re Visa Check*, 280 F.3d at 146).

Judge Chin's finding that common questions of law and fact predominate is not an abuse of discretion. This decision does not implicate a legal question about which there is a compelling need for immediate resolution.[12]

CONCLUSION

For the foregoing reasons, Google's petition for review under Fed. R. Civ. P. 23(f) should be denied. Google will retain its right to challenge the class determination on a full record at the conclusion of the case. The appeal of all issues at the conclusion of the case will promote judicial efficiency without prejudicing the parties.

[12] Google's argument about the importance of this case, Pet. 18-20, while rhetorically presented as a class certification issue, is really a merits issue – is Google's massive copying, distribution and display program a fair use of millions of books.

Dated: June 27, 2012

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PROOF OF SERVICE

The undersigned hereby certifies that Plaintiffs' Answer In Opposition To Defendant's Petition For Permission To Appeal Pursuant To Federal Rule Of Civil Procedure 23(f) and Supplemental Appendix were filed electronically using the CM/ECF system, which will send notification of such filing to counsel of record.

Dated: June 27, 2012

/s/Joanne Zack
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12-2402

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SUPPLEMENTAL APPENDIX TO PLAINTIFFS' ANSWER IN OPPOSITION TO DEFENDANT'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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Attorneys for Plaintiffs-Respondents
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June 27, 2012

Additional counsel for Plaintiffs-Respondents:

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TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc., Associational Plaintiff, Betty Miles, Joseph Goulden, and Jim Bouton, individually and on behalf of all others similarly situated, Plaintiffs, v. Google Inc., Defendant.	Case No. 05 CV 8136-DC **FILED ELECTRONICALLY**

DECLARATION OF JOANNE ZACK IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Joanne Zack, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am a partner in Boni & Zack LLC, counsel for plaintiffs in this litigation, and a member of the bar of this Court. I submit this declaration in support of Plaintiffs' Motion for Class Certification.

2. Attached hereto as Exhibit 1 is a true and correct copy of a print-out from http://investor.google.com/corporate/faq.html.

3. Attached hereto as Exhibit 2 is a true and correct copy of a print-out from http://articles.economictimes.indiatimes.com/ (*Google has one billion users*, THE ECONOMIC TIMES, June 22, 2011).

4. Attached hereto as Exhibit 3 is a true and correct copy of pages 3 and 50

from Google Inc.'s 2010 Form-10-K, available on Google's website.

5. Attached hereto as Exhibit 4 is a true and correct copy of "Google Checks Out Library Books," dated December 14, 2004, as printed from Google's website.

6. Attached hereto as Exhibit 5 is a true and correct copy of Sergey Brin, *A Library to Last Forever*, N.Y. TIMES, Oct. 8, 2009, as printed from http://www.nytimes.com/.

7. Attached hereto as Exhibit 6 is a true and correct copy of an announcement from Google, "Committee on Institutional Cooperation (CIC) Joins Google's Library Project," dated June 6, 2007, as printed from Google's website.

8. Attached hereto as Exhibit 7 is a true and correct copy of page 3 from Google Inc.'s 2009 Form-10-K, available on Google's website.

9. Attached hereto as Exhibit 8 is a true and correct copy of a print-out from http://support.google.com/books/bin/answer.py?hl=en&answer=43751.

10. Attached hereto as Exhibit 9 is a true and correct copy of a print-out from http://www.google.com/googlebooks/library.html.

11. Attached hereto as Exhibit 10 are true and correct copies of print-outs from Google's website displaying search results in JIM BOUTON, BALL FOUR.

12. Attached hereto as Exhibit 11 are true and correct copies of print-outs from Google's website displaying search results for the term "pitch" in JIM BOUTON, BALL FOUR.

13. Attached hereto as Exhibit 12 are true and correct copies of print-outs from Google's website displaying search results for the term "pitches" in JIM BOUTON, BALL FOUR.

14. Attached hereto as Exhibit 13 is a true and correct copy of Miguel Helft, *Microsoft Will Shut Down Book Search Program*, N.Y. TIMES, May 24, 2008, as printed from http://www.nytimes.com/.

15. Attached hereto as Exhibit 14 is a true and correct copy of a print-out from http://books.google.com/.

16. Attached hereto as Exhibit 15 is a true and correct copy of U.S. Copyright Office Certificate of Registration No. A173097 (for JIM BOUTON, BALL FOUR).

17. Attached hereto as Exhibit 16 is a true and correct copy of U.S. Copyright Office Certificate of Registration No. TX0000338841 (for BETTY MILES, THE TROUBLE WITH THIRTEEN).

18. Attached hereto as Exhibit 17 is a true and correct copy of U.S. Copyright Office Certificate of Registration No. A346254 (for JOSEPH GOULDEN, THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS).

19. Attached hereto as Exhibit 18 are true and correct copies of print-outs from Google's website displaying search results in BETTY MILES, THE TROUBLE WITH THIRTEEN.

20. Attached hereto as Exhibit 19 are true and correct copies of print-outs from Google's website displaying search results in JOSEPH GOULDEN, THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS.

21. Attached hereto as Exhibit 20 is a true and correct copy of a print-out from http://support.google.com/books/bin/answer.py?hl=en&answer=43729/.

22. Attached hereto as Exhibit 21 is my firm's resume.

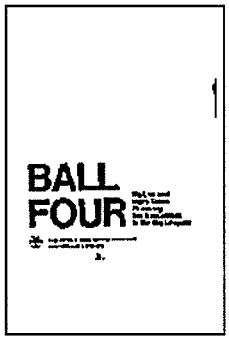
23. Attached hereto as Exhibit 22 is Milberg LLP's firm resume.

24. Attached hereto as Exhibit 23 is Kohn, Swift & Graf, P.C.'s firm resume.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct, and that this declaration was executed on December 12, 2011 in Bala Cynwyd, Pennsylvania.

Joanne Zack

Ball four: my life and hard times throwing the knuckleball in the Big Leagues



Jim Bouton

5 Reviews

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umpire Search

10 pages matching **umpire** in this book

Page 86

Unless it was Jim Bouton.

Wayne Comer got into an argument with an umpire, and they were jawing back and forth. The last thing said was, "All right, Comer. You'll be sorry you said that."

Page 146

having said anything at all. I try to be especially nice to Ashford because everybody else harasses hell out of him. He's not exactly the best umpire, but he is far from being terrible. He doesn't miss that many calls, and when he does he misses them on both sides, like any good umpire. But other umpires talk behind his back. Sometimes they'll let

Page 189 Snippet view

a few steps away from our bullpen and he stopped by, as umpires will, to pass the time between innings.

"Why is it that they boo me when I call a foul ball correctly and they applaud the starting pitcher when he gets taken out of the ball-game?" says Neudecker.

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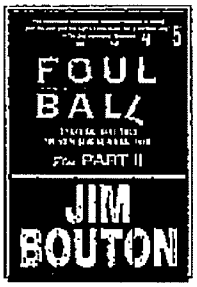

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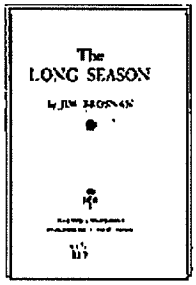

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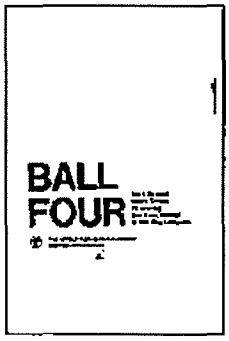

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Page 49

in Seattle last year, Tom Egan. Tommy Davis said he could follow the flight of the ball pretty good, until he lost it in a cloud. A very bad day for the knuckleball. It just didn't knuckle. The overhand curve was working pretty good and some of the fastballs hopped pretty good. Who knows, maybe my old motion is coming back. The sirens are still

Page 195

runway or even to go back into the clubhouse for a goddam cigarette, but if you take a candy bar out to the bullpen you get all kinds of static.

The bed in this hotel in Baltimore makes me think these bad thoughts. I think I'll go wash out my brain with soap.

Page 285

Snippet view

offer me a job like that?"

"All you'll get is a scouting job in Watts someplace," Tommy Harper said.

So I started doing a general-manager bit, giving scout Tommy Davis his instructions. "Now, Tom, you have to make sure to sign the

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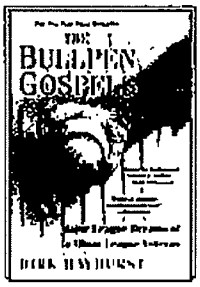

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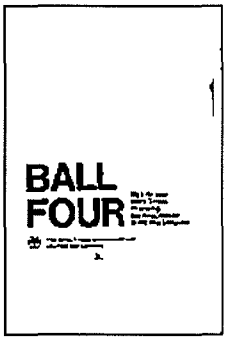

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strike Search

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Page 62

the same thing. They're asking you to obey good pitching principles; keep the ball down (most hitters are high-ball hitters), don't make the pitch too good (don't pitch it over the heart of the plate), move the ball around inside the strike zone and change speeds (keeps the hitter off balance), and get ahead of the hitter (when you have two strikes on a

Page 86

I couldn't resist, so giving him my sincere look, I said, "This is it."

He turned pale and moped over to Joe, slowly, as if attached to a large rubber band. But all Joe wanted was to tell us to run some extra laps since we were in the bullpen and weren't able to run when everybody else did.

I never saw anybody run laps looking so happy as Dick Baney.

Page 196

Snippet view

And then Carl Yastrzemski's name came up because he'd just ignored the strike and Gary Bell said, "Didn't surprise me. Carl Yastrzemski is for himself first and second and the hell with everybody else."
Gee, Gary, Carl Yastrzemski?
Yes. Besides, during the strike Yastrzemski called several super-

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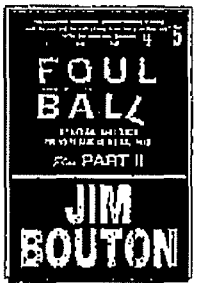

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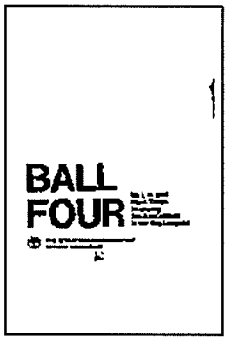

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By now, though, we're standing in clumps of five or ten and take turns catching whatever fly balls happen to come our way.

It was Dick Stuart-story day today, and this one was about the time Johnny Pesky was managing the Red Sox and Stuart was playing for him and showing up late for a lot of things. For some reason this

Page 289

the time. When things are going good Yastrzemski will go all out. When things aren't going so well he'll give a half-ass effort. But he's got so much ability that the only thing you can do is put up with him.

I asked a few of the Red Sox if they thought he deserved the fine and I thought they would defend him. But they said, "He deserved it

Page 388

scared. After a while, though, all they could do was giggle.

Dick Williams has been fired as manager of the Red Sox. I think that when a team wins a pennant the tendency is to give too much credit to the manager and when a team loses the tendency is to blame him too

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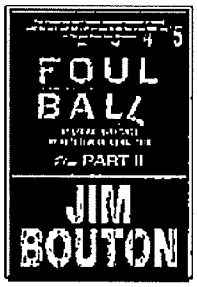

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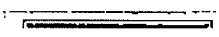
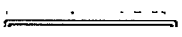
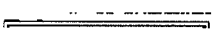

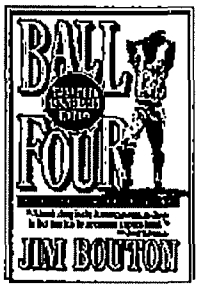

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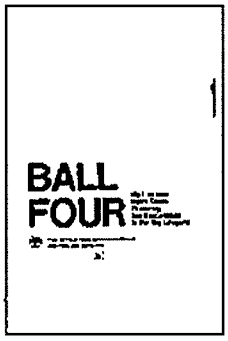

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checking the stock tables and because between 1932, when he began to play for the Yankees, and 1968, when he left as a coach, he had pulled down some 23 World Series shares in addition to his considerable salary. And no one has noticed him spending very much of it. In addition, starting at age fifty, he elected—possibly through foolishness, more likely

Page 90

the Newhouse papers. Ogle was a Yankee fan and he reacted to players purely on how much they were helping the Yankees to win. Charm, personality, intelligence—nothing counted. Only winning. Ogle didn't have even the pretense of objectivity. He was the only writer in the pressbox who would take the seventh-inning stretch in the Yankee half.

Once at a winter press conference, when the Yankees were an-

Page 154

actually has them believing they're winners.
I wonder how he is with the pitchers.

The big confrontation is coming closer. The Yankees will be in town in a couple of days and I've been invited to appear at the sports-writers and sportscasters dinner on Monday afternoon. The idea is us

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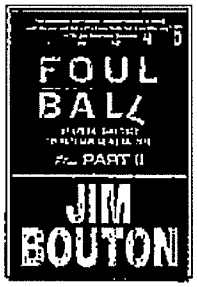

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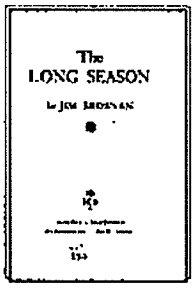

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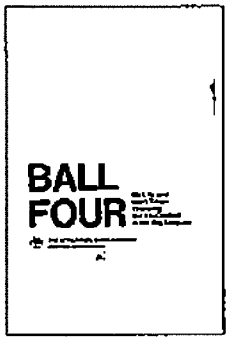

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Mickey Mantle announced his retirement the other day and I got to thinking about the mixed feelings I've always had about him. On the one hand I really liked his sense of humor and his boyishness, the way he'd spend all that time in the clubhouse making up involved games of chance and the rools he got up on golf matches and

Page 30

in left field. When the game was over I walked back into the clubhouse and there was a path of white towels from the door to my locker, and all the guys were standing there, and just as I opened the door Mickey was putting the last towel down in place. I'll never forget him for that.

And I won't forget the time—1962, I guess it was—in Kansas

Page 31

arrived, they were ready to go out with the big boys. Mantle told them to get dressed up, tie and all—this was in Detroit—and meet them in a place called The Flame. Mickey gave them the address and said to be sure to ask for Mickey Mantle's table.

Pepitone and Linz were like a couple of kids at Christmas. They couldn't stop talking about what a great time they were going to have.

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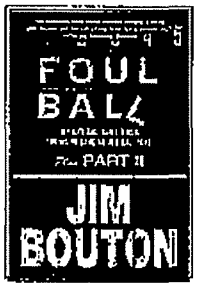

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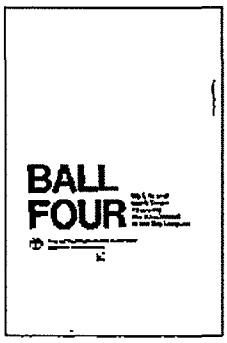

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Page 20

One of the problems is that the hitters hate to hit against my knuckleball in batting practice. They don't like pitchers to work on

Page 43

a good outing, however. I struck out the first hitter I faced on four pitches, all knuckleballs. (Don't ask me who he was; hitters are just meat to me. When you throw a knuckleball you don't have to worry about strengths and weaknesses. I'm not sure they mean anything, anyway.) I noticed again that I throw a better knuckleball in a game than

Page 141

sota and it was so damn cold—and the American League ball is definitely bigger than the Pacific Coast League ball—that I couldn't get the damn thing to break at all. Every single knuckleball I threw was rolling over, or spinning sideways, and I started to panic. I could feel the sweat break out on me, and I was cold and sweaty at the same time. Here was

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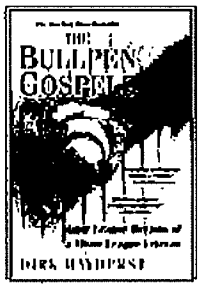

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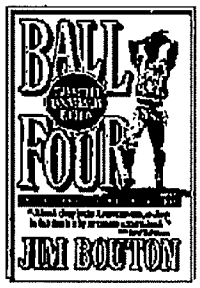

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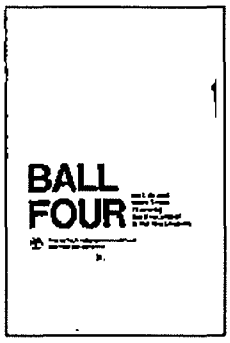

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early games, but it looks like I'm not going to be ready here. It's quite different from my last spring with the Yankees in 1967. I was really impressive, right from the beginning. I led the club in innings pitched with thirty, and I gave up the fewest hits, fifteen, and no homers and only two or three extra-base hits. My ERA was .092, which means less

Page 145

who hit one of the homers off me.

Meanwhile, in the dugout, I found out from Darrell Brandon that Sal had thrown a fit when the home run was hit. He had a toothpick in his mouth at the time and he threw it hard on the ground (so hard a tree may yet grow on the spot) and said, "Jesus, he's got to start

Page 240

Snippet view

Fred Talbot says that after listening to Sal in these meetings he's decided what kind of pitcher he must have been. "A mother," Talbot said. "A real mother."

Mother Maglie also said in the meeting that one way to handle Jackson was not to throw him any strikes. So Jackson hit three homers

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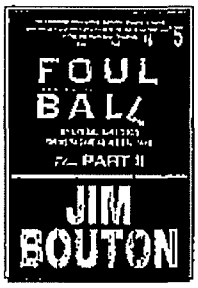

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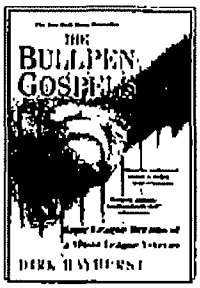

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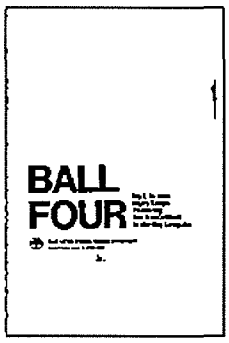

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Page 62

up into the infield and The Colonel would look down the bench and say, "The boy's fastball is moving. The boy's fastball is rising." Two innings later, same situation, the very same pitch, home run into the left-field seats. The Colonel looks up and down the bench and says very wisely, "Got the ball up. You see what happens when you get the ball up?"

Page 87

Rich Rollins has a good story he tells in the same vein. It goes back to when we were playing against each other in the Class-B Carolina League. Rich had hit two home runs in the first game of a doubleheader and the club had some deal that anybody who hit three home runs in one day would get $300. So the other players on Rollins' team told him to go to our catcher, Norm Kampsbar, and get him to tell

Page 321

so many games this year," she said. "I get nervous every day."
"Why should you get nervous? I don't. Except once in a while."
"I don't know, but I do. And every time they hit a home run off you, I just get sick to my stomach. I worry about how you feel, too, because I want you to be happy."

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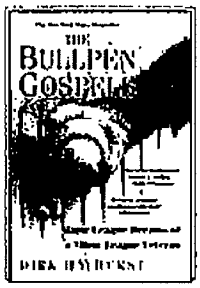

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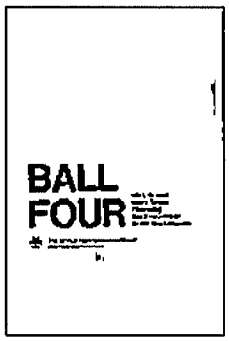

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Eddie O'Brien Search

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Page 75

picnic.

I think coach Eddie O'Brien is going to prove a gold-plated pain in the ass. He must think he's Frank Crosetti or something, because when I reached into his ballbag he said, "What are you going to do with it?"

Page 105

A few more words about Eddie O'Brien and Ron Piaza. O'Brien is one of the fairly famous basketball O'Brien twins who played with Seattle from '49 to '53. Actually his job is athletic director at Seattle U. but he had four years in the big leagues with the Pirates—as infielder and pitcher—and now he's here as a friend of management (or because his brother is in city government) to get his fifth year in

Page 307

There must have been steam coming out of my ears by now, because Eddie O'Brien said, "Go take a shower."

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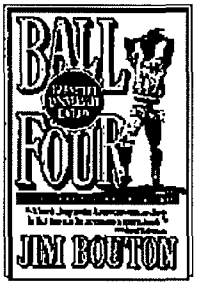

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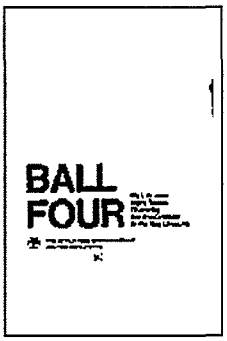

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will go away, but how am I going to pitch Sunday? I'm not ready. I haven't thrown to spots yet. I haven't thrown any curve balls at all. My fingers aren't strong enough to throw the knuckleball right. I've gone back to taking two baseballs and squeezing them in my hand to try to strengthen my fingers and increase the grip. I used to do that

Page 186

guaranteed, asking me why I'm not wearing my earflap."

