

**IS FAIR USE ACTUALLY FAIR? ANALYZING FAIR USE AND THE  
POTENTIAL FOR COMPULSORY LICENSING IN  
*AUTHORS GUILD V. GOOGLE***

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*As books are becoming electronic, people are now conducting more research online instead of venturing into bookstores and libraries. The number of bookstores in the nation is declining as people replace the relationship they once had with these stores with online sources. Particularly, in services such as Google Books, people use search engines to browse books in the same manner they would as if they were in a store. The lawsuit between Authors Guild and Google has been ongoing for over a decade, and the case largely turns on the question of fair use. However, fair use in certain situations fails by putting an undue burden on authors to help benefit the general public. Therefore, there needs to be an alternate legal avenue in place to address this problem. This Recent Development argues that, in light of preserving the access of information to the public, the law should be amended to allow for compulsory licensing so that information may be widely dispersed while being sensitive to the significant contributions of Google and the Authors Guild.*

**I. INTRODUCTION**

The decline of bookstores is frightening yet simultaneously liberating. It is fearsome because bookstores have been a long-established means for consumers to browse and buy books. Countless individuals walk into bookstores, pick up a book, read excerpts of the text in varying proportion, and then *perhaps* decide to buy it. People often even sit down and read large portions of the

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text and ultimately decide against a purchase. This practice has been occurring perhaps for as long as bookstores have existed, and it has no apparent legal consequences. In fact, instead of dissuading consumers from reading snippets of books in a bookstore, Barnes & Noble employees find certain consumers, particularly youths seen reading in the children's section, to be "[c]ute."<sup>1</sup>

It is liberating, however, because the decline of bookstores resulted in the increase of electronic purchases of books and e-books.<sup>2</sup> Access to books and information is greater and easier to obtain than ever before. While these two experiences may feel analogous to the consumer, these two processes affect authors differently, which poses a legal conundrum.

For brick-and-mortar bookstores, there is no copyright violation if consumers read excerpts of a book for free that they do not intend to buy because the consumers are not encroaching on any of the rightsholder's exclusive rights. Furthermore, the system works because the browsing consumer usually ultimately purchases a book and thus authors still receive compensation for their work. Although the process may be different for authors with varying degrees of fame<sup>3</sup> or depend on whether a business is a chain or a local bookstore, practically all bookstores aim to function in a manner that will generate revenue. In some instances, a bookstore will buy books

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<sup>1</sup> See Sara Jonsson, *8 Types of People You'll See at the Bookstore*, BARNES & NOBLE (Oct. 9, 2013, 10:15 AM), <http://www.barnesandnoble.com/blog/8-types-of-people-youll-see-at-the-bookstore/>.

<sup>2</sup> See Max Nisen, *These Charts Show Just How Bad Things Are For Bookstores*, BUSINESS INSIDER (Oct. 15, 2013, 10:53 AM), <http://www.businessinsider.com/why-bookstores-are-doomed-2013-10>. This article provides graphs that show starting in 2008, there has been a decline in monthly retail sales at brick and mortar bookstores. *Id.* The graph shows that starting in 2008, there was a great increase in e-reader related searches on Google, specifically for the Kindle. *Id.* This spike in interest for e-readers corresponded precisely with the decline of sales in brick and mortar bookstores. *Id.*

<sup>3</sup> As discussed in this Introduction, consignment situations are more likely to occur for local authors who are not very famous. However, bookstores may purchase the book in full from famous authors who write books that are in greater demand and more likely to sell.

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outright.<sup>4</sup> However, sometimes a purchase of the book is relatively risky, such as when local authors want to sell books to a small, local bookstore. In response, bookstores created an alternate system: consignment. In this process, the bookstore will pay the author once the book is sold, and the author generates only a certain percentage of the retail price of the book, the standard being 60%.<sup>5</sup>

Consignments deal with high-risk scenarios, and authors only receive revenue when a consumer purchases a book.<sup>6</sup> However, as technology has brought forth significant changes, the way the world browses and purchases books has also drastically changed. This Recent Development specifically examines the unique legal problems for book authors and copyright owners resulting from the rise of e-books and books purchased electronically. Although this paper will discuss the technology developed by Google in depth, Amazon and Barnes & Noble have also digitized books to be read instantaneously on a tablet, laptop, or cell phone.<sup>7</sup>

Specifically, in Part II, this Recent Development examines *Authors Guild v. Google*<sup>8</sup>, a Second Circuit decision indicating the problems inherent in electronic books. Part III discusses the fair use analysis, the current circuit split, and argues that although *Authors Guild* was decided correctly, fair use adopts a winner-take-all system that does more harm to the plaintiffs than is just. Part IV explores compulsory licensing, a different legal avenue that has been used in copyright law, and its treatment both internationally and in America. Part V argues that compulsory licensing should be adopted to remedy the problems of fair use in *Authors Guild v.*

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<sup>4</sup> Stephanie Chandler, *How Authors Can Sell to Bookstores, Plus Free Consignment Agreement*, AUTHORITY PUBLISHING (Dec. 12, 2012), <http://authoritypublishing.com/book-marketing/how-authors-can-sell-to-bookstores-free-bookstore-consignment-agreement-for-authors/>.