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3–1 in the seventh and I got called in with two out and runners on first and second. Pete Rose up. Real clutch situation. I throw two knuckleballs for balls. Edwards calls for a fastball and I shake him off. Rose is just going to rip my fastball. I know it. So I throw a knuckleball for a strike, another knuckleball for a foul ball, a third for strike three and strut off the mound

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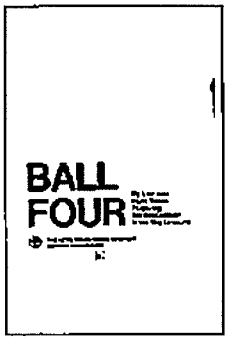

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real thing, with a baseball instead of a rubber ball. I think it will be a

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the same thing. They're asking you to obey good pitching principles; keep the ball down (most hitters are high-ball hitters), don't make the pitch too good (don't pitch it over the heart of the plate), move the ball around inside the strike zone and change speeds (keeps the hitter off balance), and get ahead of the hitter (when you have two strikes on a

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Former pitcher Jim Bouton's Ball Four: My Life and Hard Times Throwing the Knuckleball in the

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Jim Pagliaroni Bibliography | baseballlibrary.com
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Bibliographic information

Title	Ball four; my life and hard times throwing the knuckleball in the Big Leagues
Author	Jim Bouton
Editor	Leonard Shecter
Publisher	World Pub. Co., 1970
Length	400 pages
Subjects	Sports & Recreation › Baseball › General
	Baseball
	Baseball players
	Sports & Recreation / Baseball / General
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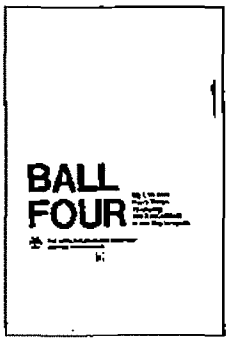

Jim Bouton

5 Reviews

World Pub. Co., 1970 - Sports & Recreation - 400 pages

From inside the book

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Page 196

And then Carl Yastrzemski's name came up because he'd just ignored the strike and Gary Bell said, "Didn't surprise me. Carl Yastrzemski is for himself first and second and the hell with everybody else."

Gee, Gary, Carl Yastrzemski?

Yes. Besides, during the strike Yastrzemski called several super-

Page 201

Talking about Joe Schultz reminded Marshall of something that happened the other night. Although we had just blown a game to the Orioles, when Schultz came back into the clubhouse he was smiling. Mike thought that was kind of strange until he heard Schultz say, to

Page 205

"All right. I'll talk to Eddie about it," Joe Schultz said.
I can't wait.

During batting practice the Orioles sneaked into our bullpen—word is that it was Eddie Watt and Pete Richert—and deposited three

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Review: Ball Four: My Life and Hard Times Throwing the Knuckleball in the Big Leagues
User Review - MacK - Goodreads
Sad to say, baseball nut that I am, this book stayed below my radar for years on end, when it finally became a known quantity in my life as a fan I viewed it as something rather like Great ... Read full review

User ratings

5 stars		4
4 stars	1	
3 stars	1	
2 stars	0	
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Review: Ball Four: My Life and Hard Times Throwing the Knuckleball in the Big Leagues
User Review - James - Goodreads
While I grew up in a family that cheered on the Chicago Cubs (my father had a baseball from a game he attended with his father when he was a boy), the love of baseball did not rub off on me. My ... Read full review

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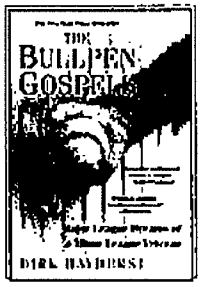

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Eamus Catuli
John Nerone - 2008 - Journal of Sport and Social Issues

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	Sports & Recreation / Baseball / General
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc., Associational Plaintiff, Betty Miles, Joseph Goulden, and Jim Bouton, individually and on behalf of all others similarly situated, Plaintiffs, v. Google Inc., Defendant.	Case No. 05 CV 8136-DC **FILED ELECTRONICALLY**

REPLY DECLARATION OF JOANNE ZACK IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Joanne Zack, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am a partner in Boni & Zack LLC, counsel for plaintiffs in this litigation, and a member of the bar of this Court. I submit this reply declaration in support of Plaintiffs' Motion for Class Certification.

2. Attached hereto as Exhibit 1 is a true and correct copy of Defendant Google Inc.'s Responses and Objection to Plaintiffs' First Set of Requests for Admission.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Expert Report of Benjamin Edelman.

4. Attached hereto as Exhibit 3 is a true and correct copy of the Expert Report of Daniel Gervais.

5. Attached hereto as Exhibit 4 are true and correct copies of pages from the transcript of the deposition of Jim Bouton in this case.

6. Attached hereto as Exhibit 5 are true and correct copies of pages from the transcript of the deposition of Joseph Goulden in this case.

7. Attached hereto as Exhibit 6 are true and correct copies of pages from the transcript of the deposition of Betty Miles in this case.

8. Attached hereto as Exhibit 7 are true and correct copies of pages 6-7, 30-45, 90-92, 108-09, 114-18, 162-63 from the transcript of the deposition of Daniel Clancy in this case. Google has consented to the public filing of these pages (as redacted). Pages 96-99, 140-41, and 182-87 from this deposition will be filed under seal.

9. Attached hereto as Exhibit 8 are true and correct copies of pages 4, 27-31 and 104-05 from the transcript of the deposition of Kurt Groetsch in this case. Google has consented to the public filing of these pages (as redacted).

10. Attached hereto as Exhibit 9 are true and correct copies of pages 5, 16-17 from the transcript of the deposition of Stephane Jaskiewicz in this case. Google has consented to the public filing of these pages (as redacted).

11. Attached hereto as Exhibit 10 are true and correct copies of pages 3, 62-64, and 96 from the transcript of the deposition of Thomas Turvey in this case. Google has consented to the public filing of these pages (as redacted). Pages 57-61, 81-85, 88-92 and 102-05 from this deposition will be filed under seal.

12. Attached hereto as Exhibit 11 are true and correct copies of pages from the transcript of the deposition of E. Gabriel Perle in this case.

13. Attached hereto as Exhibit 12 are true and correct copies of pages from the

transcript of the deposition of Hal Poret in this case.

14. Attached hereto as Exhibit 13 is a true and correct copy of the Reference Manual on Scientific Evidence, *Second Edition*, Federal Judicial Center 2000, marked as Plaintiffs' Exhibit 76 at Mr. Poret's deposition.

15. Attached hereto as Exhibit 14 is a true and correct copy of information produced by defendant to plaintiffs after Mr. Poret's deposition.

16. Attached hereto as Exhibit 15 is a true and correct copy of the Public Redacted Version of Defendant Google Inc.'s Supplemental Responses and Objections to Plaintiffs' Second Request for Production of Documents and Things.

17. Attached hereto as Exhibits 16 and 17 are, respectively, the Complaint and Answer filed in the case *Authors Guild, et al. v. Hathitrust*, et al., 11 Civ. 6351 (HB), S.D.N.Y.

18. Attached hereto as Exhibit 18 is a true and correct copy of copyright registration information obtained online from the U.S. Copyright Office's Public Copyright Catalog (1978 to present) at http://www.copyright.gov/records/.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct, and that this declaration was executed on April 3, 2012 in Bala Cynwyd, Pennsylvania.

/s/Joanne Zack
Joanne Zack

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Attorneys for Defendant
Google Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc. et al., Plaintiffs, v. Google Inc., Defendant.	Civil Action No. 05 CV 8136 (DC)

DEFENDANT GOOGLE INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure, Defendant Google Inc. ("Google") hereby responds to Plaintiffs' First Set of Requests for Admission (Nos. 1-34) with the following objections and responses.

GENERAL OBJECTIONS

1. Google objects to the preface, instructions, and definitions to the Requests to the extent that they purport to impose obligations that exceed those imposed by the Federal Rules of Civil Procedure, relevant local rules, and applicable case law. In responding to these requests, Google has followed the applicable law and has ignored the improper preface, instructions, and definitions.

2. Google objects to the Requests in their entirety and to each request to the extent that the documents and information sought are protected from discovery by the attorney-client privilege, the work-product doctrine, or any other applicable privilege.

3. Google objects to each and every request to the extent that it seeks information that is confidential and/or proprietary information. To the extent not otherwise subject to objection, Google will produce such confidential documents in accordance with the terms of the protective order entered in this case.

4. Google objects to the Requests in their entirety and to each discovery request as unduly burdensome to the extent they seek information or documents already known to Plaintiffs, or which are equally available to Plaintiffs.

5. Google objects to the Requests in their entirety and to each discovery request to the extent they seek documents not relevant to any claim or defense in this action or reasonably calculated to lead to the discovery of admissible evidence.

6. Google objects to The Authors Guild's definition of "Google" as vague, ambiguous, unintelligible, and overly-broad. For purposes of responding to these discovery requests, Google will interpret "Google" to mean Google Inc. and/or its agents.

7. Google objects to the time period of these requests as overly broad and unduly burdensome.

8. Google objects to the Requests to the extent they request information pertaining to persons or activities outside the United States.

9. Google objects to the Requests to the extent they request information pertaining to Google products other than Google Books, and Google's responses are limited to Google Books.

10. Google objects to each and every discovery request to the extent that it purports to impose a burden of providing information not in Google's possession, custody, or control or which cannot be found in the course of a reasonable search. Google has undertaken a reasonable and good-faith effort to locate all relevant, non-privileged documents known to it at this time that are responsive to these requests, but they reserve the right to conduct further investigation and discovery as to any issue raised or suggested by any discovery request and to rely on any subsequently discovered information or documents at trial or any other proceeding.

11. Google has not yet completed its investigation of the facts relating to this case. Any and all responses to the following discovery requests are therefore based solely on information presently known to Google, and Google reserves its right to conduct further discovery and investigation and to use at trial or any other proceeding evidence of any subsequently discovered facts, documents, or information.

12. In responding to these discovery requests, Google does not concede the relevancy or materiality of any request or of the subject to which any request refers. Google's responses to

these discovery requests are made expressly subject to and without waiving any objections in any proceeding, including trial of this action, as to competency, relevancy, materiality, or privilege of any of the documents referred to or the responses given.

RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1:

As part of its Library Project, Google began in 2004 to digitally copy printed in-copyright works in their entirety, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it began in 2004 to scan, among other works, printed in-copyright and out-of-copyright works from libraries in their entirety, and that Google scans some works without the permission of the copyright owners in those works, as Google's acts with respect to those works constitute fair use. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 2:

One of Google's goals in its Library Project has been to digitally copy all of the printed books in the United States, including in-copyright books, regardless of their content.

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of

the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 3:

Google undertook the Library Project for commercial reasons.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 4:

Google undertook the Library Project to gain a competitive advantage over other participants in the search engine market.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 5:

Google has entered into agreements with libraries, including the University of Michigan, Stanford University, and the University of California, to obtain access to works for the purpose of digitally copying such works, including in-copyright works.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has entered into agreements with certain libraries, including the University of Michigan, Stanford University, and the University of California, pursuant to which those libraries request that Google scan books, including in-copyright works, provided to Google by the library. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 6:

In order to gain access to printed works for the purpose of digitally copying them, Google agreed to provide libraries with digital copies of works copied from the libraries' collections.

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has entered into agreements with certain libraries, including the University of Michigan, Stanford University, and the University of California, pursuant to which those libraries request that Google scan books, including in-copyright works, provided to Google by

the library, and Google provides digital copies of those books to the libraries which, pursuant to the contracts, may be used only in ways which do not violate copyright law. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 7:

To date, as part of its Library Project, Google has copied millions of in-copyright works, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has scanned millions of in-copyright works from library collections and that, because Google's acts constituted fair use, permission was generally not sought or granted with respect to some of those works. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 8:

To date, as part of its Library Project, Google has provided to libraries digital copies of millions of in-copyright works, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of

the term "copy" as vague and ambiguous, and construes that term as that term is defined in 17 U.S.C. § 101. Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has entered into agreements with certain libraries, pursuant to which those libraries have requested that Google scan books, including in-copyright works, provided to Google by the library, and Google has provided digital copies of millions of those books to the libraries which, pursuant to the contracts, may be used only in ways which do not violate copyright law. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 9:

To date, as part of its Library Project, Google has copied in their entirety millions of in-copyright works, including in-print and out-of-print works, fiction and non-fiction works, reference works, anthologies, educational works, textbooks, dissertations, monographs, journals, government publications and other type of works.

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has scanned in their entirety millions of books from libraries, including in-print and out-of-print works, fiction and non-fiction works, reference works, anthologies, educational works, textbooks, dissertations, monographs, journals, government publications and other types of works. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 10:

Each in-copyright work copied by Google as part of its Library Project was copied by Google in its entirety at least twice, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it creates and maintains, as necessary for its fair uses, more than one copy of the books it scans from library collections. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 11:

Google maintains on its servers digital copies of millions of in-copyright works, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term as that term is defined in 17 U.S.C. § 101. Google objects to the definition of "Library Project" as vague and ambiguous. Google objects to the term "works" as vague and ambiguous. Google objects to this Request to

the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits that it creates and maintains, as necessary for its fair uses, more than one copy of the books it scans from library collections, and that it has scanned millions of books from library collections. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 12:

Google uses the works copied in its Library Project to display search results to users of its search engine.

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits that one of the fair uses to which it puts books is rendering them searchable using the Google Books website. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 13:

In response to search queries by users of its search engine, Google has displayed content on the Internet from millions of in-copyright works, without permission from the copyright owner of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits in response to search queries by users of Google Books, in order to help users find the book they're looking for, Google has displayed short "snippets" of text from millions of books to those users, though it only displays a maximum of three "snippets" in response to a search query. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 14:

In response to search inquiries by users of its search engine, Google searches the complete text of works copied in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits in response to search queries by users of its Google Books website, in order to help users find the book they're looking for, Google searches the complete text of at least some of the works scanned from library collections. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 15:

None of the representative plaintiffs gave permission to Google to copy, distribute or display any of their works.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits that the representative plaintiffs themselves did not give Google any permissions with respect to any of their books, as Google's acts constituted fair use, although their publishers gave Google certain permissions with respect to some of their works. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 16:

Google did not seek permission from any of the representative plaintiffs to copy, distribute or display any of their works.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits that, because its acts constituted fair use, Google did not seek any permission from the representative plaintiffs themselves, although their publishers gave Google certain permissions with respect to some of their works. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 17:

Google did not seek permission from copyright owners before copying in-copyright works in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that before beginning to scan works from libraries, because its acts constituted fair use, it generally did not seek or receive permissions from copyright holders with respect to its project of

scanning books from libraries. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 18:

Google has not compensated copyright owners for its copying in its Library Project of in-copyright works.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has not provided direct monetary compensation to copyright holders with respect to its scanning of books from libraries and the display of short "snippets" of text in response to search queries. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 19:

Google has not compensated copyright owners for its display on the Internet of content from in-copyright works copied in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has not provided direct monetary compensation to copyright holders with respect to its scanning of books from libraries and the display of short "snippets" of text in response to search queries. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 20:

Google's security measures may be breached due to the actions of outside parties, employee error, malfeasance, or otherwise, and, as a result, an unauthorized party may obtain access to data held by Google, including works copied in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 20:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous, including without limitation in its use of the term "security." Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 21:

Outside parties may attempt to fraudulently induce Google employees, users, or customers to disclose sensitive information in order to gain access to data held by Google.

RESPONSE TO REQUEST FOR ADMISSION NO. 21:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous. Google objects to this Request on the ground that it seeks

information pertaining to the state of mind of third parties, of which Google has no direct knowledge. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 22:

Because the techniques used by outside parties to obtain unauthorized access to data change frequently and often are not recognized until launched against a target, Google may be unable to anticipate these techniques or to implement adequate preventative measures.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 23:

Google does not consider itself responsible for the security of the digital copies of works provided by it to libraries in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 23:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it is vague and ambiguous, including without limitation in its use of the term "security."

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 24:

Google does not monitor or control the security of the digital copies of works provided by it to libraries in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 24:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it is vague and ambiguous, including without limitation in its use of the terms "monitor," "control," and "security." Google objects to this Request's use of the term "copies" as vague and ambiguous, and construes that term as it is defined in 17 U.S.C. § 101.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 25:

The security measures of libraries who receive digital copies of works from Google may be breached due to the actions of outside parties, employee error, malfeasance, or otherwise, and, as a result, an unauthorized party may obtain access to data held by such libraries.

RESPONSE TO REQUEST FOR ADMISSION NO. 25:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous, including without limitation in its use of the term "security." Google objects to this Request's use of the term "copies" as vague and ambiguous, and construes that term as it is defined in 17 U.S.C. § 101.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 26:

Outside parties may attempt to fraudulently induce library employees or patrons to disclose sensitive information in order to gain access to data held by the library.

RESPONSE TO REQUEST FOR ADMISSION NO. 26:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous. Google objects to this Request on the ground that it seeks information pertaining to the state of mind of third parties, of which Google has no direct knowledge.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 27:

Because the techniques used by outside parties to obtain unauthorized access to data change frequently and often are not recognized until launched against a target, libraries may be unable to anticipate these techniques or to implement adequate preventative measures.

RESPONSE TO REQUEST FOR ADMISSION NO. 27:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 28:

Google pays license fees and royalties to certain content providers to display content on its website.

RESPONSE TO REQUEST FOR ADMISSION NO. 28:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it is vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it pays license fees to certain content providers to display certain content on certain websites that Google operates. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 29:

Google does not use the works copied in its Library Project for the purpose of criticism.

RESPONSE TO REQUEST FOR ADMISSION NO. 29:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 30:

Google does not use the works copied in its Library Project for the purpose of commenting on the works.

RESPONSE TO REQUEST FOR ADMISSION NO. 30:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the

ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 31:

Google does not use the works copied in its Library Project for the purpose of news reporting.

RESPONSE TO REQUEST FOR ADMISSION NO. 31:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 32:

Google does not use the works copied in its Library Project for the purpose of teaching.

RESPONSE TO REQUEST FOR ADMISSION NO. 32:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies,

as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 33:

Google does not use the works copied in its Library Project for the purpose of scholarship.

RESPONSE TO REQUEST FOR ADMISSION NO. 33:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 34:

Google does not use the works copied in its Library Project for the purpose of research.

RESPONSE TO REQUEST FOR ADMISSION NO. 34:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

Dated: December 22, 2011

By: */s/ Joseph C. Gratz*

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Attorneys for Defendant Google Inc.

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the State Bar of California, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On December 22, 2011, I served the following document(s) in the manner described below:

DEFENDANT GOOGLE INC.'S RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.

☐ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.

☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jgratz@durietangri.com to the email addresses set forth below.

☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

Michael J. Boni
Joanne E. Zack
BONI & ZACK LLC
15 St. Asaphs Road
Bala Cynwyd, PA 19004
Telephone: 610-822-0200
Fax: 610-822-0206
Email: mboni@bonizack.com
jzack@bonizack.com

Attorneys for Plaintiffs

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 22, 2011, in San Francisco, California.

/s/ Joseph C. Gratz
Joseph C. Gratz

Expert Report of Ben Edelman

Introduction and qualifications

1. I am an assistant professor at Harvard Business School. My research focuses on the design of electronic marketplaces including Internet advertising, search engines, privacy, and information security. I hold a Ph.D. in Economics from Harvard University, a J.D. from Harvard Law School, an A.M. in statistics from Harvard University, and an A.B. in economics from Harvard College. Further information concerning my background and qualifications is provided in my curriculum vitae, which is attached hereto as Exhibit A.

2. My experience includes more than 15 years as a computer programmer, in which time I developed software for my own use, end-user computers, local networks, and web servers; and administered servers for myself and others. My technical experience includes efforts to verify the security of other programmers' code including uncovering shortfalls in others' security systems. I have studied and written about questions of information security, accidental information revelation, and information distributed more broadly than online services anticipated. For example, I have personally uncovered multiple Google privacy flaws, including improper data collection by Google Toolbar as well as improper data distribution by Google JotSpot. I also found and demonstrated to a court's satisfaction that an early online video service, iCraveTV, had failed to secure video contents in the way that it had previously represented to that court.

3. My academic publications explore a variety of aspects of online business, including multiple articles considering the difficulty of limiting access to and use of information systems. A full list of my publications is provided in my curriculum vitae, which is attached hereto as Exhibit A. Among the publications relevant to questions at issue in this matter are the following articles: In "Shortcomings and Challenges in the Restriction of Internet Retransmissions of Over-the-air Television Content to Canadian Internet Users," a submission to Industry Canada, I evaluated the difficulty of imposing certain access restrictions when distributing video material over the Internet. In "Securing Online Advertising: Rustlers and Sheriffs in the New Wild West," I presented the challenges of designing online advertising markets to satisfy the requirements of advertisers, online publishers, and advertising platforms while unauthorized activities such as advertising fraud are taking place. In numerous articles, I have presented all manner of online miscreants using information systems in ways their providers did not intend, did not anticipate, sought to prevent, and/or claimed to seek to prevent.

4. My teaching assignment currently consists of a HBS elective course called *The Online Economy*, which analyzes strategies for all manner of online businesses. The course includes concerns arising out information security.

5. I have testified as an expert witness in federal courts, and I have testified to committees of the United States House of Representative and United States Senate. I have offered expert testimony in the U.S. District Courts for Michigan and Pennsylvania and in Utah State Court. A listing of the cases in which I have testified as an expert at trial or by deposition during the past four years is attached as Exhibit B.

6. I am being compensated for my work in this matter at the rate of $450 per hour.

Scope of retention

7. I understand Google is asserting a fair use defense to the allegations that, without permission from rights-holders, it digitized millions of in-copyright books from a number of university libraries, maintains digital copies of those books on its servers, distributed digital copies of those books to the libraries, and displays on the Internet verbatim content from the books. In this report, I address and opine on risks of a security breach exposing widely online the contents of in-copyright books from (a) the scanning, storage and display of books (or book excerpts) by smaller, less sophisticated entities that, under an adverse fair use ruling, would be permitted to engage in conduct similar to Google's Library Project, (b) Google's distribution of digital copies of scanned books to libraries, and (c) Google's retention and storage of multiple copies of the millions of books it digitizes in its Library Project.