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

<sup>7</sup> Amazon sells the Kindle, which allows people to read books electronically on a small tablet *See Kindle Books*, AMAZON, <http://www.amazon.com/Kindle-eBooks/b?ie=UTF8&node=154606011> (last visited Mar. 4, 2016); Barnes & Noble sells a similar device called the NOOK. *See NOOK Books*, BARNES & NOBLE, [http://www.barnesandnoble.com/b/nook-books/\\_/N-8qa](http://www.barnesandnoble.com/b/nook-books/_/N-8qa) (last visited Mar. 4, 2016).

<sup>8</sup> 804 F.3d 202 (2d Cir. 2015), *cert. denied* \_\_\_ U.S. \_\_\_ (2016)(No. 15-849).

*Google*. This solution strives to mold copyright law to adapt to current technology, specifically in proposing a solution that models the online copies and purchases of books to be analogous to an author selling a book at a bookstore as discussed above. For this is what is *precisely* occurring: people are not going to bookstores and libraries as often when searching for books, but instead people are using now-available online services.<sup>9</sup> Thus, the concept and the transaction are the same. Logically, the law that governs the two methods should account for this trend and attempt to provide the same benefits to retailers, authors, and consumers alike.

## **II. *AUTHORS GUILD V. GOOGLE*—THE PROBLEMATIC FACTS CONCERNING THE BATTLE OF COPYRIGHT HOLDERS’ RIGHTS AND THE PUBLIC INTEREST**

In order to understand the legal issues concerning *Authors Guild v. Google*, it is important to understand the underlying facts. This section will discuss the background that led to the dispute and then discuss the current status and major arguments in the suit.

### *A. Technicalities of the Google Library Project*

This Recent Development attempts to resolve issues from the long-litigated case, *Authors Guild v. Google*.<sup>10</sup> The dispute revolved around Google’s Library Project, in which Google created digitized copies of millions of books.<sup>11</sup> The project allowed the public to generate key word searches to extract specific information, without acquiring the authors’ permission or providing the authors with any royalties for their copyrighted works.<sup>12</sup>

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<sup>9</sup> See Nisen, *supra* note 2.

<sup>10</sup> *Authors Guild*, 804 F.3d at 211–12. Authors Guild sued Google on September 20, 2005, as a putative class action. This was then followed by several years of negotiations that were ultimately rejected by the district court in March 22, 2011, “as unfair to the class members who relied on the named plaintiffs to represent their interests.” *Id.* In October 2011, Authors Guild filed a fourth amended class action complaint. *Id.* On November 14, 2013, the district court granted Google’s motion for summary judgment on the basis of fair use. On December 10, 2013, Authors Guild appealed. *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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Google's Library Project involved agreements in 2004 with the world's major libraries. These libraries submitted books from their collections to Google, which then digitally scanned and converted the works to machine-readable text and subsequently created indexes for the collection of these texts.<sup>13</sup> Additionally, Google allowed these participating libraries to obtain digital copies of the books they submitted, but specified that the libraries shall not use the digital copies to violate copyright laws.<sup>14</sup> So far, Google has scanned, converted, and indexed over 20 million books of all kinds, including fiction, non-fiction, and even rare books that are out of print.<sup>15</sup>

As a direct result of the conversion and indexing, Google is able to provide a "snippet-search" function that allows anyone in the public to read "snippets" of text that they wish to search for free.<sup>16</sup> An illustration of the snippet-feature provided in the appendix of the case depicts the result found when a scholar searches the term "fair use" in Google:<sup>17</sup>

Figure 1:

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<sup>13</sup> *Id.* at 208.

<sup>14</sup> *Id.* at 207.

<sup>15</sup> *Id.* at 208. The books in the collection consist of works that are in the public domain as well as copyrighted works. In order to ensure and improve accuracy of its digitized books, Google keeps the original scanned image of each book. *Id.*

<sup>16</sup> *Id.* at 207.