8. I conclude that unrestricted and widespread conduct of the sort engaged in by Google would result in a substantially adverse impact on the potential market for books.

9. If the Google Library Project is found not to be a fair use, then the books could be digitally copied, distributed and displayed through licenses that include security protocols and a damages structure for breaches of those protocols. Conversely, if such uses are deemed permissible without requiring permission from rights-holders -- i.e., if fair use were to be found here -- then rights-holders will have little or no means to reduce the security risks identified in this report.

10. Exhibit C lists the documents I reviewed and sources I considered.

Piracy of books is already a real, not hypothetical problem

11. The electronic distribution of electronic copies of books, without authorization from publishers or rights-holders, is already occurring. For example, consider a user seeking a copy of "American Sniper," the number one bestseller hardcover nonfiction book according to the New York Times bestseller list dated April 1, 2012. Such a user might run a Google search for "american sniper mobi" (without quotes), using the word "mobi" to indicate interest in a ".mobi" book (a popular electronic book file format). The first, second, third, fourth, fifth, sixth, eighth, ninth, and tenth-listed links all offer or purport to offer copies of the specified book. I checked these nine links; I found that all but one confirmed that the book was available and offered a download link or download instructions. Of the ten links, only one (the seventh) pointed to a site (Amazon) that charged for access to the book. Of course the book is a top-selling in-copyright commercial publication; anyone offering no-charge copies is almost certainly doing so without permission from the copyright holder.

12. Sites with pirated books fall into several categories. Some sites charge for pirated book copies, though they do not share the resulting revenues with those who created the books. Other sites distribute pirated book copies for free. Among sites offering free book copies, some offer direct web-based downloads, providing pirated book copies when a user simply clicks to request a copy. Other sites offer links to Bit torrent ".torrent" files that direct a user's computer to other computers from which a desired file may be copied.

Similar Scanning Operations Could Allow Book Copies to Be Copied and Redistributed

13. If Google's conduct is found to be a fair use and others engage in similar conduct, a risk is created of book redistribution through piracy.

14. If other providers ("providers") scan books, the resulting digital book copies could enter widespread public circulation via any of several channels. First, pirates could extract book copies through defects in the security of a provider's systems. Once books are scanned, the resulting digital files are stored on a server or, more often, multiple servers. Defects in the access controls of any such server could allow pirates to gain access to digital book copies. Defects could arise through flaws in the operating system, database server, web server, or other software run on a provider's servers; such flaws have been widespread in even the most popular server software. Defects could also arise through the provider's custom software, which is likely to be less secure because custom software usually receives a lesser level of scrutiny, testing, and verification than software that is distributed and used more broadly.

15. Second, pirates could extract books via errors in the security configuration of a provider's systems. If even one of a provider's servers lacks a required update or other security feature, pirates could use that server to obtain the book copies.

16. Third, pirates could extract books by impersonating provider staff to access provider systems. Suppose an attacker can obtain the username and password of a person with full access to a provider's book copies. The attacker can log in with that password to access and copy the provider's book copies. Similar attacks are frequent: For example Amazon Zappos,[1] Gawker,[2] and Microsoft Hotmail[3] suffered similar attacks in 2009-2011. Even the United Nations suffered a breach of the same type.[4] If a single staff person at a single book provider used the same password for a hacked site and for access to book copies, then a hacker could use that password to access book copies, copy book copies to the hacker's own systems, and redistribute book copies further from there.

17. Fourth, a rogue employee could intentionally redistribute book copies. Rogue employees gain and exploit privileged access to data despite organizations' efforts to screen and supervise key staff. Consider the classified US State Department material distributed by Wikileaks in 2010 – information obtained via a rogue employee. A rogue employee with access to book copies could intentionally make those copies available to the public.

18. Fifth, when books are scanned by a smaller and less sophisticated provider, there is a particularly acute risk of book contents being accessed and redistributed. For one, less sophisticated organizations have a reduced capability to design, install, and maintain suitable web site, database, and related security systems as well as anti-reconstruction

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[1] Dominic Rushe. "Zappos Database Hit by Cyberattack." The Guardian. January 16, 2012.
[2] Zachary Seward and Albert Sun. "The Top 50 Gawker Media Passwords." Wall Street Journal - Digits. December 13, 2010.
[3] Bogdan Calin. "Statistics from 10,000 Leaked Hotmail Passwords." Acunetix. October 6, 2009. http://www.acunetix.com/blog/news/statistics-from-10000-leaked-hotmail-passwords/ .
[4] Chloe Albanesius. "Team Poison Hacks UN, Leaks Usernames, Passwords." PC Magazine. November 30, 2011.

systems to secure books. Furthermore, less sophisticated organizations have a lesser ability to screen key staff to prevent data loss through rogue employees, and a lesser ability to configure security systems to exclude hackers. Thus, if other companies and organizations follow Google's lead in scanning books, a risk exists that book contents will be accessed and redistributed.

19. As set out in the section captioned "A Single Breach Could Cause Devastating Harm to the Class," one instance of book copying can have large effects. For example, if numerous companies and organizations scan books, attackers can focus their efforts on whichever installs the weakest security. Similarly, attackers can take advantage of even a brief period when a single book provider is insecure (for example, through failure to properly update a server). Once attackers obtain book copies, they can then redistribute the copies as desired. If many providers begin scanning and storing digital book copies, the affected books are only as secure as the least secure provider – so the diligent efforts of some providers would be undermined by lax security of others.

Breaches in Libraries' Systems Could Facilitate Book Piracy

20. I understand that the Google Library Project includes providing to its library partners a full digital copy of the books the libraries allowed Google to scan. Breaches in the security systems at these libraries could facilitate book piracy.

21. I have not been informed of all the ways that libraries intend to use the book contents data they receive from Google, nor have I been informed how libraries intend to secure that data. But the information currently available indicates that libraries' actions present a risk of book piracy.

22. If libraries provide book contents in a way where authorized library users can access the data, it is likely that some users will attempt to exceed the intended scope of authorization to access and copy book contents en masse. For example, in July 2011, a student used MIT library access to download 4.8 million articles and other documents.[5]

23. Structural factors also increase the difficulty of libraries properly securing book contents. University libraries typically serve myriad users including students, visitors, and others with limited long-term connection to the library – limiting a library's ability to establish accountability. Moreover, libraries typically specialize in making information available rather than in restricting how information may be used. While some libraries offer electronic resources that are subject to restrictions on use, these restrictions are typically implemented by keeping the information on the information provider's servers so that the information provider, not the library, can monitor usage and attempt to assure compliance. For example, when a library licenses journals and articles and other documents from the JSTOR digital archive, libraries do not receive full copies of the articles to store on library servers. Instead, libraries receive secure access to JSTOR servers, allowing library patrons to access individual documents on JSTOR without ever receiving the full corpus of all articles JSTOR holds. Access to documents held by Lexis-Nexis and Westlaw is similar. In contrast, the book contents here at issue would be stored on libraries' servers without an outside third party to assure and enforce compliance with access restrictions.

[5] United States of America v. Aaron Swartz. Indictment. July14, 2011.

24. The likely uses of digital book copies further exacerbate the risk of copying. A natural use of digital book copies is to analyze patterns in book text. From the perspective of a researcher seeking to perform such analysis, it is natural to begin by copying digital book copies onto a system the researcher controls, allowing the researcher to run flexible and high-speed searches of those book copies using the researcher's preferred tools. (In contrast, if the researcher had to run analyses on a server controlled by the library, the researcher would ordinarily be able to use only those tools the library provides, and the speed of the researcher's analysis might be constrained by server capacity and availability.) Crucially, once a researcher copies the data onto his own system, the library's prior security efforts (whatever they might be) are largely irrelevant. A researcher might even store digital book copies on a laptop or USB drive, where loss and theft are particularly frequent. When book copies are processed into text using optical character recognition, the resulting files can be quite small – making it feasible to store tens of thousands of book copies on an ordinary laptop or USB drive.

25. A further risk of book piracy from or via university libraries comes from the culture of "pranks" enjoyed by many software and engineering students. For example, the MIT Hack Gallery presents hundreds of hacks including public displays of the Apple logo, the logo of the Boston Red Sox, and the logos of various movies.[6]

26. In its agreement with the University of Michigan, Google has specifically avoided responsibility for monitoring how libraries store or use book contents. The University of Michigan agreement specifically speaks to Google's duty of care over physical books in Google's custody (including the risk of loss, damage, pests, fire, theft, and the like).[7] However, the agreement offers limited commitments as to the University of Michigan's duty to keep secure its Digital Copy of the book contents.[8] For example, Google's agreement with University of Michigan provides the use of robots.txt as a supposed "technological measure … to restrict automated access" to the Digital Copy, but robots.txt offers no genuine security protection and instead relies on a requester's compliance with stated restrictions on access. The other provisions of Google's agreement with University of Michigan are vague ("reasonable efforts," "cooperate in good faith to mutually develop methods," etc.). These vague provisions offer significantly lower protection than Google provides for even its routine business confidences.[9]

Google Itself Is Not Immune to Design Flaws and Security Breaches

27. Despite Google's considerable resources, Google products and services nonetheless suffer from design flaws and security breaches which result in information flowing in ways Google and/or users did not intend.

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[6] http://hacks.mit.edu/

[7] Cooperative Agreement between Google Inc. and Regents of the University of Michigan, sections 2.3.1 and 2.7.

[8] Cooperative Agreement between Google Inc. and Regents of the University of Michigan, sections 4.4.1-2.

[9] For example, the Google NDA presented at http://valleywag.com/230407/this-nda-never-existed offers greater protection including greater restrictions on the circumstances in which information can be shared, greater restrictions on the permissible recipients of such information, and more precise requirements as to how information must be secured.

28. In general, Google faces each of the vulnerabilities detailed in "Similar Scanning Operations Could Allow Book Copies to Be Copied and Redistributed" above. The following sections flag specific problems that could occur, as well as noting similar problems Google has already faced.

Google's Security Systems are not Failproof

29. In other information and distribution services, Google has failed to comply with its commitments to users and the public. For example, in January 2010, I found and reported the popular Google Toolbar program – installed on "hundreds of millions" of computers[10] – continuing to track users' browsing (including every web page visited) even after users had specifically requested that the Toolbar be "disable[d]" and even after the Toolbar had confirmed users' request and disappeared from screen.[11] The user browsing at issue was users' most sensitive online activities: reasonable users would activate the Toolbar's "disable tracking" feature exactly when they sought to engage in private activities they did not wish Google to track. Google subsequently characterized its nonconsensual information collection as "an issue"[12] but offered no explanation for why it collected information users had specifically indicated, and Google had agreed, should not be collected. Google has paid no compensation to affected users. Neither did Google promise to undo the error: Google never offered to let affected users identify themselves so Google could delete their data from its records.

30. In spring 2010, Google introduced Buzz, a social network for connecting to online colleagues and sharing information about who is doing what. For users of Google's email service, Gmail, Buzz shared with the general public the names of the persons Gmail users corresponded with – information Google had previously indicated it would keep confidential. Google subsequently faced class litigation for this information breach, alleging that affected users suffered direct economic loss as a result of Google's information revelation. For example, Buzz revealed the persons sending email to and receiving email from Andrew McLaughlin, who had previously served as a Google lobbyist, and was working in the White House as deputy Chief Technology Officer of the United States. Buzz's information revelation indicated that Mr. McLaughlin had engaged in impermissible activities with his prior employers, in violation of White House ethics rules. After Buzz-posted information prompted a complaint and an investigation, Mr. McLaughlin was formally reprimanded for the improper communications.[13] To the best of my knowledge, Google never offered any compensation to Mr. McLaughlin or other affected Gmail users.

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[10] Ian Paul. "Google Toolbar Tracks Some Browsing Even When It's Not Supposed To." PC World. January 25, 2010. http://www.pcworld.com/article/187670/google_toolbar_tracks_some_browsing_even_when_its_not_supposed_to.html .

[11] Benjamin Edelman. "Google Toolbar Tracks Browsing Even After Users Choose 'Disable'." January 26, 2010. http://www.benedelman.org/news/012610-1.html .

[12] Barry Schwarz. "Disabling The Google Toolbar Doesn't Stop Google From Tracking You." January 26, 2010. http://searchengineland.com/disabling-the-google-toolbar-doesnt-stop-google-from-tracking-you-34438

[13] J. Nicholas Hoover. "White House Reprimands Deputy CTO." Information Week. May 17, 2010. http://www.informationweek.com/news/government/leadership/224900083 .

31. In addition, during February 2012, researchers discovered that Google was bypassing Safari and Internet Explorer privacy settings to collect data that those browsers would ordinarily decline to provide.[14] While Google ceased further collection via these methods, Google has not offered to delete information improperly collected, nor has Google offered to compensate affected users.

32. In each of these examples, Google's services worked in exactly the way Google's engineers designed, in a way any Google engineer could have noticed through straightforward testing and, in many instances, in a way Google staff specifically intended. Yet Google lacked authorization for these information collection and distribution practices.

Rogue Google Employees Could Access or Redistribute Book Contents

33. In September 2010, news reports revealed that David Barksdale, a senior Google engineer, had used his privileged position at Google to spy on four teenagers for months. Because Barksdale was a Site Reliability Engineer at Google, he was able to tap into call logs for Google Voice (records of phone calls to and from the youths), read the youths' instant message chat logs, and unblock himself from buddy lists in order to send instant messages to and from the youths. Barksdale used each of these methods to access the communications of the affected youths. While Google terminated Barksdale's employment after these practices became known, Barksdale was able to continue his practices for months without Google's internal controls noticing what he was doing.[15] Google subsequently admitted that it had previously caught at least one other Google staff person accessing user data without authorization.[16]

Hackers Could Access or Redistribute Book Contents

34. Outside hackers could access or redistribute book contents. Many hackers disagree with the public policy embodied in applicable copyright law. For example, during January 2012, hackers disabled web sites of the U.S. Department of Justice and FBI, trade associations Recording Industry Association of America and Motion Picture Association of America, and record labels Universal, BMI, and Warner Music Group, when hackers disapproved of possible revisions to copyright law then under discussion in Congress.[17] Google's digitized book contents thus could attract hackers seeking to redistribute notable information.

35. In January 2010, Google reported a "highly sophisticated and targeted attack on our corporate infrastructure originating from China that resulted in the theft of intellectual

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[14] Jonathan Mayer. "Safari Trackers." February 17, 2012. http://cyberlaw.stanford.edu/blog/2012/02/safari-trackers .

[15] Adrian Chen. "GCreep: Google Engineer Stalked Teens, Spied on Chats." Gawker. September 14, 2010. http://gawker.com/5637234/gcreep-google-engineer-stalked-teens-spied-on-chats .

[16] Jacon Kincaid. "This Is the Second Time a Google Engineer Has Been Fired for Accessing User Data." TechCrunch. September 14, 2010.

[17] Ingrid Lunden. "SOPA Blackout, Anonymous-Style: FBI, DOJ Sites Downed In Megaupload Protest." paidContent.org. January 19, 2012. http://paidcontent.org/article/419-sopa-blackout-anonymous-style-doj-riaa-hacked-in-megaupload-protest/.

property from Google."[18] A subsequent analysis by McAfee indicated that hackers had specifically sought access to the source code for Google systems, and that hackers had even obtained the ability to alter the source code for Google systems.[19] If Google cannot keep its own intellectual property secure from attackers, it is plausible to conclude that Google cannot keep book contents invulnerable to security breaches.

A Single Breach Could Cause Devastating Harm to the Class

36. A single breach of the systems that store book contents could allow book contents to become ubiquitous online. In particular, after that single breach occurs, users are likely to copy and/or share the material en masse, preventing any subsequent efforts to resecure book contents. For example, on August 4, 2006, AOL posted twenty million searches performed by more than 650,000 users over a three-month period. Once AOL realized that posting this information was inadvisable (because it included myriad sensitive subjects and could be easily linked to individual AOL users), AOL removed the file from its servers the same week, but the file remains easily available, including on the web and via BitTorrent.[20] Similarly, Wikileaks in February 2010 began publishing hundreds of thousands of pages of classified material. The information remains easily available, including via straightforward Google searches. The information simply cannot be "unpublished" once it has become publicly available on the Internet.

37. Thus, if book contents become available once – via a breach of book copies scanned by others, via a breach in libraries' copies of books scanned by Google, or via a breach of Google's own systems – the book contents are likely to be available easily and indefinitely.

38. However remote one may consider the risk of book contents becoming available, that risk must be considered in light of the devastating impact to the Class if book contents become available.

Conclusion

39. If Google's practices of digitally copying, distributing and displaying books without rightsholder permission are found to be fair uses and become widespread, the market for books will be adversely impacted by the potential for security breaches. Conversely, requiring Google and others to obtain the permission of rights-holders before engaging in such practices could prompt negotiations between rights-holders and those who seek to digitally use their works, thereby fostering standards for the allocation of the costs and risks of any harm flowing from such security breaches.

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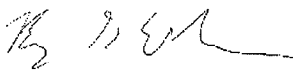
[18] David Drummond. Official Google Blog. January 12, 2010. http://googleblog.blogspot.com/2010/01/new-approach-to-china.html .

[19] McAfee Labs. "Protecting Your Critical Assets: Lessons Learned from 'Operation Aurora.'" March 2010. http://www.wired.com/images_blogs/threatlevel/2010/03/operationaurora_wp_0310_fnl.pdf .

[20] For example, I searched Google for "AOL search torrent" (without quotes) on March 27, 2012. Among the first ten results, I found six locations where I could download the files. http://gregsadetsky.com/aol-data/ presents nine different locations where the data remains available.

Signed April 2 2012,



Benjamin Edelman

EXHIBIT A

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Experience

Assistant professor, Harvard Business School. Negotiations, Organizations & Markets unit. (April 2007 – present)

Fields: Industrial organization, market design, information economics.
Research interests: Electronic markets. Internet advertising, reputation, and fraud. Automated data collection.
Teaching: Networked businesses, market design, information systems, online marketing, negotiation.

Independent consultant and expert witness (November 1999 – present)

Conducted quantitative analyses and empirical testing for a variety of clients including the American Civil Liberties Union, AOL, Microsoft, National Association of Broadcasters, National Football League, New York Times, Universal Music Group, and Washington Post on topics including online advertising, advertising fraud, spyware, spam, pay-per-click advertising and click fraud, Internet filtering, geolocation and targeting, privacy, security, automated data collection, and user interface design. Qualified as an expert in Federal court on multiple occasions, and provided oral testimony under direct and cross examination.

Student Fellow / Technology Analyst, Berkman Center for Internet & Society (May 1998 – January 2004)

Conducted empirical studies of the Internet's domain name system, spyware/adware, content filtering by network intermediaries. Developed software systems for interactive real-time communication among class/meeting participants. Designed and operated system for webcast of and remote participation in numerous Berkman Center, Harvard Law School, and Cambridge community events as well as twelve ICANN public meetings.

Education

Harvard Graduate School of Arts & Sciences - Ph.D., Economics, 2007. Dissertation: "Topics in Internet Advertising."

Harvard Law School - J.D., 2005.

Harvard Graduate School of Arts & Sciences - A.M., Statistics, 2002.

Harvard College - A.B., Economics, *summa cum laude*, 2002; Phi Beta Kappa.

Woodrow Wilson Senior High School - Washington, DC: 1998; valedictorian.