<sup>17</sup> *Id.* at 230 (Appendix A).

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The screenshot shows a Google Books search interface. At the top, there are buttons for 'Add to my library' and 'Write review'. The main title is 'Copyright for the eighties: cases and materials' by Alan Latman, Robert A. Gorman, and Jane C. Ginsburg. Below the title is a search bar with the text 'MC USE' and a 'Search' button. The results show '72 pages matching gorman ginsburg fair use in this book'. Three pages are previewed: Page 437, Page 452, and Page 456. The text on these pages is partially highlighted in yellow, showing phrases like 'fair use', 'apparent lack of independent research', 'In Takagig v. Bruce Publishing Co.', and 'standards for resolving the fair use defense in copyright cases'. The page numbers 432, 452, and 456 are also visible. At the bottom, there is a link 'Where's the rest of this book?' and 'Results 1-3 of 72'.

As shown above, a limited portion of the text is available and the exact terms the scholar searched for is highlighted in yellow. The benefit is tremendous—this technology allows people to access information instantaneously that would “otherwise not be obtainable in lifetimes of searching.”<sup>18</sup> It is also noteworthy that Google does not make any direct profit from this through advertising or a subsequent purchase by a consumer.<sup>19</sup> However, the Library Project

<sup>18</sup> *Id.* at 209.

<sup>19</sup> *Id.* (“No advertising is displayed to a user of the search function. Nor does Google receive payment by reason of the searcher’s use of Google’s link to purchase the book.”).

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can nevertheless be viewed as inherently commercial<sup>20</sup> because it prevents competitor search engines from achieving similar results and thus puts Google at a much greater market advantage.<sup>21</sup> This market advantage exists because (1) Google can generate better search results than its competitors and (2) competitors have been deterred for over a decade from digitizing books for fear of copyright liability from the uncertain results of *Authors Guild v. Google*.<sup>22</sup> Consequently, Google has developed this project for several years while no competitor has undertaken a similar endeavor. The Google Library Project provides undeniable benefits, but at a cost to rightsholders. As a result, rightsholders brought suit against Google in *Authors Guild v. Google*.

#### B. Authors Guild v. Google

On October 16, 2015, the Second Circuit affirmed the U.S. District Court of the Southern District of New York's decision that Google's project involving digitally copying books did not constitute copyright infringement.<sup>23</sup> The Authors Guild appealed this decision on December 31, 2015, but on April 18, 2016, the Supreme Court denied certiorari.<sup>24</sup>

While Google successfully argued that it should be entitled to continue its Library Project under the fair use exception in copyright law, several authors still believe Google's actions constitute copyright infringement. Specifically, Jim Bouton,<sup>25</sup> Betty Miles,<sup>26</sup> and Joseph Goulden,<sup>27</sup> who each own copyrights on works that

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<sup>20</sup> Commercialism is a consideration in the first factor of the fair use analysis. See *infra* Part III.

<sup>21</sup> Brief for Appellants at 6, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (No. 12-4829).

<sup>22</sup> Benjamin J. Keele, *Copyright and Research in Google Book Search*, WM & MARY LAW SCHOOL SCHOLARSHIP REPOSITORY (2011), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1026&context=libpubs>.

<sup>23</sup> *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

<sup>24</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208 (2d Cir. 2015), *cert. denied* \_\_\_ U.S. \_\_\_ (2016) (No. 15-849).

<sup>25</sup> JIM BOUTON, *BALL FOUR* (1970).

<sup>26</sup> BETTY MILES, *THE TROUBLE WITH THIRTEEN* (1979).

<sup>27</sup> JOSEPH GOULDEN, *THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS* (1972).

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Google included in the Library Project, and joined Authors Guild in a suit against Google for copyright infringement on behalf of themselves and authors who are similarly situated.<sup>28</sup>

The reason the plaintiffs sued is simple—authors are concerned regarding the loss of present and future revenue, which in turn can harm the nation’s creative culture. Google commenced its project without the permission from the copyright holders for the works being utilized in the project.<sup>29</sup> The Authors Guild expressed two major ways Google’s Library project causes the authors economic harm: (1) it creates a disincentive for researchers to go out and buy books if they can find the material they need on Google Books, and (2) the slippery slope argument which suggests that if Google’s use is considered fair use, then anyone can claim fair use in digitizing books, which will inevitably lead to “widespread, free, and unrestricted availability of books online.”<sup>30</sup> Thus, the Authors Guild claimed that Google poses a “serious threat to writers and their livelihoods, one which will affect the depth, resilience, and vitality of our intellectual culture.”<sup>31</sup> However, the Authors Guild emphasized that it believes that Google Books is “a good thing . . . .”<sup>32</sup> These authors simply want a system where authors can still be compensated.<sup>33</sup>