Representative Research

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with Michael Ostrovsky and Michael Schwarz

Optimal Auction Design and Equilibrium Selection in Sponsored Search Auctions (*American Economic Review*, 2010)
with Michael Schwarz

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Bias in Search Results?: Diagnosis and Response (2011) *The Indian Journal of Law and Technology*

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To Groupon or Not to Groupon: The Profitability of Deep Discounts (2010) *HBS Working Paper* – with Scott Kominers and Sonia Jaffe
and To Groupon or Not To Groupon: New Research on Voucher Profitability (2011) *HBR Blogs*

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iCravetv.biz/Entervision Retransmits CNN, Cartoon Network, PAX TV, California NBC Affiliate (2002)
cyber.law.harvard.edu/people/edelman/icrave

Analysis of Registrations in Alternative Root TLDs (2001)
cyber.law.harvard.edu/people/edelman/dotbiz and /people/edelman/dotweb

Documentation of Privacy and Security Shortcomings at Buy.com (2000)
cyber.law.harvard.edu/people/edelman/buy-privacy.html

Understanding and Critiquing ICANN's Policy Agenda (2000)
cyber.law.harvard.edu/icann/pressingissues2000/briefingbook

Software Environments for Online Deliberative Discourse (1999-2000) cyber.law.harvard.edu/projects/deliberation

Executive Summaries of Formative ICANN Documents (1999)
cyber.law.harvard.edu/pressbriefings/icann/briefingbook/executivesummaries.html

ICANN and the Public Interest: Pressing Issues (1999) cyber.law.harvard.edu/icann/workshops/la/briefingbook

Using Trumpet Winsock on Netcom Netcruiser Accounts (1995) cyber.law.harvard.edu/people/edelman/trumpet.html

Teaching Cases and Notes

Airbnb (A) and (B) (HBS Case 912-019, -020) (and TN) (2011) with Michael Luca

Attack of the Clones: Birchbox Defends Against Copycat Competitors (HBS Case 912-010) (2011) with Peter Coles

The Online Economy: Strategy and Entrepreneurship - Course Architecture Note (HBS Note 911-069) (2011)
with Peter Coles

Mobilizing Online Businesses (HBS Module Note 911-048) (2011) with Peter Coles

Online Marketing at Big Skinny (HBS Case 911-033) (and TN) (2011) with Scott Kominers

The iPhone at IVK (TN) (HBS Teaching Note 911-414) (2010)

Akamai, Inc. (HBS Case 804-158) (2010) with Thomas Eisenmann and Eric Van den Steen

Google Inc. and Google Inc. (Abridged) (HBS Case 910-036 and 910-032) (2010) (and TN) with Thomas Eisenmann

Personal Rapid Transport at Vectus, Inc. (HBS Case 910-010) (2010) (and TN)

eBay Partner Network (A), (B), and (C) (HBS Case 910-008, -009, and -012) (2009) (and TN) with Ian Larkin

Symbian, Google & Apple in the Mobile Space (A) and (B) (HBS Case 909-055, -056) (2009)
with F. Suarez & A. Srinivasan

Distribution at American Airlines (A) and (B) (HBS Case 909-035 and -036) (and TN) (2009)

Windows Vista (HBS Case 909-038) (2009)

Online Restaurant Promotions (HBS Case 909-034) (and TN) (2009)

Ad Classification at Right Media (HBS Case 909-032) (and TN) (2009)

Consumer Payment Systems – United States (HBS Case 909-006) (2009) (and TN) with Andrei Hagiu

Consumer Payment Systems – Japan (HBS Case 909-007) (2009) (and TN) with Andrei Hagiu

TheLadders (HBS Case 908-061) (2008) (and TN) with Peter Coles, Brian Hall, and Nicole Bennett

Opening Dot EU (A) and (B) (HBS Case 908-052 and -053) (2008)

Microsoft adCenter (HBS Case 908-049) (and TN) (2008) with Peter Coles

Programming Experience

Microsoft Visual Basic (15+ years experience), VB.NET	Mathworks MatLab	Stata
SPlus / R	Python	PHP

Awards

Emerald Citations of Excellence Award (2011)

ECCH Award for Outstanding Contribution to the Case Method – Strategy and General Management (2011)

Best Paper Award, Honorable Mention – The 11th International Conference on Electronic Commerce (2009)

Harvard University Graduate Economics Fellowship (2003-2006)

John M. Olin Fellowship in Law and Economics (2003-2004, 2004-2005)

Hoopes Prize for Undergraduate Research (2002)

Seymour and Ruth Harris Prize for Best Honors Thesis in Economics (2002)

John Harvard Scholarship, Harvard College (1998-1999, 1999-2000, 2000-2001)

Rank I Honors, Harvard College (1998-1999, 1999-2000, 2000-2001)

Phi Beta Kappa, Harvard College (2001)

Undergraduate Honors Research Scholarship, Department of Economics, Harvard College (2001)

Detur Prize, Harvard College (1999)

Congressional and Expert Testimony

US Senate, Commerce Committee (2009) (statement for the record)

US House of Representatives, Committee on the Judiciary (2008) (invited / hearing cancelled)

US Senate, Committee on Commerce, Science, and Transportation (2008)

Federal Trade Commission Public Hearing on Effectiveness of CAN-SPAM (2005)

District Court, Third Judicial District of Utah (2004)

US Federal Court, Eastern District of Michigan (2003)

US House of Representatives, Committee on the Judiciary (2003)

US Federal Court, Eastern District of Pennsylvania (2002)

US Federal Court, Western District of Pennsylvania (2000)

Academic Service

Associate Editor: Journal of Economic Perspectives (2008-2012)

Referee: American Economic Review, Quarterly Journal of Economics, Journal of Applied Economics, RAND Journal of Economics, Management Science, Journal of Economics & Management Strategy, Sponsored Search Workshop, Workshop on the Economics of Information Security, Workshop on the Economics of Securing the Information Infrastructure, Manufacturing & Services Operations Management, The International Conference on Electronic Commerce (2009), International Review of Law and Economics, Journal of Industrial Economics, Operations Research, Berkeley Electronic Press – Policy & Internet, Review of Economic Studies, Economics Letters, Management Science, Review of Industrial Organization, Telecommunications Policy, Emerald Program

Program committee: Workshop on the Economics of Securing the Information Infrastructure (2006), Sponsored Search Workshop (2007), WWW2008, Fourth Workshop on Ad Auctions (2008), The First Conference on Auctions, Market Mechanisms and Their Applications (2009), ACM Conference on Electronic Commerce (2010), Workshop on the Economics of Information Security (2010) , Workshop on the Economics of Information Security (2011), Seventh Workshop on Ad Auctions (2011), The Second Conference on Auctions, Market Mechanisms and Their Applications (2011), WWW2012

Co-organizer: Sixth Workshop on Ad Auctions (2010)

Non-resident tutor / senior common room member: Cabot House (2004-2012)

EXHIBIT B

Benjamin Edelman – Prior Testimony at Trial or Deposition

Proceeding	Court	Reference	Context	Year	On behalf of
State of South Carolina v. Casale Media, Inc., et al.	South Carolina Court of Common Pleas, Richland County	08-CP-40-0729	Deposition	2008	Plaintiff
UMG Recordings, Inc., et al. v. Veoh Networks, Inc., et al.	U.S. District Court, Central District of California	No. CV 07-5744 AHM (AJWx)	Deposition	2009	Plaintiff
Netscape Communications Corp. v. Valueclick, Inc., et al.,	U.S. District Court, Eastern District of Virginia	No. 1:09-cv-225-TSE-IDD	Deposition	2009	Plaintiff
Arista Records, et al., v. Myxer, Inc., et al.	U.S. District Court, Central District of California	No. CV 08-03935 GAF (JCx)	Deposition	2009	Plaintiff
Stephanie Lens v. Universal Music Corp., et al.	United States District Court, Northern District of California	No. C 07-03783 JF (PVT)	Deposition	2010	Defendant

EXHIBIT C

Exhibit C to Edelman Report

1. The Fourth Amended Class Action Complaint

2. Google Objections and Responses to Plaintiffs' First Requests for Admissions

3. Plaintiffs' Brief in Support of Their Motion for Class Certification

4. Zack Decl. and Exhibits in support of motion for class certification

5. Google's Brief in Opposition to Class Certification

6. Declarations of Daniel Clancy, dated February 11, 2010, and February 7, 2012

7. Plaintiffs' brief in opposition to Google's motion to dismiss the Authors Guild

8. Cooperative Agreement between Google and the University of Michigan (from the University of Michigan website)

9. The Complaint and Plaintiffs' brief in support of motion for partial judgment on the pleadings in *Authors Guild, et al. v. Hathitrust*, et al., 11 Civ. 6351 (HB)(S.D.N.Y.)

10. Defendant Google Inc.'s Supplemental Narrative Responses and Objections to Plaintiffs Second Request for Production of Documents and Things – Public Redacted Version

11. The books.google.com website

12. The materials cited in my report

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

The Authors Guild, Inc., Associational Plaintiff, Betty Miles, Joseph Goulden, and Jim Bouton, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

Google Inc.,

Defendant.

- x

Case No. 05 CV 8136-DC

ECF Case

REPORT OF PROFESSOR DANIEL GERVAIS

A. INTRODUCTION AND BACKGROUND

1. I have been retained by Plaintiffs as an expert on issues of intellectual property, and collective licensing of intellectual property.

2. I am FedEx Research Professor of Law at Vanderbilt University Law School and Director of the Vanderbilt Intellectual Property Program.

3. I am an expert in the field of intellectual property law. I have taught intellectual property law at various institutions in the U.S., Europe, and Canada. I have edited or contributed to 33 books related to intellectual property; and have written publications on intellectual property law for journals around the world, including the *Journal of the Copyright Society of the USA* (my article won the Charles B Seton Award in 2002-03), *Columbia Journal of Law & the Arts, Fordham Law Review, Cardozo Arts & Entertainment Law Journal, European Intellectual Property Review*, *American Journal of International Law*, *Chicago-Kent Law Review*, *Vanderbilt Journal of Technology and Entertainment Law* and the *Journal of Intellectual Property Law.* I have been cited in a decision by the Supreme Court of the United States (Golan v. Holder, 2011),

and in decisions by many other courts. A recent article was republished in *Intellectual Property Law Review (2011)* as one of the best intellectual property articles of 2010.

4. One of my special interests is in "collective management" of copyright, meaning how aggregations of individual copyrights are legally protected, licensed, and marketed. I authored the first chapter of a 2010 book I edited on this subject, entitled "Collective Management of Copyright: Theory and Practice in the Digital Age."

5. In January 2011, I gave the keynote talk at an event on collective management of copyright organized by the Kernochan Center for Law, Media and the Arts at Columbia Law School. An updated version of my presentation was published under the title "The Landscape of Collective Management."[1]

6. Prior to my teaching career, I served as Head of the Copyright Projects Section at the World Intellectual Property Organization (WIPO). In that capacity, I was asked to help establish new, or improve the functioning of existing, Collective Management Organizations (CMOs) in various countries around the world.

7. I also served as Deputy Secretary General of the International Confederation of Societies of Authors and Composers, the largest association of copyright collectives in the world; and as Vice-President of Copyright Clearance Center, Inc., based in Danvers, MA, during which time I was also Deputy Chair of the International Federation of Reprographic Rights Organizations (IFRRO), a worldwide association of CMOs, specializing in reprography (photocopying and digital reproduction of printed content). I have spoken at over 130 academic, professional and other conferences and events, discussing various issues related to intellectual property, including copyright law of the United States, international copyright law and the TRIPS Agreement.

[1] 24:4 COLUM-VLA J. L & ARTS 423-449 (2011).

8. I also serve as Editor-in-Chief of the *Journal of World Intellectual Property,* published jointly by John Wiley & Sons (New York) and Blackwell Publishing (Oxford, UK).

9. My complete curriculum vitae is attached here to as Exhibit A. The facts and data I considered in forming my opinion are listed on Exhibit B. I have not testified as an expert at trial or by deposition in the last four years. I am being compensated for my time at the rate of $400 per hour.

B. MY OPINION

10. It is my understanding that Google has engaged in the digital copying of millions of books in libraries, the distribution of digital copies of these books to libraries, and display of "snippets" from these books in search results. I have been asked my opinion (a) whether collective licensing markets will continue to develop for the digital uses of books and (b) whether unrestricted and widespread conduct of the type engaged in by Google will harm the development of such markets. As I discuss in greater detail below, in my opinion, the answer to each of these questions is the affirmative.

11. I believe that, if Google's uses are determined not to be fair uses, the market would intervene and one or more CMOs (with proper authorizations from right holders) would license Google (and potentially others) to scan, distribute and display copyrighted works. In fact, as discussed further below, the type of copyrighted content that Copyright Clearance Center, Inc. presently licenses is essentially printed content, much of the same nature as the material scanned by Google. The rights involved are also essentially the same. In other words, this type of licensing is already a reality.

12. Collective management is already indispensable for many categories of content creators and for many types of copyright uses, including online uses. The value of copyright

rights to authors and other copyright owners is often monetized not in individual transactions (authorizing the use of one or more specific works) but in licensing their rights in aggregated form, as part of a "repertory" of works or rights. This allows markets for those repertoires of works and rights to form and to operate, allowing access to and uses of copyrighted material while compensating creators for their work. Collective licensing markets have often developed in response to new technologies and uses and will continue to develop for digital uses of books unless widespread copying of entire books is permitted as a fair use, thus discouraging the development of such collective licenses.

13. Making books and other copyrighted works available online is desirable both for authors and readers. Technologically, it may be inevitable. It is likely to become a major form of access to content. It may also facilitate access by people with disabilities.

14. Allowing the market, or Congress, to develop a collective licensing system for the types of uses that Google has been making would not prevent these uses. Instead, it would compensate those who created and published the content and whose ability to earn a living often depends on being able to monetize online uses. The actual scope of the uses could be taken into account in determining appropriate rates. Collective management solutions can be applied to manage this type of licensing transaction, as the existence of successful similar collective systems demonstrates.

15. An argument that collective management is not possible or desirable in this case because there are many different types of books is negated by the existence of successful licensing systems for more than two centuries that have combined works of a similar form but with different content into repertoires. Collective Management Organizations license old and new works. Today, existing collective rights music organizations license everything from Philip

Glass to the latest hip-hop hit. CMOs typically pay authors and other right holders based on actual usage.

16. Collective licensing was the thrust of the proposed settlement in this case. The proposed Book Rights Registry was a form of collective management with a repertory license allowing Google to use millions of titles. The Registry would have maintained a database of rights information, received on behalf of the rightsholders the agreed payments from Google, and distributed those payments to rightsholders who had registered their works with the Registry.

17. It is my opinion that a similar type of collective management system, most likely one requiring that rightsholders opt their books in to participate in collective management, would develop here if some or all of Google's uses are found not to be fair. Further, it is my opinion that, if conduct such as Google's is permitted and becomes widespread, this will harm or impede the development of such a collective management model.

C. BASES FOR THE OPINION

(1) The Emergence and Basic Operations of Copyright Management Organizations

18. Collective management reportedly emerged around 1777 in France, when authors of theatrical plays formed an association to license their plays.[2] In the United States, collective

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[2] In 1838, Honoré de Balzac and Victor Hugo established the Society of French Writers, (known in French as Société des gens de lettres. *See* online : <http://www.sgdl.org/> (last visited : March 28, 2012), which was mandated with the collection of royalties from print publishers. A net of authors' societies, shaped by the cultural environment of each country, slowly spread throughout the world. *Id.* at 10. Around the same time, the Universal Theatrical Society was established.
See www.answers.com/topic/firmin-g-mier (last visited: March 28, 2012).
Both of these initiatives led to the founding congress in 1926 of the International Confederation of Societies of Authors (CISAC) . *See* www.cisac.org (last visited: March 28, 2012).
The founding members identified the need to establish both uniform principles and methods in each country for the collection of royalties and the protection of works, and to ensure that copyright was protected throughout the world. (By "world", I am referring only to the Western World. This is inclusive of the Anglo-Saxon and *droit d'auteur* traditions of copyright.)
Today, CISAC has 232 members in 121 countries. *See* http://www.cisac.org/CisacPortal/initConsultDoc.do?idDoc=22994 (last visited: March 28, 2012).

management developed as technology and markets made possible the widespread and dispersed infringement of copyrights. Broadcasters were considered "pirates," until their use of music was licensed by performing rights organizations (PROs). ASCAP, BMI and SESAC are the three PROs identified as such in 17 U.S.C. §101. The first PRO, the American Society of Composers and Publishers (ASCAP), was formed in 1914.

19. Collective management provides a number of advantages in licensing uses of copyrights. CMOs are a single-source for the licensing of specific uses, thereby eliminating the need for individually negotiated licenses from each copyright owner. By reducing the transaction costs associated with enforcing, on the one hand, and licensing, on the other, they help convert widespread infringement into markets. This benefits authors and users.

(2) Collective Management in the Copyright Act

20. The Copyright Act regulates CMOs in the United States in a variety of ways. For example, PROs are named in section 101. Section 115 establishes a compulsory license for making and distributing phonorecords. When certain uses are determined by Congress to be desirable but subject to a payment to authors, Congress may establish a compulsory license. Such a system is now in place to set rates for non-interactive transmissions of sound recordings.[3]

21. A brief review of the legislative history might be helpful to illuminate the issue at hand.

22. The initial focus of legislative action was the collective management of music. In the 1897 Act, Congress prohibited unauthorized public performances generally.[4] However, in the Copyright Act of 1909, Congress limited the prohibition to those done "for profit."[5]

For 2010, CISAC members reported collections of $9.9 billion. *See id.*

[3] Section 114 and chapter 8 of Title 17 of the United States Code.

[4] *Id.*

[5] *Id.*

23. Not surprisingly, within a few years of the 1909 Act's enactment, the need to define "for profit" emerged.[6] In *Herbert*, the Supreme Court, in the words of Justice Holmes, explained that the notion should be defined fairly broadly:

> The defendants' performances are ... part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.[7]

24. The Court thus established the need for the public performance licenses that ASCAP and now the other PROs provide.[8] This is a good example of infringement preceding the establishment of a working collective licensing system.

25. When Congress enacted the Copyright Act of 1976,[9] it did away with the "for profit" language of the 1909 Act. However, Congress also expressly exempted from copyright liability "the public reception of [a transmission embodying a performance of a work] on a single receiving apparatus" where no separate charge was made to see or hear the transmission.[10]

26. In an effort to adapt the statute to technological change, in the Digital Performance Right in Sound Recordings Act of 1995, Congress enacted a limited digital public

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[6] *See* Herbert v. Shanley Co., 242 U.S. 591 (1917) [Herbert]; John Church Co. v. Hilliard Hotel Co., 221 F. 229 (2nd Cir. 1915). The named plaintiff in Herbert v. Shanley Co., Victor Herbert, was a founding member of ASCAP, and brought the case as a test case to establish a broader scope for the right of public performance.

[7] *See* Herbert, *id.*

[8] Exempted from license fees in the 1909 Act were certain charitable performances and for jukeboxes.

[9] Act of October 19, 1976, Pub. L. No. 553, 94th Cong., 1st Sess., 90 Stat. 2586, codified as amended at 15 U.S.C. §§ 1-1332 (2005).

[10] *Id.* at § 110(1), (2), (3), (4), (6), (8), (9), codified as amended 17 U.S.C. § 110(1), (2), (3), (4), (6), (8), (9) (2005).

performance right for sound recordings, contained in 17 U.S.C.§114.[11] Congress then provided a compulsory license for non-interactive transmissions - that do not enable a member of the public to receive, on request, a transmission of a particular sound recording or a program specially created for the recipient.[12] The Act also tasked the U.S. Copyright Office to designate a CMO to administer the license, which it did, naming SoundExchange, Inc.[13]

27. The 1995 amendments did not follow the antitrust regulation model that applies to ASCAP and BMI. Instead, Congress opted for a more specialized and modern form of regulation of collective management. Under this new regulatory model, the Act gave the Library of Congress (of which the Copyright Office forms part) the authority to set rates and licensing conditions. The Act also set a distribution key according to which SoundExchange distributes 50% of the revenues to the sound recording copyright owners, 45% to the featured artists, and 5% to an independent administrator to distribute to non-featured artists and vocalists. Licensing rates are set by Copyright Royalty Judges (CRJs)[14] appointed by the Librarian of Congress for six-year terms.

(3) The Copyright Clearance Center

28. A different, voluntary model emerged when Copyright Clearance Center, Inc. ("CCC") was formed in 1978 as a New York not-for-profit corporation. Publishers and authors register their works with the CCC and set the fee for use of their works in CCC's several per-use license services. CCC also offers annual repertory licenses in both the business and academic

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[11] 104 Pub. L. No. 39, 109 Stat. 336 (1995).
[12] 17 U.S.C. §114(d)(2), (f)(2) (2009); *see also* Bonneville Int'l Corp. v. Peters, 347 F.3d 485, (3d Cir. 2003) (affirming Copyright Office's decision to require a compulsory license for simultaneous transmission of a radio station's broadcast through the Internet).
[13] *See* 17 U.S.C. § 114(g)(2); and Notice of Designation As Collective Under Statutory License filed with the Licensing Division of the Copyright Office in accordance with Copyright Office regulation 270.5(c), 37 C.F.R. § 270.5(c).
[14] 17 U.S.C. §§ 801-805 (2009).

markets. For the year ended June 30, 2011, CCC reported revenues in excess of $238 million and payments to right holders in excess of $171 million.[15] According to its website, CCC licenses business users, under one or more of its repertory or per-use licenses, the right to photocopy an article from a newspaper, magazine, book, journal, research report or other published document; e-mail an online article or PDF; post digital content on their corporate Web sites, intranets and extranets; print out Web-based and other digital content onto paper and overhead slides; republish content in a newsletter, book or journal; and scan printed content into digital form when an electronic version is not readily available.[16] For academic institutions, again under one or more of its repertory or per-use services, it licenses the right to photocopy material from books, newspapers, journals and other publications for use in coursepacks and classroom handouts; use and share information in library reserves, interlibrary loan and document delivery services; post and share content electronically in e-reserves, course management systems, e-coursepacks and other e-learning environments; distribute content via e-mail or post it to their intranets, Internet and extranet sites; and republish an article, book excerpt or other content in their own books, journals, newsletters and other materials.[17]

(4) Other Collective Management Organizations

29. Today, CMOs in the United States license: (a) musical works (primarily the three PROs and Harry Fox Agency (HFA) which licenses mostly the reproduction of musical works); (b) sound recordings and the artists' performances they contain (Sound Exchange); and (c) photocopying and digital reprography (Copyright Clearance Center, Inc. or CCC), to name the

[15] The difference between the two numbers includes but is not all a service charge. Due to the time period required to process usage data, the 2011 distributions were mostly of 2010 collections which were significantly lower than 2011 collections. *See* http://annualreport.copyright.com/management-summary-financial-data.
[16] *See* www.copyright.com.
[17] *See id.*

most well-known organizations. In addition, a form of collective management is used to collect and distribute residuals to certain actors, directors and screenwriters by the audiovisual guilds.

30. CMOs typically operate as follows: Once established (sometimes an authorization is required to operate as a CMO, as was the case for SoundExchange[18]), a CMO needs the authority to license a repertory of works, performances or recordings and/or to collect a license fee. The authority may be granted by law, as when a compulsory or statutory license is in place[19], or by contracts with individual right holders or other CMOs. With that authority, a CMO can license and/or collect fees on the basis of rates (also known as "tariffs"). Those rates may be set by a governmental authority such as the Legislative Branch as in section 115 of the Copyright Act or in section 114 by the Copyright Royalty Judges for SoundExchange, or by the Judiciary Branch, such as the federal judges operating as rate courts under the ASCAP and BMI consent decrees.[20] At other times, the rates are set by rightholders, as is the case with CCC.[21]

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[18] *See infra* note 13.

[19] According to the US Copyright Office, there are eight compulsory and statutory licenses in the Copyright Act (the Copyright Office also notes that the "terms 'compulsory' and 'statutory' are interchangeable"):
Section 111 - Statutory License for Secondary Transmissions by Cable Systems
Section 112 - Statutory License for Making Ephemeral Recordings
Section 114 - Statutory License for the public performance of Sound Recordings by Means of a Digital Audio Transmission
Section 115 - Compulsory License for Making and Distributing Phonorecords
Section 118 - Compulsory License for the use of Certain Works in Connection with Non-Commercial Broadcasting
Section 119 - Statutory License for Secondary Transmissions for Satellite Carriers
Section 122 - Statutory License for Secondary Transmissions by Satellite Carriers for Local Retransmissions
Section 1003 - Statutory Obligation for Distribution of Digital Audio Recording Devices and Media (Chapter 10).
See www.copyright.gov/licensing/

[20] *See, e.g.,* United States v. Am. Soc'y of Composers, Authors and Publishers, No. 41-1395, 2001 WL 1589999, (S.D.N.Y. June 11, 2001); and Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 361 (2001).

[21] Sometimes the price is set by a governmental authority without the need to seek a voluntary agreement first.

31. Having thus obtained the authority to license and/or collect fees, the CMO will normally proceed to sign agreements with users that provide for the collection of license fees and usage data. For example, radio stations (broadcasters) provide logs (often in digital form) of the recordings they used to the PROs in an agreed format. While a radio station may use computer logs to report the recordings used, for other types of users (hotels, bars, restaurants), it is difficult to require 100% reporting. Sometimes statistical surveys are used instead. For example, a number of (representative) users may be surveyed for a specific period of time, and the data thus gathered will then be extrapolated to the class of users concerned using statistical regressions and other similar models.

32. The CMO will process such data and apply them to distribute the funds to copyright holders.[22] Identification data (metadata) is generally used to match usage data reported by users or generated by the CMO to specific works, recordings or performances and the right holders therein.

(5) Collective management is a major part of copyright in practice

33. As I see it, in practice there are six ways in which copyrights are currently treated in the United States:

(A) Full individual exercise of rights by the copyright owner

(B) Voluntary collective management of rights by the copyright owner

(C) Presumption/designation of uses by statute

(D) Statutory limitations on damages to the applicable CMO rate

(E) Statutory or judicial compulsory licensing

[22] Payment to foreign copyright holders is often done through local CMOs in each territory on the basis of a contract usually referred to as a Reciprocal Representation Agreement. Worldwide databases of identification data have been created by CISAC and IFRRO. This allows their members to identify foreign works, performances and recordings licensed to them under those reciprocal representation agreements.

(F) Exceptions allowing uncompensated uses (such as fair use)

34. In a full individual exercise scenario (level A), a user must contact the copyright owner to obtain permission to make uses. Examples would be a book author's contract with a publisher or an author allowing the making of a derivative work, such as a film made based upon a novel. This often entails significant transaction costs (negotiation, etc.).

35. Then there are four levels of right at which the author loses the ability to say no to certain uses by others but retains a right to be paid for such uses. Such is the case when an author voluntarily joins a CMO (level B) because CMOs in most cases will not prohibit the use of a work in their repertory.[23]

36. At level C, a CMO may be designated by governmental authorities to manage a right. This system is applied in the United States under section 114 (SoundExchange is the designated CMO).

37. Another option (level D) is to statutorily limit the damages available for certain uses. A number of options under consideration for orphan works resemble this option.[24]

38. The next level is a compulsory license (level E). This may be managed by a private CMO (for example Harry Fox Agency under the section 115 compulsory license). A governmental authority can also be designated for this purpose. The U.S. Copyright Office directly administers royalty fee collections from cable operators for retransmitting television and radio broadcasts (under 17 U.S.C.§ 111), from satellite carriers for retransmitting non-network

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[23] Often they simply cannot or should not, as would arguably be the case with ASCAP and BMI under their respective consent decrees.

[24] *See* http://www.copyright.gov/orphan/ (last accessed March 28, 2012). One of the proposals most discussed would limit damages (conditions apply) to a "reasonable compensation" mutually agreed by the owner and the user or, failing that, be decided by a court and the suppression of statutory damages. My point is that if a collective rate was in place, it would likely inform the reasonable compensation determination by a court.

and network signals (17 U.S.C.§ 119), and from importers or manufacturers for distributing digital audio recording products ((17 U.S.C.§ 1003).[25]

39. At level F, a statute takes away from the copyright owner the right to receive remuneration for certain uses. Fair use is such a situation.

40. I believe that if Google's uses are not determined to be fair uses, the market, or Congress, will develop a collective licensing system for the types of uses that Google has been making so that Google would not have to negotiate a transactional license for each book or other work it wishes to use. Such an approach would compensate those who created and published the content and whose ability to earn a living often depends on being able to monetize online uses.

(6) Collective management and the digitization of, and mass access to, books

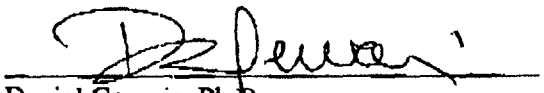
41. Often after a new form of use has emerged, collective management systems are established to license uses that have been found to be desirable but unauthorized. The purpose of collective management is not to put roadblocks in the utilization of works but rather to reconcile the needs of users and authors, to ensure that copyright rights are duly reflected in new forms of use that do not constitute fair uses or are otherwise exempt. Using collective management, users can obtain licenses with limited transaction costs (such as the annual licenses granted by the PROs and by CCC) or at least a single interlocutor. CMOs can also aggregate usage data to protect the privacy of individuals and the confidentiality of institutional and business users.

[25] *See Circular 75: The Licensing Division of the Copyright Office*, available at http://www.copyright.gov/circs/circ75.pdf (last accessed March 28, 2012).

CONCLUSION

42. Allowing practices like Google's as fair use may be expected to thwart the development of collective management systems for the digital uses of books and book excerpts that authors and publishers would otherwise likely develop, join or license others to develop.

Dated: April 2, 2012



Daniel Gervais, Ph.D.

EXHIBIT A

CURRICULUM VITAE

Daniel J. Gervais

PART I – EMPLOYMENT & HONORS

a) CURRENT POSITION

Professor of Law
Co-Director, Vanderbilt Intellectual Property Program
Vanderbilt University Law School

b) EDUCATION

- Doctorate, University of Nantes (France), 1998
  - *magna cum laude ("très honorable")*
- Diploma of Advanced International Studies, Geneva (Switzerland), 1989
  - *summa cum laude ("très bien")*
- LL.M., University of Montreal, 1987
- Computer science studies University of Montreal, 1984-1985
- LL.B. (McGill University/University of Montreal), 1984
- D.E.C. (Science, Jean-de-Brébeuf College, Montreal), 1981

c) PREVIOUS EMPLOYMENT & OTHER ACADEMIC EXPERIENCE

- Acting Dean, Common Law Section, University of Ottawa (Feb-Jul 2006 and Sep-2007-July 2008)
- University Research Chair, Common Law Section, University of Ottawa (2006-2008)
- Vice-Dean, Research, Common Law Section, University of Ottawa (2003-2006)
- Full Professor, Common Law Section, University of Ottawa (2005-2008)
- Associate Professor, Common Law Section, University of Ottawa (2001-2005)
- Vice-President, International, Copyright Clearance Centre, Inc., Massachusetts, USA, 1997-2000
- Consultant, Organization for Economic Cooperation and Development (OECD), Paris, 1997
- Assistant Secretary General, International Confederation of Societies of Authors and Composers (CISAC), Paris, 1995-1996
- Head of Section, World Intellectual Property Organization (WIPO), Geneva, 1992-1995
- Consultant & Legal Officer, General Agreement on Tariffs and Trade (GATT/WTO), Geneva, 1990-1991
- Lawyer, Clark, Woods, (Montreal), 1985-1990.

Visits:

- Visiting Lecturer, Washington College of Law, American University, June 2011;
- Visiting Professor, University of Liège (Belgium), March 2010 and 2011;

- Visiting Professor, University of Strasbourg (Centre for International Intellectual Property Studies (CEIPI), France), Nov.-Dec. 2009;
- Visiting Professor, Université de Montpellier, France (Feb. 2007 and Apr. 2008)
- Visiting Professor, Univesity of Haifa (2005)
- 2004 Trilateral Distinguished Scholar-in-Residence, Michigan State University, Detroit College of Law (April-May 2004)
- Visiting Scholar, Stanford Law School, Feb-Apr. 2004
- Visiting Professor, DEA (graduate) program, Faculty of Law, University of Nantes, France (May 2003)
- Visiting Professor, Faculty of Law, Graduate program in intellectual property (DESS), Centre universitaire d'enseignement et de recherché en propriété intellectuelle (CUERPI), Université Pierre Mendès-France (Grenoble II), France
- Visiting Professor, Faculty of Law, University of Puerto Rico (June-July 2002--instruction in Spanish and English)
- Lecturer, Institute for Information Law, Faculty of Law, University of Amsterdam, Postdoctoral Summer Program in International Copyright Law (every year since 2000; last in July 2011)

d) HONORS

- Ontario Research Excellence Award (ex PREA), 2005*
- Charles B. Seton Award, 2003 (see under "Scholarly Articles" below)
- Quebec Bar 1985. Finished first ex aequo out of 600+ candidates—received all available awards, including:
    - Quebec Bar Award
    - Quebec Young Bar Award
    - Paris Bar Prize
- Two Excellence Awards, Faculty of Law, University of Montreal, 1984

e) OTHER RELEVANT

1. Editor-in-Chief, *Journal of World Intellectual Property*, Wiley-Blackwell (2006-)
2. Panelist, UDRP, WIPO Arbitration and Mediation Center
3. International editor, *Journal of Intellectual Property Law & Practice* (Oxford Univ. Press) (2005-2008)
4. Member, International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)
5. Member of the Law Society of Upper Canada (Ontario Bar) and of the Bar of Quebec
6. Languages: English, French, Spanish. German (functional). One year of Mandarin.

* Of the 64 awards in 2005, only one given to a law professor.

f) ACADEMIC CONFERENCES:

- Invited speaker, Copyright in a borderless online environment Symposium, Thoresta, Sweden, October 27-28, 2011
- Invited moderator, Max-Planck Institute Workshop on Economic Partnership Agreements of the EU: A Step Ahead an International IP Law?", Frauenchiemsee, Germany, June 26-28, 2011
- Invited keynote speaker, 39e Colloque Annuel International de l'AFEC, Stretching borders: How far can Canada Go?, Montpellier, France, June 15-17, 2011
- Moderator, Vanderbilt University Law School Program, Beijing, May 21, 2011
- Invited moderator and panelist, 19th Annual Conference on Intellectual Property Law & Policy, Fordham University Law School, New York, April 28-29, 2011
- Invited Chair, Invitation-only Intellectual Property Workshop, Canadian International Council, Ottawa, March 31-April 1, 2011
- Moderator, Patent Unrest, Vanderbilt Law School. February 24, 2011
- Keynote Speaker, Annual Symposium of the Kernochan Center for Law, Media & the Arts, Columbia Law School, New York, January 28, 2011
- Invited speaker, Intellectual Property Institute of Australia (IPRIA), University of Melbourne, Australia, December 13, 2010
- Invited speaker, Trade, Intellectual Property and the Knowledge Assets of Indigenous Peoples: The Developmental Frontier, Victoria University, Wellington, New Zealand, December 8-10, 2010
- Invited speaker, Computer Programs and TRIPS, TRIPS@10 Conference, Columbia University, November 16-18, 2010
- Speaker, International Law Weekend, American Branch of the International Law Association, Fordham Law School, New York, October 22-23, 2010
- Invited speaker, Bits Without Borders conference, Michigan State University, East Lansing, MI, September 25-26, 2010;
- Invited speaker, World Trade Forum, Bern, Switzerland, September 3-4, 2010
- Invited speaker, Copyright @ 300, UC Berkeley School of Law, Berkeley, CA, April 9-10, 2010
- Invited speaker, The Statute of Anne 300 Birthday, Cardozo Law School, New York, March 24-25, 2010
- Invited panelist, Access to Knowledge (A2K) conference, Yale Law School, February 12-13, 2010
- Invited speaker, IUS COMMUNE, Reinventing the Lisbon Agreement, Maastricht University, The Netherlands, November 26, 2009
- Invited speaker, The Lisbon Agreement, CEIPI (Université de Strasbourg, France), November 17, 2009
- Invited keynote speaker, Signifiers in Cyberspace: Domain Names and Online Trademarks

Conference, Case Western Reserve University, Cleveland, Ohio, November 12, 2009
- Invited speaker, Beyond TRIPS: The Current Push for Greater International Enforcement of Intellectual Property, American University (Washington College of Law), November 5, 2009
- Invited speaker, Intellectual Property Developments in China: Global Challenge, Local Voices conference, Drake University, Des Moines, Iowa, October 15-16, 2009
- Invited speaker, University of Hong Kong, June 12-13, 2009
- Invited speaker, Conference on 100th Anniversary of the 1909 Copyright Act, Santa Clara University, April 27, 2009
- Invited panelist, Fordham International Intellectual Property law & Policy Conference, Cambridge, England, April 15-16, 2009
- Invited participant, University of Cambridge-University of Queensland Copyright History Roundtable, Cambridge, England, April 15, 2009
- Commentator, Vanderbilt Roundtable on User-Generated Content, Social Networking & Virtual Worlds, Nashville, November 14, 2008
- Distinguished Finnegan Lecturer, Washington College of Law, Washington, D.C., October 18, 2008
- Invited panelist, International Law Weekend, New York, October 16, 2008
- Invited speaker, IP Speaker Series, Cardozo Law School, September 22, 2008
- Invited lecturer, Intellectual Property Research Institute of Australia (IPRIA), Melbourne, June 3, 2008
- Invited speaker, International Conference on Patent Law, University of New Zealand, Wellington, May 29-30, 2008
- Invited speaker, Law School of National Taiwan University, March 21, 2008
- Invited commentator, EDGE Project Conference on Intellectual Property and Development, Hong Kong, March 17-18, 2008
- Invited speaker, Cardozo Law School Conference on Harmonizing Exceptions and Limitations to Copyright Law, New York, March 30-31, 2008
- Invited panelist, Fordham Conference on International Intellectual Property Law & Policy, New York, March 27-28, 2008
- *Rapporteur*, International Literary and Artistic Association Biennial Congress (ALAI), Punta del Este, Uruguay, Oct. 31 – Nov. 3 2007
- Invited speaker, Vanderbilt University, Nashville, Tennessee, Oct. 16-17, 2007. "Collective Management of Copyright in North America", (conference organized in cooperation with WIPO)
- Invited speaker, University of South Carolina, Columbia, SC, October 12, 2007 "The Future of Copyright Law"
- Invited panellist, Fordham University Conference on International Intellectual Property Law & Policy, New York, April 12-13, 2007
- Invited speaker, Dean's lectures on intellectual property, George Washington University School of Law, Washington D.C., March 13, 2007
- Invited Speaker, UCLA Conference on the WIPO Development Agenda, Los Angeles, March 9-11, 2007
- Invited speaker, International Conference on Impact of TRIPS: Indo-US Experience. NALSAR University of Law, Hyderabad (India), Dec. 15-16, 2006
- Invited speaker, International intellectual property conference, University of Chicago-Kent, October 12-13, 2006
- Speaker, Study days of the International Literary and Artistic Association, Barcelona, June 18-21, 2006

- Invited moderator, Fourteenth Annual Conference on International Intellectual Property Law & Policy, New York, April 20-21 2006
- Invited speaker, University of Michigan, Ann Arbor. Intellectual Property & Development, April 14 2006;
- Invited speaker, Michigan State University College of Law (MSU), East Lansing, The International
- Intellectual Property Regime Complex, April 7-8 2006
- Invited Roundtable participant, Vanderbilt University Law School, Nashville, Tennessee. Private International Law and Intellectual Property Law: Theory and Practice, March 24-25, 2006
- Invited panelist, Federalist Society, Annual Lawyers Convention. Washington, D.C., November 2005
- Panel Chair, Annual meeting of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), Montréal, July 11-13, 2005
- Invited lecturer, Institute of European Studies, Macau (IEEM), Advanced IP course (25 June-1 July 2005)
- Invited lecturer, Advanced IP conference, Macau, June 27-30, 2005
- Invited speaker, Conference on the Relationship between international and domestic law McGill University, June 15-16, 2005
- Invited speaker, Conference on the Collective Management of Copyright, Oslo, May 19-21, 2005
- Invited keynote speaker, Conference of the Department of Justice on intellectual property and Internet Law, Ottawa, April 21, 2005
- Invited keynote speaker, LSUC Annual Communications Law Conference, Toronto, April 8-9, 2005
- Invited speaker, Law & the Information Society Conference, Fordham University, New York, April 6-7, 2005
- Invited panelist, Fordham International Intellectual Property Law & Policy Conference, New York, March 31-Apirl 1, 2005
- Invited Speaker, Shanghai 2004: Intellectual Property Rights and WTO Compliance. University of East China, Shanghai, China, Nov. 24, 2004
- Invited speaker, "The Internet: A Global Conversation" Conference, University of Ottawa, Oct. 1-2, 2004
- Invited lecturer, Office for Harmonization in the Internal Market (Trade Marks and Designs). Alicante (Spain), July 2004
- Organizer and speaker, Rethinking Copyright Conference, University of Ottawa, May 20-21, 2004
- Invited panelist, American Intellectual Property Lawyers Association (AIPLA), Dallas TX, May 13-14, 2004
- Invited speaker , 2004 Computers Freedom & Privacy Conference, Berkeley, California Apr. 20-23, 2004
- Invited speaker, Intellectual Property, Sustainable Development & Endangered Species Conference. Detroit College of Law, Michigan State University, March 26-27, 2004
- Invited Speaker, Securing Privacy in the Internet Age Symposium, Stanford Law School, March 13-14, 2004
- Invited keynote speaker, "US Copyright Office Comes to California" Conference, Hastings College of Law, San Francisco, CA, March 3, 2004
- Invited speaker, Global Arbitration Forum, Geneva, Switzerland, Dec. 4-5, 2003;

- Invited Panel Chair and speaker, "Copyright and the Music Industry: Digital Dilemmas", Institute for Information Law, Amsterdam, July 4-5, 2003. Topic: "Collective Rights Management & the Future of Copyright";
- Conference Fellow, "International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime" Conference, Duke Law School, Raleigh, NC, USA, Apr. 4-6, 2003
- Invited speaker, Roundtable on questions arising out of the intersections of technology and questions of social justice, University of Ottawa, March 28, 2003. Topic: "Democracy, Technology and Social Justice" (available at commonlaw.uottawa.ca);
- Invited speaker, Conference of Copyright Law Association of Japan (CLAJ), Tokyo, Dec. 7, 2002. Topic : "Transactional Copyright: Licensing Tailored Uses"
- Invited speaker, Facultés universitaires de Saint-Louis, Belgique, May 25-26 2002. Topic : «De l'œuvre à l'auteur »
- Invited speaker. Institutions administratives du droit d'auteur, colloquium organized by the Université de Montréal, Montreal, Oct. 2001. Topic : « La gestion collective au Canada : fragmentation des droits ou gestion fragmentaire »
- Invited speaker, Annual Meeting of the International Literary and Artistic Association (ALAI International), Columbia University, New York, 2001. Topic: " Rights Management Systems"
- Invited lecturer, Swedish School of Economics and the Finnish IPR Institute, Helsinki, Finland, 2000. Topic: "Copyright and Electronic Commerce", lecture presented to graduate students
- Invited speaker, Fordham University Conference on International Intellectual Property, New York, April 2001. Topic "Electronic Commerce and Copyright"
- Invited speaker, Fordham University Conference on International Intellectual Property, New York, April 2000. Topic: "The TRIPS Agreement After Seattle"
- Invited speaker, Ohio State University, Columbus, Ohio, 2000. Topic: "Digital Licensing of Copyright"
- Invited speaker, Fordham University Conference on International Intellectual Property, New York, April 1999. Topic: "Digital Distance Education: Exemption or Licensing?"
- Invited speaker, Fordham University Conference on International Intellectual Property, New York, April 1999. Topic: "An Overview of TRIPS: Historical and Current Issues"

g) PUBLIC LECTURES:

- Invited speaker and session leader, High-level (Ministerial) Forum on Intellectual Property for the Least-Developed Countries, WIPO, Geneva, July 24-25, 2009
- Invited moderator, Copyright Counseling, Management, and Litigation Law Seminar, Seattle, WA, April 26-27, 2009
- Invited speaker, Annual Meeting. Commission on Intellectual Property, International Chamber of Commerce, Cambridge, England, April 17, 2009
- Invited keynote speaker, Asian Copyright Seminar, Tokyo, Japan, February 25-27, 2009
- Invited speaker, International Copyright Institute, Washington DC, Nov. 28, 2006
- Invited speaker, International Trademark Association, Trademarks Administrators Conference, Crystal City, Virginia, September 19-20, 2006
- Invited speaker, General Assembly of the National Association of Publishers (ANEL), Montréal, September 14, 2006

- Invited speaker, Federalist Society Annual Lawyers Convention, Washington D.C. November 2005.
- Invited keynote speaker. InSIGHT, Old Mill Inn, Toronto, September 2005. Topic: "Copyright Reform in Canada"
- Invited speaker. Canadian Institute, , Montréal, 5-6 June, 2005;
- Invited speaker, Canadian Bar Association, Montreal, Nov. 9, 2004. Topic: "Recent developments in Canadian copyright law"
- Invited speaker, Peer-to-Peer Luncheon speech, The 45th Circuit, Ottawa Centre for Research and Innovation (OCRI), Oct. 5, 2004. Topic: "Peer-to-Peer File-Sharing"
- Invited speaker, Luncheon conference, ALAI Canada, Toronto, Sept. 13, 2004. Topic: "The Supreme Court decision in *SOCAN v. Can. Ass'n of Internet Providers*"
- Invited Lecturer, International Copyright Institute, Washington, D.C., May 5, 2004. Topic: "Collective management of copyright"
- Invited speaker, Biannual Canadian Bar Association/Law Society of Upper Canada Communications Law Conference, Ottawa, April 23-24, 2004. Topic: "The Supreme Court decision in *CCH v. Law Society of Upper Canada"*
- Invited Speaker, Association pour l'avancement des sciences et des techniques de la documentation (ASTED), Annual Meeting, Gatineau, Quebec, Nov. 7, 2003. Topic : "Copyright Exceptions and Librarians"
- Invited Keynote Speaker, International Conference on National Copyright Administrative Institutions, Ottawa, Oct. 8-10, 2003. Topic: "Status Report on Internet Tariffs";
- Invited Panelist, Intellectual Property Institute of Canada (IPIC), Annual Meeting, Halifax, Sept. 19, 2003. Topic: "Technical Protection Measures and Copyright";
- Invited Speaker, North American Workshop on Intellectual Property and Traditional Knowledge, Ottawa, Sept. 7-9, 2003. Topic: Traditional Knowledge and Intellectual Property: The Issues (overview)";
- Invited speaker, Association des juristes d'expression française de l'Ontario (AJEFO), Ottawa, June 21, 2003. Topic: Law & Technology
- Invited speaker, Editors Association of Canada, Ottawa, June 15, 2003. Topic : "A Walk Through the Copyright Labyrinth";
- Keynote speaker, Computer Assisted Language Instruction Consortium (CALICO), Ottawa, May 22, 2003. Topic : "Copyright, Copyleft, Copywrong?";
- Invited speaker, Expert Roundtable on Transactions in Intellectual Property, Amsterdam, May 17-18, 2003. Topic: "Fragmentation of Copyright and Rights Management";
- Invited speaker, "The 45th Circuit" (OCRI), Ottawa, Apr. 1, 2003. Topic : "Emerging Issues in Digital Rights Management";
- Invited speaker, Information Highways Conference, Toronto, March 24, 2003. Topic : Digital Rights Management : Balancing Creators Rights and User Interests";
- Invited speaker, Literary and Artistic Association (ALAI Canada), Montreal, Oct. 22, 2002. Topic : « La gestion collective es-elle en crise? »;
- Invited instructor, World Trade Organization (WTO), Nairobi, Sept. 2002. Topic: The TRIPS Agreement after Doha";
- Invited instructor, World Trade Organization (WTO), Casablanca, Sept. 2002. Topic: "The TRIPS Agreement After Doha";
- Invited speaker, Literary and Artistic Association (ALAI Canada), Montreal, May 7, 2002. Topic: « La décision de la Cour suprême dans l'affaire *Galeries d'art du Petit Champlain Inc. c. Théberge »;*

- Invited instructor. International Copyright Institute (Washington, D.C.), Nov. 2000 and Nov. 2001. Topic: "Collective Management of Copyright in the Digital Age";
- Invited speaker. Annual Meeting of the International Trademark Association (INTA), Denver, CO, USA, May 2000. Topic: "The TRIPS Agreement: Implementation and Dispute Settlement Issues";
- Invited speaker, New York Bar (NYCLA), 2000. Topic : "Current Rights Clearance Issues";
- Invited speaker, Society of Scholarly and Professional Publishers (SSP), Boston, Mass., 1999. Topic: "Copyright Licensing Issues" ;
- Invited speaker, Canadian Writers Union Conference, Toronto, 2000. Topic: "Copyright Management in the Digital Age";
- Invited Speaker, Heritage Canada Roundtable on Copyright Management, Ottawa, 1999. Topic: "Copyright Management: US Practices";
- Invited speaker, International Publishers Association (IPA) Congress, Tokyo, Japan, 1998. Topic: "Copyright, Publishing in the Face of Technological Change";
- Invited speaker, Marché international du multimédia (MILIA), Cannes, France, 1995. Topic : "Droit d'auteur et multimédia";
- Invited speaker, Chilean Book Fair, Santiago, Chile, 1999. Topic: "El papel de las sociedades de derechos reprográficos y de la IFRRO";
- Invited speaker, Sydney Bar, NSW, Australia, 1996. Topic: "Intellectual Property and Technology"
- Invited speaker, Congress of the International Publishers Association, Barcelona, Spain, 1996. Topic: "Online Copyright Licensing";
- Invited speaker, Pan African Film Festival (FESPACO), Ouagadougou, Burkina Faso, 1994. Topic: "Protection of Intellectual Property in Film" ;
- Invited speaker, Chambre française du commerce et de l'exportation (CFCE), Paris, 1990. Topic : "TRIPS: Le point à dix semaines de Bruxelles";

h) Publications [†]

i) Summary

Books authored	8
Books edited	3
Book chapters	23+7
Articles	50+2
Conference proceedings (refereed)	1
Major reports	15
Other publications	26
Commissioned Reports	6

ii) Detailed description

Books (authored)

1. INTELLECTUAL PROPERTY: THE LAW IN CANADA, 2d ed. (Carswell, 2011) --with Prof. Elizabeth Judge, 1223 p.

[†] **Only ACCEPTED publications are indicated as forthcoming.**

2. L'ACCORD SUR LES ADPIC: PROPRIÉTÉ INTELLECTUELLE À L'OMC (Larcier, 2010), 733 p.
3. THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS, 3rd ed. (Sweet & Maxwell, December 2008), 785 p.
4. LE DROIT DE LA PROPRIETE INTELLECTUELLE, (Yvon Blais, 2006). 702 pages--with Professors Elizabeth Judge and Mistrale Goudreau
5. INTELLECTUAL PROPERTY: THE LAW IN CANADA (Carswell, 2005), with Prof. Elizabeth Judge
6. THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS, 2ND ed. (Sweet & Maxwell, June 2003). 590 p.
7. THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS. (Sweet & Maxwell, 1998). 444 p.
8. LA NOTION D'ŒUVRE DANS AA CONVENTION DE BERNE ET EN DROIT COMPARÉ. (Librairie Droz, 1998). 276 p.

Books (edited)

1. COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, 2nd ed. (Kluwer Law International, 2010) 495 p.
2. INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT (Oxford Univ. Press, 2007). 564 p.
3. COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Kluwer Law International, 2006), 464 p.

Book Chapters[‡]

1. *Traditional Innovation and the Ongoing Debate on the Protection of Geographical Indications*, INTELLECTUAL PROPERTY AND INDIGENOUS INNOVATION (P Drahos and S Frankel, eds) (forthcoming)
2. *The International Legal Framework of Border Measures in the Fight against Counterfeiting and Piracy*, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS THROUGH BORDER MEASURES, 2D ED. (O. Vrins and M. Schneider eds.). Oxford Univ. Press, 2011 (forthcoming)
3. *Adjusting Patentability Criteria to Optimize Innovation: A Look at China and India*, GLOBAL PERSPECTIVES ON PATENT LAW (M Bagley and R Okediji, eds). Oxford Univ. Press, x (forthcoming)
4. *The TRIPS Agreement and Climate Change,* in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CLIMATE CHANGE (Joshua Sarnoff, ed.) (forthcoming)
5. *Copyright, Culture and the Cloud*, in BITS WITHOUT BORDERS (Sean Pager & Adam Candeub, eds.) (forthcoming)
6. *Country Clubs, Empiricism, Blogs and Innovation: The Future of International Intellectual Property Norm-Making in the Wake of ACTA,* TRADE GOVERNANCE IN THE DIGITAL AGE, Mira Burri and Thomas Cottier (eds). Cambridge University Press, 2011 (forthcoming)

[‡] R= refereed publication.

7. **R** *The TRIPS Agreement,* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW; (forthcoming, 2011)
8. *TRIPS Articles 10; 63-71*, in CONCISE INTERNATIONAL AND EUROPEAN IP LAW, 2D ED. (Th. Cottier and P. Véron, eds). Kluwer Law International, 2011, pp. 38-42 and 168-186
9. *User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill* C-32, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA (M. Geist, ed.)
10. *Of Silos and Constellations: Comparing Notions of Originality in Copyright Law*, *in* INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS (Robert F. Brauneis, ed) (Edward Elgar, 2010) 74-106--with Professor Elizabeth Judge;
    - Also published as an article (see below)
11. *Policy Calibration and Innovation Displacement*, *in* DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM (J. Trachtman, and Ch. Thomas, eds.) (Oxford Univ. Pr., 2009) 363-394;
12. *TRIPS 3.0*, *in* THE DEVELOPMENT AGENDA : GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES (N. Netanel, ed) 51-75. (Oxford Univ. Pr., 2009)
13. **R** *A Uniquely Canadian Institution: The Copyright Board of Canada*, *in* A NEW INTELLECTUAL PROPERTY PARADIGM: THE CANADIAN EXPERIENCE (Y. Gendreau ed). (Edward Elgar, 2009)
14. *TRIPS Article 10; Articles 63-71*, *in* CONCISE INTERNATIONAL AND EUROPEAN IP LAW (Th. Cottier and P. Véron, eds). (Kluwer Law International, 2008), 39-42 et 153-170
15. *Intellectual Property and Human Rights: Learning to Live Together*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS (P. Torremans, ed). (Wolters Kluwer, 2008) 3-24
16. **R** *A Canadian Copyright Narrative*, *in* COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH. (P. Torremans, ed.) (Edward Elgar, 2007) 49-82;
17. *The Changing Landscape of International Intellectual Property, in,* INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS. (Christopher Heath and Ansel Kamperman Sanders, eds) (Oxford: Hart Publishing, 2007), 49-86;
18. *TRIPS and Development*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT (D. Gervais, ed--see under Books (edited) above), 3-60
19. *A TRIPS Implementation Toolbox, in idem*, 527-545
20. *Traditional Knowledge and Intellectual Property; A TRIPS Compatible Approach*, *in*, IPR PROTECTION AND TRIPS COMPLIANCE. (Veena, ed.) (Amicus/ICFAI University Press, 2007), 146-178;
    - Republication of article listed under No. 24 below
21. *Em busca de uma Norma Internacional para os Direito de Autor: O 'Teste dos Três Passos Reversos'*, *in* PROPIEDADE INTELECTUAL (Edson Beas Rodrigues Jr et Fabrício Polido, eds), (Rio de Janeiro, Elsevier, 2007), 201-232 (republication of article listed under No 22 in list below)
22. *The TRIPS Agreement and the Changing Landscape of International intellectual Property*, *in* INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA. (Paul Torremans et al., eds). (Edward Elgar, 2007), 65-84
23. *The TRIPS Agreement and the Doha Round: History and Impact on Development*, *in*

INTELLECTUAL PROPERTY AND INFORMATION WEALTH. (Peter Yu, ed), (Praeger, 2006), vol. 3, 23-72.

24. *The Changing Role of Copyright Collectives*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS. (Daniel Gervais, ed.) (Kluwer Law International, 2006), 3-36
25. **R** *The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes*, *in* THE GLOBALIZED RULE OF LAW: RELATIONSHIPS BETWEEN INTERNATIONAL AND DOMESTIC LAW. (O. FITZGERALD, ED), (Toronto: Irwin Law, 2006), 549-572
26. **R** *Le rôle des traits internationaux dans l'interprétation des lois canadiennes sur la propriété intellectuelle, in* O. Fitzgerald (ed), RÈGLE DE DROIT ET MONDIALISATION : RAPPORTS ENTRE LE DROIT INTERNATIONAL ET LE DROIT INTERNE (Yvon Blais, 2006), 679-712;
    - French version of previous item in list
27. **R** *The TRIPS Enforcement Provisions*, *in*, CONCISE COMMENTARY OF EUROPEAN INTELLECTUAL PROPERTY LAW (Thomas Dreier, Charles Gielen, Richard Hacon, eds.) (Kluwer Law International, 2006)
28. *The TRIPS Agreement*, *in* BORDER MEASURES IN THE EUROPEAN UNION. (OLIVIER VRINS AND MARIUS SCHNEIDER, EDS.), (Oxford University Press, 2006), 37-62;
29. **R** *Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing*, *in* IN THE PUBLIC INTEREST: THE FUTURE OF COPYRIGHT LAW IN CANADA (Michael Geist, ed). (Toronto: Irwin Law, Oct. 2005);
30. *Copyright and eCommerce: License or Lock-up*?, *in* INTELLECTUAL PROPERTY IN THE GLOBAL MARKETPLACE : 2001 UPDATE. (Neil Wilkof et al. eds.), (New York: John Wiley & Sons, 2002). 18 p.

Articles in English[§]

1. *The Landscape of Collective Management,* COLUM-VLA J. L & ARTS (2011) (forthcoming)
2. *Cloud Control: Copyright, Global Memes and Privacy,* J. TELECOM. & HIGH TECH L. (2011) (coauthored with Dan Hyndman) (forthcoming)
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    - Published in March 2011
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6. *Reinventing Lisbon: The Case for a Protocol to the Lisbon Agreement* , 11:1 CHICAGO J. INT'L L.67-126 (2010);

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14. *The Tangled Web of User-Generated Content*, 11:4 VAND. J. OF TECHNOLOGY AND ENTERTAINMENT LAW 841-870 (2009);
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17. **R** *A Canadian Copyright Narrative*, 21 INT. PROP. J. (Can.) 269 (2009)
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20. **R** *The Changing Landscape of International Intellectual Property*, 2 J. OF INTELL. PROP. LAW & PRACTICE 1-8 (2006);
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26. *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39-74 (2004);

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30. **R** *TRIPS, Doha & Traditional Knowledge: A Proposal*, 6 J. WORLD INT. PROP. 403-419 (2003);

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EXHIBIT B

Exhibit B to Gervais Report

1. The Fourth Amended Class Action Complaint

2. Google Objections and Responses to Plaintiffs' First Requests for Admissions

3. Plaintiffs' Brief in Support of Their Motion for Class Certification

4. Zack Decl. and Exhibits in support of motion for class certification

5. Google's Brief in Opposition to Class Certification

6. Clancy Decl., Gratz Decl., Perle Decl., Poret Decl. and Report, filed with Google class certification opposition

7. Google's brief and reply brief in support of its motion to dismiss the Authors Guild

8. Plaintiffs' brief in opposition to Google's motion to dismiss the Authors Guild

9. The materials cited in my report

10. The article available at http://papers.ssrn.com/so13/papers.cfm and materials cited therein

11. The books.google.com website

12. The Complaint, Answer and Plaintiffs' brief in support of motion for partial judgment on the pleadings in *Authors Guild, et al. v. Hathitrust*, et al., 11 Civ. 6351 (HB)(S.D.N.Y.)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., Associational Plaintiff, BETTY MILES, JOSEPH GOULDEN, and JIM BOUTON, on behalf of themselves and all other similarly situated,	)	
Plaintiffs,	)	
Vs.	)	Civil Action No. 05 CV 8136 (DC)
GOOGLE INC.,	)	
Defendant.	)	

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

DEPOSITION OF: DANIEL CLANCY

TAKEN ON: February 10, 2012

NO. 13042

REPORTED BY: BRENDA L. MARSHALL
CSR No. 6939

DANIEL CLANCY,

a Witness having been duly

sworn, testified as follows:

EXAMINATION

BY MS. ZACK:

Q. Okay. Could you state your name and address for the record.

A. Yes. Daniel J. Clancy,

09:18:57 **REDACTED**

Q. And you work for Google; right?

A. Yes.

Q. And what's your current position?

A. Current position is director of

09:19:07 engineering for YouTube.

Q. When did you join Google?

A. I joined Google in January 2005.

Q. Okay. And what was your first position?

A. My first position was engineering

09:19:19 director for Google Books.

Q. And how long did you have that position?

A. I kept that role till June of last year. 2011.

Q. Okay. So six and a half years, you were

09:19:40 an engineering director for Google Books?

09:19:53

REDACTED

09:20:10

Q. Okay. As engineering director for Google Books, how would you describe that position?

09:20:26 A. I was responsible for directing the engineering team that developed the technology for Google Books back-end servers, and I also was heavily involved in strategy and other -- other issues involving Google Books.

09:20:49 Q. When you say "strategy," what do you mean?

A. I mean decisions about the product and the -- and the directions we would be going with the product, and I was involved heavily in

09:21:05 our -- in our library partnerships.

Asked and answered. Mischaracterizes the witness's testimony.

BY MS. ZACK:

Q. Is that true?

10:08:01 A. Huh?

Q. Is that true?

A. I think I've -- I think I've answered that.

Q. Now, when you display snippets, how many

10:08:22 snippets from a book can a user see? How would you describe that?

A. The way I would describe it is when you enter search query, it will display up to three snippets of that book in response to that query.

10:08:43 For a given book and for a given query, those snippets remain consistent, meaning it's the same snippets. You issue the query again, you see the same snippets.

Q. And for that book, if another query is

10:08:58 entered, would other snippets from the book appear?

A. Yes.

Q. So would it be accurate to describe snippets as being limited to three per book? Is

10:09:13 that an accurate description of Google's display

of snippets in a book?

A. As I said, I don't think that's an accurate description. It is -- for a given query, we might display up to three snippets, but then if you entered a different query, you might see different snippets.

10:09:25

Q. Okay. And would it be an accurate description, in your view, of the Library Project to discuss it without mentioning that Google returns copies of the books scanned to the libraries?

10:09:39

MS. DURIE: Objection. That's vague and ambiguous.

THE WITNESS: Yeah.

BY MS. ZACK:

Q. Is -- if you gave a description of the Library Project, do you think it would be complete if you omitted to include the fact that Google provides copies of the books it scans to the libraries?

10:10:01

MS. DURIE: Still vague.

THE WITNESS: So if you're asking me to describe the Library Project right now, I would describe the Library Project as I stated before as including the scanning, indexing, search,

10:10:16

discovery, snippets, along with the return of the book to the library and the -- and then the uses of those for other forms of nondisplay, nonconsumptive research.

10:10:33 BY MS. ZACK:

Q. You would agree with me that a material part of the Library Project is Google's distribution back to the library of a digital copy of the entire book scanned; correct?

10:10:46 MS. DURIE: Objection. It's vague, ambiguous, calls for a legal conclusion.

THE WITNESS: Yeah. I'm not a lawyer. So I won't -- I won't conclude, you know, legally.

10:10:57 BY MS. ZACK:

Q. Well, you would agree that it's an important part of the Library Project that Google returns back to the library a digital copy of the entire book scanned; correct?

10:11:10 A. As it -- it is part of the Library Project that -- as I stated -- that we provide a copy, the ability to get a copy, for our library partners of the books we scan, in addition to any other uses.

10:11:29 Q. And how many books have been provided to

13:50:

REDACTED

13:50:

13:50:

13:51:04 Q. Does Google keep any statistics on how many clicks there are on the Buy the Book's links?

A. We did keep statistics on the click-through rate for the Buy the Book link.

13:51:21 Q. While you were director of engineering?

A. Uh-huh. Yes.

13:51:41

REDACTED

13:51:58 Q. And did you have any information about whether people ever bought the book after they clicked?

A. In general, we weren't -- we did not have any information. We made various efforts 13:52:08 to get estimates from some of our partners, but I don't remember ever really having a good estimate of what the -- what happened once it went off to partners.

13:52:24

REDACTED

13:52:39

CONFIDENTIAL

* * * C O N F I D E N T I A L * * *

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 05 Civ. 8136 (DC)
GOOGLE INC.,	)	
Defendant.	)	
----------	)	

February 17, 2012

9:52 a.m.

Deposition of THOMAS TURVEY, held at the offices of Milberg, One Penn Plaza, New York, New York, before Laurie A. Collins, a Registered Professional Reporter and Notary Public of the State of New York.