The holding of *Authors Guild v. Google* rested on the fair use defense. Although Google clearly used copyrighted works to provide its snippet-search function, Google’s use of the copyrighted material is fair use, and thus, Google does not have to pay the Authors Guild a dime. Had Google’s use been considered to not be fair use, then Google would have been held liable for infringing over 20 million books and paid the respective damages, and the project would have continued without consent and licenses for each copyrighted book. Thus, had Google lost, not only does the company incur serious economic harm, but also the public would no

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<sup>28</sup> See *Authors Guild*, 804 F.3d at 208.

<sup>29</sup> *Id.*

<sup>30</sup> *Where We Stand*, THE AUTHORS GUILD, <https://www.authorsguild.org/where-we-stand/authors-guild-v-google/> (last visited Jan. 29, 2016).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

longer have the wonderful resource that the snippet function provides.

In this case, Google in essence asked for forgiveness through fair use, since it had failed to appropriately ask for permission at the outset. In light of the Supreme Court's denial of certiorari, it is now final that forgiveness has been granted. However, the Supreme Court in its denial missed an opportunity to hear the case and resolve the inconsistency of the application of the fair use seen lower courts. Thus, this Recent Development will analyze the fair use defense in the next section in light of the varying analyzes seen in different circuits, and help readers understand the underlying consequences of granting Google fair use.

### **III. THE MOST TROUBLESOME DOCTRINE IN COPYRIGHT LAW: FAIR USE**

The decisions in *Authors Guild v. Google* ultimately turned on whether Google's actions qualified as a specific defense, fair use, to the author's copyright protections. In 1984, the Supreme Court decided *Sony Corp. of Am. v. Universal City Studios, Inc.*,<sup>34</sup> and acknowledged that "[t]he doctrine of fair use has been called, with some justification, 'the most troublesome in the whole law of copyright.'"<sup>35</sup> The passage of time has not made fair use any less troublesome. The root of this trouble is that Congress did not "provide definitive rules when it codified the fair use doctrine in the 1976 [Copyright] Act; it simply incorporated a list of factors 'to be considered'"<sup>36</sup> As a result, different circuits have begun to analyze the factors slightly differently. Part A will discuss the fair use four factor test and circuit split, and Part B will apply the rules to Authors Guild while taking a careful look at the analysis provided by the Second Circuit's Court of Appeal decision. This analysis ultimately determines that although the Second Circuit correctly found for fair

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<sup>34</sup> 464 U.S. 417 (1984).

<sup>35</sup> *Id.* at 475 (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); see also *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980); *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

<sup>36</sup> *Sony*, 464 U.S. at 476.

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use, the doctrine of fair use fails in this situation because it unjustly place a significant burden on one party to provide a public benefit.

A. *The Circuit Split*

The four fair use factors, as set forth by the statute, are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>37</sup>

At its core, the fair use defense is exactly how it sounds—it is grounded in the notion of fairness. Fair use is “troublesome” because courts do not sum the factors to determine whether something is fair use.<sup>38</sup> Rather, courts perform a nuanced analysis balancing the benefit to the public with the harm to the creators.<sup>39</sup> When benefit to the public outweighs the harm the creators would face, courts find fair use.<sup>40</sup> However, the statute does not tell us which factor is *more* important in the analysis and whether there should be placed more emphasis on the public interest or the creators.<sup>41</sup> As a result, courts have valued the four factors of the test

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<sup>37</sup> 17 U.S.C. § 107 (2012).

<sup>38</sup> *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994). The court held:

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.

*Id.* (citations omitted).

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See* 17 U.S.C. § 107.

differently, and there is a clear split between the Second and Seventh Circuits in the weighing of these factors.<sup>42</sup>

The Second Circuit considers the first factor most important,<sup>43</sup> but the Seventh Circuit places greater emphasis on the fourth factor.<sup>44</sup> *Kienitz v. Sconnie Nation LLC*<sup>45</sup> and *Cariou v. Prince*,<sup>46</sup> cases involving appropriation art, clearly demonstrates the split.<sup>47</sup> In *Kienitz*, the Seventh Circuit case involved Micheal Kienitz, a photographer, who brought suit against Sconnie Nation for producing t-shirts and tank tops displaying an image of the Mayor of Madison, Wisconsin's face (as shown below).<sup>48</sup> Sconnie Nation conceded that it had used Kientz's photograph as the basis of its work.<sup>49</sup>

Figure 2:

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<sup>42</sup> Besides the Second and Seventh circuits, other circuits have not appeared to take a direct stance in balancing the first and fourth factors. The Ninth Circuit recently stated "that factor one and factor four have 'dominated the case law' and are generally viewed as the most important factors." *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013). The Ninth Circuit previously acknowledged that "[a] transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work." *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003). The Eleventh Circuit also did not explicitly determine which factor is more important but recognized the tension between the first and fourth factor in a case where it found that the fourth factor weighed strongly against fair use and the first factor weighed only slightly in favor of fair use. "Therefore, the District Court should have afforded the fourth fair use factor more significant weight in its overall fair use analysis." *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1283 (11th Cir. 2014).

<sup>43</sup> *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) ("The first statutory factor . . . is '[t]he heart of the fair use inquiry.'").

<sup>44</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) ("We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect).").

<sup>45</sup> 766 F.3d 756, 758 (7th Cir. 2014).

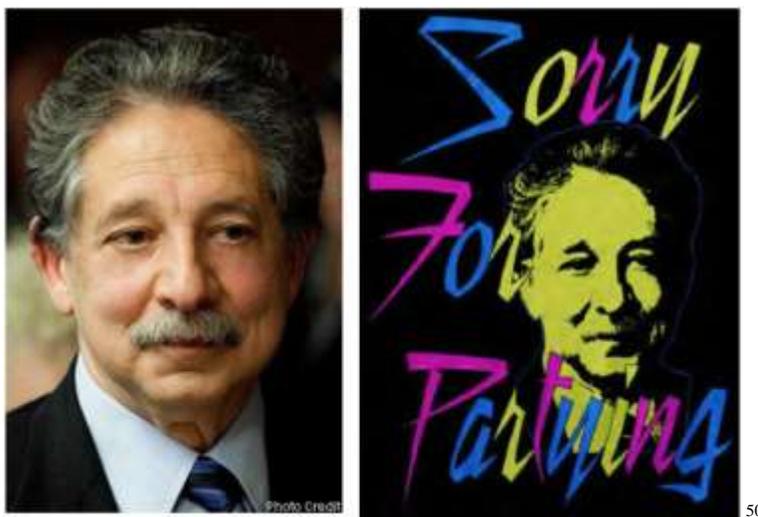
<sup>46</sup> 714 F.3d 694 (2d Cir. 2013).

<sup>47</sup> Appropriation art is an art form, seen within pop art, involving "the intentional borrowing, copying, and alteration of preexisting images and objects." *Pop Art*, MoMA [https://www.moma.org/learn/moma\\_learning/themes/pop-art/appropriation](https://www.moma.org/learn/moma_learning/themes/pop-art/appropriation) (last visited Mar. 4, 2016).

<sup>48</sup> *Kienitz*, 766 F.3d at 757.

<sup>49</sup> *Id.*

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Giving the fourth factor the most importance, the Seventh Circuit first analyzed the market effect and found that it weighed in favor of fair use because the clothing did not act as a substitute for the demand of the original photograph, there was no disruption of a licensing plan, and the demand for the original work had not been reduced.<sup>51</sup> Also relying heavily on factor three, which analyzes the amount and substantiality of the original work used, the Seventh Circuit found that so little of the original copyright remained that this factor also weighed in favor of fair use.<sup>52</sup> Finally, the court gave little treatment to factors one and two, stating that they “don’t do

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<sup>50</sup> Picture provided from the court opinion. *Id.*

<sup>51</sup> *Id.* at 759.

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

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much in this case.”<sup>53</sup> Thus, the court held that these actions constituted fair use and ruled in favor of Scennie nation.<sup>54</sup>

Similarly, in *Cariou*, the Second Circuit dealt with a copyright infringement suit brought by Cariou, a professional photographer, against Prince, a well-known appropriation artist, over photographs in Cariou’s book, *Yes Rasta*.<sup>55</sup> Prince had created a series of artworks, under the title *Canal Zone*, which utilized several torn out pages of *Yes Rasta*.<sup>56</sup> Prince significantly altered the photographs in various ways, including painting “lozenges” over their subjects’ facial features and using only portions of some of the images.<sup>57</sup>

Of the thirty works examined by the court, twenty-five of Prince’s artworks were found to be transformative under the first factor because they “have a different character, give Cariou’s photographs a new expression, and employ new aesthetics with

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<sup>53</sup> *Id.* The court stated:

Consider (1), for example. Defendants sold their products in the hope of profit, and made a small one, but they chose the design as a form of political commentary. Factor (2) is unilluminating, and as we have mentioned Kienitz does not argue that defendants’ acts have reduced the value of this photograph, which he licensed to Soglin at no royalty and which is posted on a public website for viewing and downloading without cost.