T H O M A S T U R V E Y ,

called as a witness, having been duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY

MS. ZACK:

Q. Good morning.

A. Good morning.

Q. Can you state your full name and address, please?

A. Sure. Thomas Turvey,

REDACTED

Q. And you work for Google?

A. I do.

Q. What is your position?

A. I am the director of strategic partnerships.

Q. How long have you had that particular position at Google, approximately?

A. Approximately three years.

Q. And when did you join Google?

A. February 2004.

Q. And when you first joined, what was your position?

REDACTED

Q. Did you at any time get any data about whether after the "buy the book" link was clicked that books were actually purchased?

A. Not that I remember.

Q. Did you ever attempt to get that data?

A. I think we had a discussion or two.

Q. Was there some reason why you didn't get that done?

A. As I remember, no retailer was willing to provide that to us.

Q. Excuse me?

A. As I remember, no retailer was willing to provide that to us.

REDACTED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 05 Civ. 8136 (DC)
GOOGLE INC.,	)	
Defendant.	)	

March 22, 2012
12:50 p.m.

Deposition of HAL PORET, held at the offices of Milberg, One Penn Plaza, New York, New York, before Laurie A. Collins, a Registered Professional Reporter and Notary Public of the State of New York.

A. I'm not saying it's inappropriate; I'm saying the way I did it I think is appropriate.

Q. Now, you've mentioned this survey was limited to the snippets. You're aware that Google scanned entire books and gave copies of the entire scans to libraries; right?

A. Yes.

Q. Were you specifically instructed not to ask any questions about that?

A. No.

Q. You just didn't?

A. Nobody said to me don't ask questions about that, but that was not a subject that was brought up as a purpose of the research.

Q. On the top of page 9 it says, The order in which "object" came before "approved" was randomized in both the question text and in the order of the response option, so that half of respondents were always presented with "approved" first and half presented with "object" first.

That's done by the computer. Even though you have a lot of nonrespondents, you can make sure that half and half of the actual respondents had this different order?

is what happens in this survey.

Q. The question was I feel I have been. You didn't ask whether they had been; you asked whether I feel I have financially benefited. It's a different question than I have financially benefited; correct?

A. It's different wording. But what I was saying is that the other piece of what you said does happen, which is if they give one of these answers they are asked about that.

Q. Right. But is there a particular reason why you included the "feel" part of the question?

A. Yes, because I don't expect that somebody on the phone is going to -- is going to know for sure how this has affected them. In other words, I don't know that an author always would have the ability to quantify somehow whether this has financially benefited them or not.

So it is phrasing it in a way that is intended to convey we want to know your opinion about this. You don't have to necessarily have plotted this out with an accountant and figured it out.

But that doesn't mean we're not interested in fact. We're interested in their perception of what the facts are.

Q. Let's go back to page 7, going back to this description that you read to all the respondents or that they read themselves online if they responded to the e-mail version. There's a sentence that says, A user can also click on a link to find a book in a bookstore or library.

Is there a particular reason you put that in there, that text?

A. Yes.

Q. What was the reason?

A. That that is an accurate description of what happens that I think would be relevant to some people's opinions.

Q. Have you ever clicked on any of those links?

A. I did, in some of my searches, see that there were in fact links to buy books. I can't remember if I clicked on any of those links.

Q. Well, if you click on a link for some of the books and -- you didn't click on any of them, so you don't know what happens when you

reporting numbers from that document, which is why I haven't looked at the document, because she's explicitly discussing the numbers that are in that document.

Q. Do you know if that document has other information in it?

A. I'd imagine it does.

Q. But you never thought to look at it?

A. No.

Q. The next portion of this paragraph says, According to these guidelines, response rates of 90 percent or more reliable, et cetera, and then it goes down. It says, If the response rate drops below 50 percent, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn.

You don't agree with that, I take it?

A. Well, I don't -- I don't agree with the number 50 percent. And I know she's rewriting this section, because no survey would ever come close to that anymore.

I do agree with the issue of caution about precise quantitative statements. But

when -- in a survey like this, it's -- to me whether 14 percent is the exact number or it's really 16 percent or 12 percent is not -- is not as important.

In other words, to me whether something's 14 percent as a precise quantitative statement is not so much the point. The point is more -- it is obviously relevant, but the grander conclusion is that there's a dramatic pattern of people favoring -- saying they approve of something as opposed to objecting to it. A response -- a low response rate does not call that into question at all.

Q. You don't like her numbers here, but there's no number that you would substitute and agree with, like if the response rate drops below X percent the survey should be regarded with significant caution?

A. I don't know what number I would put on that, but I would tell you that no survey getting a 20 percent rate is miraculous with a survey these days. The standards for response rates have changed dramatically with the way the world has changed.

And I know that -- well, at least from what I've been told, the next version of this reference guide is dramatically changing this section to reflect what the standards are in the industry.

Q. Is that because nobody responds to surveys?

A. It's not because nobody responds; it's because there are heightened security and privacy concerns, and it's not like it used to be where people could walk up -- go door to door doing surveys. It's harder and harder to reach people.

Q. So because it's harder and harder to reach people, somehow the standards for reliability drop?

A. Yes. The only -- the standards -- the only standards one can have are what is standard in your field. And standard response rates are in the 10 to 20 percent range now. And something that's going to be used as evidence can't be expected to do anything but comply with accepted standards within its field.

Q. Assuming the courts accept standards that are lowered; correct?

MS. DURIE: That calls for speculation and legal conclusion.

A. I don't think that's right. I think it's fairly clear that the rules for courts are that some -- that scientific evidence has to satisfy the standards that are accepted within the relevant field. And these surveys are accepted within the field of market research.

And companies are spending billions and billions of dollars on surveys with response rates below 20 percent and 10 percent to make decisions of tremendous consequence for them. And that would not be happening if it wasn't well accepted that surveys with lower response rates are reliable.

Q. People wouldn't be spending money on advertising irrationally? Is that your testimony?

A. No, I didn't say advertising; I said on market research. Companies wouldn't be spending billions of dollars to get information that they consider obtained through an unreliable method.

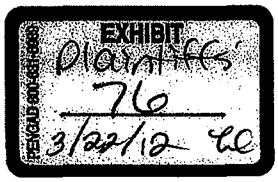
MS. DURIE: Joanne, I should either move my flight --

MS. ZACK: I told Joe that I was going

Reference Manual on Scientific Evidence

Second Edition

Federal Judicial Center 2000



Reference Guide on Survey Research

SHARI SEIDMAN DIAMOND

Shari Seidman Diamond, J.D., Ph.D., is Professor of Law and Psychology, Northwestern University, Evanston, Illinois, and Senior Research Fellow, American Bar Foundation, Chicago, Illinois.

CONTENTS

D. Was the Level of Nonresponse Sufficient to Raise Questions About the Representativeness of the Sample? If So, What Is the Evidence That Nonresponse Did Not Bias the Results of the Survey?

Even when a sample is drawn randomly from a complete list of elements in the target population, responses or measures may be obtained on only part of the selected sample. If this lack of response were distributed randomly, valid inferences about the population could be drawn from the characteristics of the available elements in the sample. The difficulty is that nonresponse often is not random, so that, for example, persons who are single typically have three times the "not at home" rate in U.S. Census Bureau surveys as do family members.[62] Efforts to increase response rates include making several attempts to contact potential respondents and providing financial incentives for participating in the survey.

One suggested formula for quantifying a tolerable level of nonresponse in a probability sample is based on the guidelines for statistical surveys issued by the former U.S. Office of Statistical Standards.[63] According to these guidelines, response rates of 90% or more are reliable and generally can be treated as random samples of the overall population. Response rates between 75% and 90% usually yield reliable results, but the researcher should conduct some check on the representativeness of the sample. Potential bias should receive greater scrutiny when the response rate drops below 75%. If the response rate drops below 50%, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn.[64]

Determining whether the level of nonresponse in a survey is critical generally requires an analysis of the determinants of nonresponse. For example, even a survey with a high response rate may seriously underrepresent some portions of the population, such as the unemployed or the poor. If a general population sample was used to chart changes in the proportion of the population that knows someone with HIV, the survey would underestimate the population value if some groups more likely to know someone with HIV (e.g., intravenous drug users) were underrepresented in the sample. The survey expert should be prepared to provide evidence on the potential impact of nonresponse on the survey results.

61. *See infra* § III.E.

62. 2 Gastwirth, *supra* note 33, at 501. This volume contains a useful discussion of sampling, along with a set of examples. *Id.* at 467.

63. This standard is cited with approval by Gastwirth. *Id.* at 502.

64. For thoughtful examples of judges closely scrutinizing potential sample bias when response rates were below 75%, see *Vuyanich v. Republic National Bank*, 505 F. Supp. 224 (N.D. Tex. 1980); Rosado v. Wyman, 322 F. Supp. 1173 (E.D.N.Y.), *aff'd*, 437 F.2d 619 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971).

In surveys that include sensitive or difficult questions, particularly surveys that are self-administered, some respondents may refuse to provide answers or may provide incomplete answers. To assess the impact of nonresponse to a particular question, the survey expert should analyze the differences between those who answered and those who did not answer. Procedures to address the problem of missing data include recontacting respondents to obtain the missing answers and using the respondent's other answers to predict the missing response.[65]

E. What Procedures Were Used to Reduce the Likelihood of a Biased Sample?

If it is impractical for a survey researcher to sample randomly from the entire target population, the researcher still can apply probability sampling to some aspects of respondent selection to reduce the likelihood of biased selection. For example, in many studies the target population consists of all consumers or purchasers of a product. Because it is impractical to randomly sample from that population, research is conducted in shopping malls where some members of the target population may not shop. Mall locations, however, can be sampled randomly from a list of possible mall sites. By administering the survey at several different malls, the expert can test for and report on any differences observed across sites. To the extent that similar results are obtained in different locations using different on-site interview operations, it is less likely that idiosyncrasies of sample selection or administration can account for the results.[66] Similarly, since the characteristics of persons visiting a shopping center vary by day of the week and time of day, bias in sampling can be reduced if the survey design calls for sampling time segments as well as mall locations.[67]

In mall intercept surveys, the organization that manages the on-site interview facility generally employs recruiters who approach potential survey respondents in the mall and ascertain if they are qualified and willing to participate in the survey. If a potential respondent agrees to answer the questions and meets the specified criteria, he or she is escorted to the facility where the survey interview takes place. If recruiters are free to approach potential respondents without controls on how an individual is to be selected for screening, shoppers who spend more time in the mall are more likely to be approached than shoppers who visit the mall only briefly. Moreover, recruiters naturally prefer to approach friendly-

65. Andy B. Anderson et al., *Missing Data: A Review of the Literature*, *in* Handbook of Survey Research, *supra* note 1, at 415.

66. Note, however, that differences in results across sites may be due to genuine differences in respondents across geographic locations or to a failure to administer the survey consistently across sites.

67. Seymour Sudman, *Improving the Quality of Shopping Center Sampling*, 17 J. Marketing Res. 423 (1980).

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March 26, 2012

Joseph Gratz
Durie Tangri LLP
jgratz@durietangri.com

Dear Joe,

At my deposition, I was asked to provide certain information pertaining to the attempts to reach survey participants by phone and email. I have spoken to Opinion America, the company that carried out the phone and online surveys for me, and have obtained all available information.

Attached is a complete disposition report on all phone calls made. This report contains all the information requested regarding phone calls.

Regarding the emails, here is the information that was requested:

# of email invites that were sent out ---- 4,962

clicked on link ---------- 266

partial completes---------- 87

terminated & on what questions------- 55 - All termed on Q100 (Did not live in U.S.)

Regarding the description of Google Books, all 880 respondents said they understood the description the first time. No one asked to hear it again, and no one terminated at that point.

Please let me know if you need anything else from me.

Best Regards,

Hal Poret

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SAMPLE DISPOSITION REPORT FINAL
For Study: Author Study - OAG o11085
TABLE 001
TOTAL SAMPLE DISPOSITION REPORT
BASE: TOTAL

	TOTAL
TOTAL SAMPLE	10294
TOTAL COMPLETES (CP)	756
TOTAL CALLABLE SAMPLE BY TYPE (LAST STATUS)	
----------	2874
RECORDS NOT YET CALLED (FS)	-
NO ANSWER	942
ANSWERING MACHINE	1755
BUSY	56
UNSPEC. CALLBACK	44
CHANGE NUMBER	-
AVAILABLE SAMPLE BY ATTEMPT (CS)	2797
1 ATTEMPT MADE	155
2 ATTEMPTS MADE	308
3 ATTEMPTS MADE	260
4 ATTEMPTS MADE	2074
SUSPENDS (SU)	9
CALLBACKS (CB)	68
CALLBACK (CB) Left 800#	-
CALLBACK (CB) Requested Fax	-
TOTAL DEAD SAMPLE	
----------	7420
BAD SAMPLE (BS)	1209
NONWORK	948

SAMPLE DISPOSITION REPORT FINAL
For Study: Author Study - OAG o11085
TABLE 001 (continued)
TOTAL SAMPLE DISPOSITION REPORT
BASE: TOTAL

	TOTAL
WRONG NUMBER	-
COMP/FAX	125
PRIV. MGR	3
NON-BUS	75
OTHER PHONE PROB.	6
DUPLICATE NUMB/NOT CALLED	52
BURNED NUMBERS (BN)	3796
REFUSED	949
NSP	2662
LANGUAGE	68
PARTIAL SCREENER REFUSAL	117
QUAL. REFUSAL	-
NOT QUALIFIED (NQ)	48
TERM 100 - OUTSIDE US OR US TERRITORY	21
TERM 117 - ZERO	27
TERM DOESN'T UNDERSTAND GOOGLE SCAN	-
OVER QUOTAS (OQ)	-
MAX ATTEMPTS REACHED (MA)	1611
COMPLETES (CP)	756
HIDDEN NUMBERS (HD)	-
INCIDENCE	94.0%
AVERAGE LENGTH OF INTERVIEW (TOTAL)	7.31

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Google Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc. et al., Plaintiffs, v. Google Inc., Defendant.	Civil Action No. 05 CV 8136 (DC)

DEFENDANT GOOGLE INC.'S SUPPLEMENTAL NARRATIVE RESPONSES AND OBJECTIONS TO PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

[redacted]

PUBLIC REDACTED VERSION

Pursuant to Federal Rules of Civil Procedure 26 and 34 and pursuant to the parties' agreement, Defendant Google, Inc. ("Google") provides this supplemental set of responses and objections to the Second Set of Document Requests (the "Requests") propounded by Plaintiff The Authors Guild, Inc. ("The Authors Guild") as follows:

GENERAL OBJECTIONS

1. Google objects to the preface, instructions, and definitions to the Requests to the extent that they purport to impose obligations that exceed those imposed by the Federal Rules of Civil Procedure, relevant local rules, and applicable case law. In responding to these requests, Google has followed the applicable law and has ignored the improper preface, instructions, and definitions.

2. Google objects to the Requests in their entirety and to each request to the extent that the documents and information sought are protected from discovery by the attorney-client privilege, the work-product doctrine, or any other applicable privilege.

3. Google objects to each and every request to the extent that it seeks information that is confidential and/or proprietary information. To the extent not otherwise subject to objection, Google will produce such confidential documents in accordance with the terms of the protective order entered in this case.

4. Google objects to the Requests in their entirety and to each discovery request to the extent that it requests "all documents" and "all copies," or other similar language, consisting of materials that are produced in multiple copies. Google will produce representative examples of such documents and things to the extent that they are relevant, discoverable, and not subject to any claim of privilege.

5. Google objects to the Requests in their entirety and to each discovery request as unduly burdensome to the extent they seek information or documents already known to Plaintiffs, or which are equally available to Plaintiffs.

6. Google objects to the Requests in their entirety and to each discovery request to the extent they seek documents not relevant to any claim or defense in this action or reasonably calculated to lead to the discovery of admissible evidence.

7. Google objects to The Authors Guild's definition of "Google" as vague, ambiguous, unintelligible, and overly-broad. For purposes of responding to these discovery requests, Google will interpret "Google" to mean Google, Inc. and/or its agents.

8. Google objects to the Requests in their entirety and to each discovery request to the extent they purport to require the identification and description of every document no longer in existence

9. Google objects to the Requests in their entirety and to each discovery request to the extent they seek to require the identification of the department, branch, or office in whose possession the document was located and the natural person in whose possession the document was found.

10. Google objects to the time period of these requests as overly broad and unduly burdensome.

11. Google objects to the Requests to the extent they request information pertaining to persons or activities outside the United States.

12. Google objects to each and every discovery request to the extent that it purports to impose a burden of providing information not in Google's possession, custody, or control or which cannot be found in the course of a reasonable search. Google has undertaken a reasonable

and good-faith effort to locate all relevant, non-privileged documents known to it at this time that are responsive to these requests, but they reserve the right to conduct further investigation and discovery as to any issue raised or suggested by any discovery request and to rely on any subsequently discovered information or documents at trial or any other proceeding.

13. Google has not yet completed its investigation of the facts relating to this case. Any and all responses to the following discovery requests are therefore based solely on information presently known to Google, and Google reserves its right to conduct further discovery and investigation and to use at trial or any other proceeding evidence of any subsequently discovered facts, documents, or information.

14. In responding to these discovery requests, Google does not concede the relevancy or materiality of any request or of the subject to which any request refers. Google's responses to these discovery requests are made expressly subject to and without waiving any objections in any proceeding, including trial of this action, as to competency, relevancy, materiality, or privilege of any of the documents referred to or the responses given.

SUPPLEMENTAL NARRATIVE RESPONSES TO REQUESTS FOR PRODUCTION

Subject to the general objections stated above, and subject to the specific objections to each Request, served November 21, 2011, Google provides the following supplemental narrative responses in lieu of document productions, pursuant to the agreement of the parties.

I. INCLUSION CRITERIA

This narrative is responsive to Request No. 10 in Plaintiffs' Second Set of Requests for Production of Documents to Google, which calls for: "Documents sufficient to identify all criteria used by Google to select which works to copy in the Library Project." This narrative describes Google's policies and practices since approximately May, 2008 with respect to books (as opposed to periodicals or other materials) from libraries. This narrative is provided in

fulfillment of the Request, pursuant to the parties' agreement, and is provided subject to Google's November 21, 2011 objections to the Request and subject to Google's general objections, and may be amended or supplemented as Google's investigation of the facts continues.

Google selects which books from libraries to scan in the following manner. [redacted]

[redacted]

II. SCANNING AND INDEXING PROCESS

This narrative is responsive to a portion of Request No. 1 (which calls for "the number of copies made of each book") and a portion of Request No. 9 ("Documents sufficient to describe all uses made by Google of all copies of all in-copyright, English language books copied in the Library Project."). This narrative is provided in fulfillment of the Request, pursuant to the parties' agreement, and is provided subject to Google's November 21, 2011 objections to the Request and subject to Google's general objections, and may be amended or supplemented as Google's investigation of the facts continues. This portion of the narrative describes the process by which Google scans and indexes books from libraries for snippet display in the United States.

A. Scanning

After Google has received a book from a library for scanning, and that book has been checked in, it is given to a scan station operator. [redacted] The scan station operator then scans the covers and scans each page of the book without removing the pages from the binding; this is known as "non-destructive" scanning. The scan station takes pictures of the covers and of each page of the book with two cameras. The first camera takes a standard photograph of the page. The second camera takes an infrared image of the page, which is used to "de-warp" the page during later processing, based on an infrared grid which is projected onto the page during scanning. [redacted]

[redacted]

B. Processing

After scanning, automated image processing is performed on the scanned images. [redacted] Optical character recognition ("OCR") is performed on the images to derive machine-readable text, and that text is stored on an internal file server.

C. Analysis

Next, an automated process compiles a digital copy of the book. [redacted]

Based on the book's metadata, this process then determines the viewability of the book -- "Metadata only view," "snippet view," "partial preview," "full view," and so on. Pre-1923 books are placed in full view. Books published in 1923 or later and books for which no date can be ascertained are placed in snippet view, except:

- reference works are placed in metadata only view;
- books published within the preceding two years which would have been placed in snippet view are placed in metadata only view;
- works for which a rightsholder has instructed Google not to display the work are placed in metadata only view and, in addition, the text is not made searchable;
- partner program books are given the viewability chosen by the partner program participant; and
- books for which research has revealed public domain status despite publication in 1923 or later are placed in full view.

[redacted]

[redacted]

D. Indexing

After Analysis, the book is indexed so that it may be searched. [redacted]

In addition, if the library whose copy of the book was scanned submits a request for a digital copy of the book through the Google Return INterface (GRIN), a temporary, encrypted copy of the page images and corresponding text and metadata for that book is placed on a server to which that library has access. [redacted]

In addition, throughout the process, backup and replication copies are made of the data identified above as necessary to ensure reliability and speed of access to that data.

In addition, some books are re-scanned to ensure quality.

The books are then made searchable through the Google Book Search website, and are viewable based on the appropriate viewability status. [redacted]

III. USES MADE OF BOOKS

This narrative is responsive to a portion of Request No. 9 ("Documents sufficient to describe all uses made by Google of all copies of all in-copyright, English language books copied in the Library Project."). This narrative is provided in fulfillment of the Request, pursuant to the parties' agreement, and is provided subject to Google's November 21, 2011 objections to the Request and subject to Google's general objections, and may be amended or supplemented as Google's investigation of the facts continues. This narrative describes non-display uses made by Google of English-language books.