*Id.*

<sup>54</sup> *Id.* at 760. The Court ruled in favor of fair use but it seems that they would have easily ruled the other way had the plaintiffs made a stronger argument for economic loss. The court stated:

[T]his use may injure Kienitz’s long-range commercial opportunities, even though it does not reduce the value he derives from this particular picture. He promises his subjects that the photos will be licensed only for dignified uses. Fewer people will hire or cooperate with Kienitz if they think that the high quality of his work will make the photos more effective when used against them. But Kienitz does not present an argument along these lines, and the consideration in the preceding paragraph is not enough to offset the fact that, by the time defendants were done, almost none of the copyrighted work remained. The district court thus reached the right conclusion.

*Id.* at 759–60.

<sup>55</sup> *Cariou v. Prince*, 714 F.3d 694, 699 (2d Cir. 2013).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

creative and communicative results distinct from Cariou's."<sup>58</sup> Next, the Court jumped to the fourth factor where it posed a higher burden for market effect to weigh against fair use. Particularly, the Second Circuit found that the fourth factor "is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work."<sup>59</sup> A secondary use usurps the original market, encompassing its derivative market, in instances "where the infringer's target audience and the nature of the infringing content is the same as the original."<sup>60</sup> Because Prince's work targeted a different audience than Cariou's, the fourth factor also weighed in favor of fair use.<sup>61</sup>

Next, the Second Circuit found that the second factor weighed against fair use because the works in dispute were creative, but nevertheless found that this factor was of "limited usefulness" because "the creative work of art is being used for a transformative purpose."<sup>62</sup> Lastly, in analyzing factor three, Court found that although "Prince used key portions of certain of Cariou's photographs . . . . Prince transformed those [twenty-five] photographs into something new and different and, as a result, this factor weighs heavily in Prince's favor."<sup>63</sup> This analysis suggests that if the infringing work is found to be transformative under the first factor, the first factor overshadows the importance of the second and third factor. Consequently, the Second Circuit found all but five artworks to be fair use.<sup>64</sup> The remaining five were remanded to the trial court because "[e]ach of those artworks differs from, but is still similar in key aesthetic ways, to Cariou's photographs."<sup>65</sup>

Despite the similarities of fact and the same holding, the two circuits weighed these factors very differently. The Seventh Circuit directly addressed *Cariou*, particularly criticizing the Second

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<sup>58</sup> *Id.* at 707–08.

<sup>59</sup> *Id.* at 708.

<sup>60</sup> *Id.* at 709.

<sup>61</sup> *See id.*

<sup>62</sup> *Id.* at 710.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 712.

<sup>65</sup> *Id.* at 711.

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Circuit’s application of the test, stating that the Second Circuit failed to “explain how every ‘transformative use’ can be ‘fair use’ without extinguishing the author’s rights” to derivative works.<sup>66</sup> Although these cases deal with appropriation art, which is admittedly different from digitized books, the underlying law is the same. The decisions did not differ in interpreting whether appropriation is fair use, but differed in how to balance the factors of fair use, and particularly, the appropriate way to resolve the tension between the first and fourth factors. Considering the circuit split, the fair use analysis will be applied to *Authors Guild v. Google* in the next section.

B. *Fair Use Applied to Authors Guild v. Google*

The Supreme Court has not decided a fair use case since the *Campbell* decision in 1994.<sup>67</sup> Given the Supreme Court’s denial of certiorari, this case illustrates the need to resolve ongoing conflict in determining how to weigh the first factor emphasizing the transformative use against the fourth factor that focuses on market effects. In theory, these two factors should be two sides of the same coin because a highly transformative use should not cause market harm.<sup>68</sup> This accounts for why *Cariou* and *Kientz* came out the same way. However, emphasizing different factors can potentially cause the same facts to yield a different result, as may very well be the case in *Authors Guild v. Google*. Because a goal of copyright law is to ensure the free flow of information to the public, this case was ultimately determined correctly on the grounds of fair use. Thus, the correct application of this defense makes it even more important to realize the shortcomings of fair use and the injustice faced by the Authors Guild.

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<sup>66</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

<sup>67</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). *Campbell* is a case involving Acuff-Rose Music (Plaintiff) suing members of a rap music group, 2 Live Crew, and their record company for producing the rap song, “Pretty Woman” that parodied Plaintiff’s rock-ballad “Oh, Pretty Woman.” Although Authors Guild does not deal with parodies, *Campbell* is still a valuable reference in interpreting the application of fair use, as the most recent Supreme Court case on fair use. *Id.*

<sup>68</sup> *Id.* at 591.