Google makes the following non-display uses of books:

- Text and images from books are used to facilitate the provision of the functionality of the Google Book Search web site, including optical character recognition to derive the text of the books from images and clustering analysis to identify different editions or different copies of the same book.
- Text from books is used as an input to the "n-grams" research project, which is described in Michel et al., *Quantitative Analysis of Culture Using Millions of Digitized Books*, 331 SCIENCE 176 (2011), *available at* http://www.sciencemag.org/content/early/2010/12/15/science.1199644 , and the results of which are available at http://books.google.com/ngrams .
- [redacted]

[redacted]

IV. SECURITY

This narrative is responsive to Request No. 13 ("Documents sufficient to describe in detail the security procedures employed by Google to prevent unauthorized access to and display of books copied in the Library Project."). This narrative is provided in fulfillment of the Request, pursuant to the parties' agreement, and is provided subject to Google's November 21, 2011 objections to the Request and subject to Google's general objections, and may be amended or supplemented as Google's investigation of the facts continues. This narrative describes procedures employed with respect to the security of images of snippet view books.

[redacted]

With respect to the security of the front-end system which provides scan data to libraries (the Google Return Interface, or GRIN), that system is secured, for example, in the following manner. [redacted]

[redacted]

Google also ensures that searches that return snippets of books cannot be used to recover entire books or entire pages of books, as follows:

- To prevent users from being able to formulate a query which will predictably return the "next" snippet on a page, the positions of snippets on a page are fixed, with pages divided into about eight snippets. The actual number of snippets depends on the height-to-width ratio of the page, [redacted]. Thus, while a normal book has about eight snippets per page, a book with extremely tall pages would have more than eight snippets per page, and a book with extremely wide pages would have fewer than eight snippets per page.
- Also to prevent users from being able to formulate a query which will predictably return the "next" snippet on a page, [redacted]
- To prevent the entire book from being downloaded and pieced together, Google blacklists at least one out of every ten pages in each book.
- To prevent any entire page from being downloaded and pieced together, Google blacklists one of the snippets on every page (unless there are three or fewer

snippets per page, which could only occur if a book had pages for which the page height is less than two thirds of the page width)

- To deter automated "scraping" of snippets, [redacted]

- To deter automated "scraping" of snippets, Google places rate limits on the snippet display of any given book, aggregated over all users. [redacted]

[redacted]

- To further deter automated "scraping" of snippets, Google places rate limits on the snippet display to any given user [redacted], aggregated over all books. [redacted]

Google is not aware of any intrusion attempt which has allowed unauthorized access to back-end scan data or to blacklisted snippets. Google is not aware of any effort to "scrape" snippets on a substantial scale.

[redacted]

Dated: December 9, 2011

As to objections:

By: */s/ Joseph C. Gratz*

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Attorneys for Defendant Google Inc.

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the State Bar of California, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On December 9, 2011, I served the following document(s) in the manner described below:

DEFENDANT GOOGLE INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.

☐ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.

☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jgratz@durietangri.com to the email addresses set forth below.

☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

Michael J. Boni
Joanne E. Zack
BONI & ZACK LLC
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Bala Cynwyd, PA 19004
Telephone: 610-822-0200
Fax: 610-822-0206
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jzack@bonizack.com

Attorneys for Plaintiffs

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 21, 2011, in San Francisco, California.

/s/ Joseph C. Gratz
Joseph C. Gratz

C53FGOOA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GIULD, et al,

Plaintiff,

v. 05 CV 8136 (DC)

GOOGLE INC.,

Defendant.

THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS INC., et al,

Plaintiff,

v. 10 CV 2977 (DC)

GOOGLE INC.,

Defendant.

New York, N.Y.
May 3, 2012
10:00 a.m.

Before:

HON. DENNY CHIN,

District Judge

APPEARANCES

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JAMES JOSEPH McGUIRE
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Attorneys for Defendant
DARALYN DURIE, ESQ.
JOSEPH C. GRATZ, ESQ.

Also present:
Amy Keating, Esq., Google Inc.

o0o

(Case called)
(In open court)
THE DEPUTY CLERK: The Authors Guild et al v. Google Inc. and The American Society of Media Photographers, Inc., et al, v. Google, civil cause for motion argument. Would the parties state their appearances and who they represent?
MR. McGUIRE: Good morning, your Honor. James McGuire for plaintiffs in the ASMP visual artists case. With me is my partner, Mark Berube.
MS. ZACK: Your Honor, Joanne Zack from Boni & Zack for the plaintiffs in the Authors Guild v. Google case, along with my partner, Michael Boni.
MR. DUMAIN: Good morning. Sanford Dumain for the Authors Guild.
MS. DURIE: Good morning, your Honor. Daralyn Durie and Joe Gratz from Durie Tangri for defendant Google, and I'd like to introduce to the Court Amy Keating who is in-house

copied in the Partner Program. The reason being that Google did not seek permission from anyone to copy books in the Library Project because they took the position that it was fair use. Therefore, there is no individualized determination of license or permission with respect to those books.

Google raises a fair use defense as to those books, and they were copied en masse in a number of libraries, particularly the University of Michigan, the University of California, where they just went in and took books off the shelves and put them into their patented scanning machines.

THE COURT: I understand that. What else do you want to tell me on this motion?

MS. ZACK: Well, I do want to respond on the issue of fair use, which is the other issue that Google has said raises individualized issues, and there's a four-factor test. They conceded that the first factor raises common issues. The second factor under the law has only two types of categories of books that will be relevant, which are fiction, non-fiction, in print, out of print. And under common sense you can put those into different categories and just make a determination across the categories of books rather than individually looking at every single book.

With respect to the third prong, that's the substantiality of the copying. Plaintiff's claim here is not just about the snippets per se, it's about copying entire books

and making complete digital copies, distributing complete digital copies to libraries and then displaying so-called snippets. Each of those things were done by Google pursuant to blanket policies, not individual determinations.

With respect to certain categories of books that they considered to be reference-type materials; poetry, dictionaries, cookbooks, that sort of thing, they do not show snippets at all. They show only what they call metadata for the books. But I have a list from Google that lists every book that was copied and whether it was in snippet display or metadata display. No author has to come forward to present that evidence.

On Friday the parties exchanged contention interrogatory responses. I'd really like to hand them up, because Google's response on the fourth fair use factor in their papers argue somehow is going to raise individualized issues and in their contention interrogatory response they make it crystal clear that they intend to raise issues only that are common, such as the fact that a search engine is not a substitute for a book, that there's no market for selling snippets to search engines, that that isn't a likely to be a developed market or reasonable market. They're responding to plaintiff's contentions. But they are not going to argue in this case that they are using the books fairly based on an individualized determination. They are going to argue that

their search engine's transformative and that is why they should win, and that is a common issue, not an individualized issue.

THE COURT: All right.

MS. ZACK: May I hand these up, your Honor?

THE COURT: Sure. Any objection? They're just interrogatories that were served?

MS. ZACK: Yes.

THE COURT: Responses on Friday? Sure. Give it to my law clerk.

MS. ZACK: Thank you.

THE COURT: Wait, wait. Does Mr. McGuire want to add anything?

MR. McGUIRE: Just a couple of points, your Honor. I'll be brief.

Thank you, your Honor, may it please the Court. To be colloquial, my song has already been sung, but I'd like to make a couple of points if I could. First and perhaps dispositively on this motion, I guess on the one hand you have an Authors Guild case around for six years, our case is in its 26th month. Although we haven't been around the Court very much, we've been active in preparing for full-scale litigation and also negotiating.

The bottom line is the Worth case, which I think goes back to the Supreme Court close to 40 years, basically says

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Attorneys for Defendant
Google Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., Associational Plaintiff, BETTY MILES, JOSEPH GOULDEN, and JIM BOUTON, on behalf of themselves and all other similarly situated, Plaintiffs, v. GOOGLE INC., Defendant.	Civil Action No. 05 CV 8136 (DC) **ECF Case**

DEFENDANT GOOGLE INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Pursuant to Federal Rule of Civil Procedure 26 and 33, Defendant Google Inc. ("Google"), by its attorneys, hereby responds and objects to Plaintiffs' First Set of Interrogatories (the "Interrogatories") dated March 14, 2012.

These responses are based on the information currently available to Google. Google reserves the right to amend, supplement or modify its responses and objections at any time in the event that it obtains additional or different information.

GENERAL OBJECTIONS

1. Google objects to the preface, instructions, and definitions to the Requests to the extent that they purport to impose obligations that exceed those imposed by the Federal Rules of Civil Procedure, relevant local rules, and applicable case law. In responding to these requests, Google has followed the applicable law and has ignored the improper preface, instructions, and definitions.

2. Google objects to the Requests in their entirety and to each request to the extent that the documents and information sought are protected from discovery by the attorney-client privilege, the work-product doctrine, or any other applicable privilege.

3. Google objects to each and every request to the extent that it seeks information that is confidential and/or proprietary information. To the extent not otherwise subject to objection, Google will provide such confidential information in accordance with the terms of the protective order entered in this case.

4. Google objects to Plaintiffs' definition of "Google" as vague, ambiguous, unintelligible, and overly broad. For purposes of responding to these discovery requests, Google will interpret "Google" to mean Google, Inc. and/or its agents.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

INTERROGATORY NO. 1:

Identify all factual and legal bases supporting Google's defense that its digital copying in libraries of Books in their entirety is a fair use under 17 U.S.C. § 107, including without limitation all facts Google intends to rely on with respect to the four factors set forth in Section 107.

RESPONSE TO INTERROGATORY NO. 1:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory's use of the term "digital copying in libraries of Books" is vague and ambiguous, and understands it to refer to Google's digitization of Books from library collections. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google's digitization of Books from library collections is a fair use under 17 U.S.C. § 107. Specifically:

- The "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," weighs in favor of a finding of fair use.
    - The purpose and character of Google's use is transformative, because it adds something new, with a further purpose or different character, and does not merely supersede the objects of the original.
        - The purpose of Google's use is to assist users in identifying Books which may be of interest by creating a search engine by which the text of Books may be searched.

        - Google's digitized copies do not serve as a substitute for Books, but rather are necessary to create Google's book search engine, which is a new tool for finding books.
    - The nature of Google's use is at least partially noncommercial, because the use facilitates access to the collections of libraries, enables research and scholarship, and does not directly generate revenue for Google.
- The "nature of the copyrighted work" weighs in favor of a finding of fair use.
    - All of the Books at issue have been published.
    - Some of the Books at issue are factual in nature, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
    - Some of the Books at issue are less factual in nature, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
    - Some of the Books at issue are out of print, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
    - Some of the Books at issue are in print, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
- The "amount and substantiality of the portion used in relation to the copyrighted work as a whole" weighs in favor of a finding of fair use.
    - Because the use is transformative, and the use of the whole is necessary to the transformative purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified, the digitization of the entire work does not militate against a finding of fair use.

- The "effect of the use upon the potential market for or value of the copyrighted work" weighs in favor of a finding of fair use.
    - A search engine is not a market substitute for a book.
    - The effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified.
    - There is no market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified.
    - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is not a traditional market.
    - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is not a reasonable market.
    - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is not a market which is likely to be developed.
    - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is a transformative market, and is thus not cognizable.
- Balanced in light of the purposes of copyright, the four factors favor fair use.
    - Each factor either favors fair use or is neutral.

- A finding of fair use promotes the purpose of copyright, which is to promote the dissemination of knowledge by granting limited exclusive rights to authors. Google's use promotes the dissemination of knowledge, by assisting users in identifying books which may be of interest, while not serving as a substitute for the Books themselves.

In addition, Google's use is fair because it is necessary to the fair use purpose set forth in Google's response to Interrogatory No. 3. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 2:

Identify all factual and legal bases supporting Google's defense that its distribution to libraries of entire digital copies of Books is a fair use under 17 U.S.C. § 107, including without limitation all facts Google intends to rely on with respect to the four factors set forth in Section 107.

RESPONSE TO INTERROGATORY NO. 2:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google does not distribute entire digital copies of Books to libraries. Rather, Google makes available to libraries an automated system, called GRIN, by which a library may choose to create and download digital copies of Books which have been scanned from its collection. A

library performs the volitional acts which result in the creation of the digital copies which are created by the GRIN system and which result in the transmission of the content of those digital copies to that library. Accordingly, Google can be at most liable under doctrines of secondary liability, and cannot be directly liable for the library copies.

Google is not secondarily liable with respect to the library copies. First, Google is not secondarily liable with respect to the library copies under any theory of secondary liability because there is no underlying act of direct infringement by the libraries, since the libraries' volitional acts in creating and downloading the library copies are fair use, not infringement. Second, Google is not vicariously liable because vicarious liability requires a financial benefit directly attributable to the particular infringing activity, and Google does not derive any financial benefit directly attributable to the library copies. Third, Google is not liable under a theory of contributory liability because (1) the GRIN system has at least substantial noninfringing uses; (2) the libraries were and are contractually bound to use the GRIN system only in a noninfringing manner; and (3) Google lacks knowledge of any use of the GRIN system which is infringing, as opposed to fair use.

The libraries' volitional acts in creating and downloading the library copies are fair use under 17 U.S.C. § 107. Specifically:

- The libraries' use is in part for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.
- The "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," weighs in favor of a finding of fair use.

- The purpose and character of the libraries' use is transformative, because it adds something new, with a further purpose or different character, and does not merely supersede the objects of the original.
    - One purpose of the libraries' use is to assist users in identifying books which may be of interest by creating a search engine by which the text of books may be searched.
    - The libraries' digitized copies do not serve as a substitute for Books, but rather are necessary to create the libraries' book search engine, which is a new tool for finding books.
  - The nature of the libraries' use is entirely for nonprofit educational purposes.
- The "nature of the copyrighted work" weighs in favor of a finding of fair use.
  - All of the Books at issue have been published.
  - Some of the Books at issue are factual in nature, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
  - Some of the Books at issue are less factual in nature, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
  - Some of the Books at issue are out of print, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
  - Some of the Books at issue are in print, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
- The "amount and substantiality of the portion used in relation to the copyrighted work as a whole" weighs in favor of a finding of fair use.

- Because the use is transformative, and the use of the whole is necessary to the transformative purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified, the digitization of the entire work does not militate against a finding of fair use.

- The "effect of the use upon the potential market for or value of the copyrighted work" weighs in favor of a finding of fair use.
  - A search engine is not a market substitute for a Book.
  - The effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified.
  - There is no market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a "dark archive."
  - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a "dark archive" is not a traditional market.
  - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a "dark archive" is not a reasonable market.
  - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a "dark archive" is not a market which is likely to be developed.

- The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a "dark archive" is a transformative market, and is thus not cognizable.

- Balanced in light of the purposes of copyright, the four factors favor fair use.
  - Each factor either favors fair use or is neutral.
  - A finding of fair use promotes the purpose of copyright, which is to promote the dissemination of knowledge by granting limited exclusive rights to authors. The libraries' use promotes the dissemination of knowledge, by assisting users in identifying books which may be of interest, while not serving as a substitute for the Books themselves.

Google provides this response as a courtesy to Plaintiffs, and the burden of proving infringement (be it direct or secondary) remains with Plaintiffs. To the extent Google performed any volitional act with respect to library copies, which Google denies, Google's conduct was fair use because it was necessary to the foregoing fair use purposes and was conducted at the behest of the libraries expressly for the purpose of achieving the foregoing fair use purposes. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 3:

Identify all factual and legal bases supporting Google's defense that its display of verbatim expression from Books in response to search requests is a fair use under 17 U.S.C. §

107, including without limitation all facts Google intends to rely on with respect to the four factors set forth in Section 107.

RESPONSE TO INTERROGATORY NO. 3:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory's use of the term "display of verbatim expression from Books in response to search requests" is vague and ambiguous, and understands it to refer to Google's display of snippets of Books from library collections in response to search requests. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google's display of snippets of Books from library collections in response to search results is a fair use under 17 U.S.C. § 107. Specifically:

- The "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," weighs in favor of a finding of fair use.
    - The purpose and character of Google's use is transformative, because it adds something new, with a further purpose or different character, and does not merely supersede the objects of the original.
        - The display of snippets is important to helping users find books which may be of interest.
        - The snippets displayed do not serve as a substitute for Books, but instead serve as a tool to identify books which are of interest.

        - Snippets are not displayed with respect to those Books for which there is a possibility that a snippet could serve as a substitute for a Book, such as dictionaries and books of quotations.
    - The nature of Google's use is at least partially noncommercial, because the use facilitates access to the collections of libraries, enables research and scholarship, and does not directly generate revenue for Google.
- The "nature of the copyrighted work" weighs in favor of a finding of fair use.
    - All of the Books at issue have been published.
    - Some of the Books at issue are factual in nature, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
    - Some of the Books at issue are less factual in nature, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
    - Some of the Books at issue are out of print, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
    - Some of the Books at issue are in print, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
    - Some of the snippets at issue are factual in nature, and as to those snippets, this factor tilts more strongly in favor of a finding of fair use.
    - Some of the snippets at issue are less factual in nature, and as to those snippets, this factor tilts less strongly in favor of a finding of fair use.
- The "amount and substantiality of the portion used in relation to the copyrighted work as a whole" weighs in favor of a finding of fair use.
    - Snippets are displayed only in response to user search queries.

- Each snippet is only approximately one-eighth of a page.
- At maximum, three snippets are displayed in response to a particular search query.
- Only snippets containing the user's search query are displayed.
- The location of a snippet on a page is fixed.
- Some snippets are blacklisted.
- Some pages are blacklisted.
- Measures are in place to prevent any one user, or users in the aggregate, from abusing the system by repeated queries.
- Some of the snippets at issue are taken from long books, and as to those snippets this factor tilts more strongly in favor of fair use.
- Some of the snippets at issue are taken from short books, and as to those snippets this factor tilts less strongly in favor of fair use.

- The "effect of the use upon the potential market for or value of the copyrighted work" weighs in favor of a finding of fair use.
  - A snippet is not a market substitute for a Book.
  - The effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified.
  - There is no market for a license to display short snippets as part of a search engine so that books of interest may be identified.
  - The market for a license to display short snippets as part of a search engine so that books of interest may be identified is not a traditional market.

- The market for a license to display short snippets as part of a search engine so that books of interest may be identified is not a reasonable market.
- The market for a license to display short snippets as part of a search engine so that books of interest may be identified is not a market which is likely to be developed.
- The market for a license to display short snippets as part of a search engine so that books of interest may be identified is a transformative market, and is thus not cognizable.

- Balanced in light of the purposes of copyright, the four factors favor fair use.
  - Each factor either favors fair use or is neutral.
  - A finding of fair use promotes the purpose of copyright, which is to promote the dissemination of knowledge by granting limited exclusive rights to authors. Google's use promotes the dissemination of knowledge, by assisting users in identifying books which may be of interest, while not serving as a substitute for the Books themselves.

Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 4:

Identify by title, author, publisher and ISBN (if applicable) all Books as to which Google claims a license to digitally copy in full, and for each Book identify all factual and legal bases supporting the defense of license.

RESPONSE TO INTERROGATORY NO. 4:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google claims the defense of license with respect to those Books listed in the document bearing Bates number GOOG05004752. Google is permitted by law, at least under the doctrine of fair use, to digitally copy in full all of the remaining Books at issue, as set forth in Google's response to Interrogatory No. 1. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 5:

Identify by title, author, publisher and ISBN (if applicable) all Books as to which Google claims a license to distribute digital copies to libraries, and for each Book identify all factual and legal bases supporting the defense of license.

RESPONSE TO INTERROGATORY NO. 5:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google claims the defense of license with respect to those Books listed in the document bearing Bates number GOOG05004752. Google is permitted by law, at least under the doctrine of fair use, to digitally copy in full all of the remaining Books at issue, as set forth in Google's response to Interrogatory No. 1. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 6:

Identify by title, author, publisher and ISBN (if applicable), all Books as to which Google claims a license to display verbatim expression in response to search requests, and for each book identify all factual and legal bases supporting the defense of license.

RESPONSE TO INTERROGATORY NO. 6:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google claims the defense of license with respect to those Books listed in the document bearing Bates number GOOG05004752. Google is permitted by law, at least under the doctrine of fair use, to digitally copy in full all of the remaining Books at issue, as set forth in Google's response to Interrogatory No. 1. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 7:

Identify any and all affirmative defenses other than fair use and license which Google claims in this case and, for each such defense, identify all factual and legal bases supporting such defense.

RESPONSE TO INTERROGATORY NO. 7:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google does not claim any affirmative defenses other than fair use and license affirmative defenses with respect to Plaintiffs' claims of direct copyright infringement as to Books scanned from the collections of libraries, but does not intend to waive any such defenses to the extent they overlap with Google's fair use and license defenses. Google reserves the right to present different or additional affirmative defenses in the event Plaintiffs make other or further claims, or for the purpose of rebutting Plaintiffs' contentions. Google reserves the right to present defenses which rebut or negate elements upon which Plaintiffs bear the burden, which defenses are not encompassed within this interrogatory because they are not affirmative defenses. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

Dated: April 27, 2012

Respectfully submitted,

By: */s/ Joseph C. Gratz*

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Attorneys for Defendant Google Inc.

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the State Bar of California, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On April 27, 2012, I served the following document(s) in the manner described below:

DEFENDANT GOOGLE INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.

☐ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.

☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jcotton@durietangri.com to the email addresses set forth below.

☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

Michael J. Boni
Joanne E. Zack
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Attorneys for Plaintiffs

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 27, 2012, in San Francisco, California.

/s/ Janelle Cotton
Janelle Cotton