1. *Transformative Use: The Purpose and Character of the Use*

The first statutory factor, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,”<sup>69</sup> is especially important in the circuit split. The Supreme Court in *Campbell* determined whether the use is transformative, considering whether the use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>70</sup> In determining whether the use is transformative, the “commercial or nonprofit character” of the use is also considered but is not conclusive.<sup>71</sup> Commercialism is considered to prevent a presumptively “unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”<sup>72</sup>

The Second Circuit heavily weighs this first factor because it “communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge.”<sup>73</sup> Google has argued that it satisfied transformative use because copying the texts provides the public with information that was otherwise unavailable.<sup>74</sup> The Second Circuit ultimately found transformative use because “the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn.”<sup>75</sup>

Additionally, the Authors Guild asserted that the immense financial benefits demonstrate commercial use, a consideration used

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<sup>69</sup> 17 U.S.C § 107 (2012).

<sup>70</sup> *Campbell*, 510 U.S. at 579.

<sup>71</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–49 (1984) (involving fair use in the context of personal use, involving defendants who manufactured and sold home video tape recorders). In this case, the Supreme Court stated that if the technology was being used “to make copies for a commercial or profit-making purpose, such use would presumptively be unfair.” *Id.* at 449.

<sup>72</sup> *Id.* at 451.

<sup>73</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208 (2d Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3357 (U.S. Dec. 31, 2015) (No. 15-849).

<sup>74</sup> *Id.* at 215.

<sup>75</sup> *Id.* at 217.

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to weigh against a finding of transformative use.<sup>76</sup> However, the Second Circuit dismissed this argument because “the more transformative the secondary work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>77</sup> Furthermore, commercial use must not be given presumptive weight because it would “swallow” uses that are considered otherwise classic examples of fair use, such as news reporting, in which selling newspapers for profit does not overcome the new industry’s ability to claim fair use.<sup>78</sup>

This first factor is important in the fair use analysis because it focuses on the public interest. Here, the use is considered “transformed” because it is now accessible to the public to search in a new way. This is a broad interpretation of transformation since the inherent nature and value of the books are not being changed, but rather, the format is simply being enhanced. However, since the public benefit from access to more texts is so great, and because Google has no direct commercial gains from this project, it was reasonable for the Second Circuit to weigh this factor strongly in favor of fair use in light of the ultimate goals of copyright law.

## 2. *The Nature of the Copyrighted Work*

Although the Second Circuit chose not to weigh this factor heavily,<sup>79</sup> it ultimately would not have affected the outcome in this case because the majority of the works were nonfictional. This factor asks whether the work is a creative work, which receives more protection, or if it is more informational and functional in nature,

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<sup>76</sup> Reply Brief for Plaintiffs-Appellants at 5, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (No. 12-4829), 2012 WL 5817270.

<sup>77</sup> *Authors Guild*, 804 F.3d at 219 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)).

<sup>78</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994). “If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities ‘are generally conducted for profit in this country.’ *Id.* (internal quotations omitted).

<sup>79</sup> See *Authors Guild*, 804 F.3d at 220.

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which will receive less protection.<sup>80</sup> Creative works receive greater protection because they are the “core” of what copyright law is designed to protect.<sup>81</sup>

The court found that the specific works of the three plaintiffs in this case were factual, non-creative pieces,<sup>82</sup> even though the plaintiffs hoped to represent all of the authors whose books have been digitized, which included the “hundreds of thousands, if not millions, of works of fiction.”<sup>83</sup> Nevertheless, plaintiffs argued that the nonfiction authors may face even greater economic harm because those “works are often consulted in searches for relatively narrow types of information that can be found readily by reviewing small portions of a work without ever accessing the full text.”<sup>84</sup> Because the court gave little weight to this factor, it noted that the outcome would be the same even if the plaintiffs’ works were fiction.<sup>85</sup>

Even if the court gave more weight to this factor, it would not have helped the Authors Guild win this case. The majority of the works that Google scanned without permission are nonfictional. However, the plaintiffs claimed that “hundreds of thousands, if not millions”<sup>86</sup> of fictional works were infringed as well. However, factor two and factor one are similar in that the rules appear to be closely intertwined with allowing uses that most greatly benefit the public interest. The public should be able to gain access to factual materials to increase people’s ability to learn and build upon ideas in such a process that fosters innovation. Although these non-fictional works may have been infringed, the court should not disregard the factor test as it is traditionally applied. However, in applying the fair use test, fictional and non-fictional works were

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<sup>80</sup> ROBERT E. TRAGER, ET AL., *THE LAW OF JOURNALISM AND MASS COMMUNICATION*, 606 (Matthew Byrnie et al. eds., 4th ed. 2013).

<sup>81</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

<sup>82</sup> *Authors Guild*, 804 F.3d at 220.

<sup>83</sup> Reply Brief for Plaintiffs-Appellants at 6–7, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (No. 12-4829), 2014 WL 3795603.

<sup>84</sup> *Id.* at 7.

<sup>85</sup> *Authors Guild*, 804 F.3d at 220.

<sup>86</sup> Reply Brief for Plaintiffs-Appellants at 6, *Authors Guild*, 804 F.3d 202 (No. 12-4829), 2014 WL 3795603.

unfairly grouped together and this result poses serious harm to the creative community. Therefore, this Recent Development argues if the legislature adopted a compulsory licensing scheme, the law would be more flexible to accommodate fees arranged based on a tiered system or an algorithm accounting for the type of work to correct this injustice.

3. *The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*

In analyzing the third factor, the statute directs courts to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>87</sup> If the portion of the text used is small or unimportant, the court is more likely to decide this constitutes fair use than if large or vital parts of the text were used.<sup>88</sup>

Here, the decision came down to numbers. The plaintiffs asserted that “[u]nder Google’s scheme, a full 78% of any given work is susceptible to display.”<sup>89</sup> However, Google convinced the court that only 16% is actually revealed when a person conducts a search.<sup>90</sup> The court reasoned that although 78% is “*theoretically* accessible,” it is not in fact accessible because of other restrictions built into the program.<sup>91</sup> The court also noted that the manner in which the content is revealed is just as important as the quantity. Here, the court found that Google’s search reveals content in a “fragmentary and scattered nature,” but if the search revealed content coherently, the court’s question and decision would have changed. Consequently, the court ruled in Google’s favor for this factor because consumers are unable to experience the true value of the book through the disjointed and fragmented nature provided through the snippet function.<sup>92</sup>

The court noted that, “[e]ven if the search function revealed 100% of the words of the copyrighted book, this would be of little

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<sup>87</sup> 17 U.S.C § 107 (2012).

<sup>88</sup> *Authors Guild*, 804 F.3d. at 221.

<sup>89</sup> Reply Brief for Plaintiffs-Appellants at 19, *Authors Guild*, 804 F.3d 202 (No. 12-4829), 2014 WL 3795603.

<sup>90</sup> *Authors Guild*, 804 F.3d at 223.

<sup>91</sup> *Id.* at 222 (emphasis in original).

<sup>92</sup> *Id.* at 223.

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substitutive value if the words were revealed in alphabetical order, or any order other than the order they follow in the original book.”<sup>93</sup> Thus, the court clearly saw more value in order and coherence rather than the quantity of the work. This further suggests that even if the court adopted the plaintiffs’ 78% number, the court still would have weighed this factor in favor of Google on the basis on coherence.

However, this ruling has concerning consequences. If a person had access to the complete, but scrambled text, that person could still put words and phrases together like pieces of a puzzle. In this sense, the third factor is deeply connected the fourth factor. If one is given enough time to piece the text together, the snippet function could serve as a market substitute for the original copy of the text. The Seventh Circuit in *Kientz* placed great importance on factor three after discussing factor four, as these two factors are sometimes inextricably connected. If the Seventh Circuit had decided this factor, the result likely could have come out the other way.

4. *The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work*

The fourth and final factor of the statute, “the effect of use upon the potential market for or value of the copyrighted work,”<sup>94</sup> considers “not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.”<sup>95</sup> Thus, in the proper application of fair use, none of the allowed uses would “materially impair the marketability” of the original work.<sup>96</sup> In *Sony*, the Supreme Court stressed that it need be only *potential* harm because it is speculative that actual proof is possible to obtain, but also that there is a serious danger in “confining the scope of an author’s rights on the basis of

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<sup>93</sup> *Id.*

<sup>94</sup> 17 U.S.C § 107 (2012).

<sup>95</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (internal citations omitted).

<sup>96</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566–67 (1985).

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the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.”<sup>97</sup>

In *Authors Guild v. Google*, the Second Circuit specifically asked whether the copy serves as “a competing substitute for the original” which can “deprive the rightsholder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.”<sup>98</sup> The Authors Guild argued that consumers do not always intend to read books cover-to-cover, and, particularly for non-fiction works, just as often consult books for only a specific piece of information.<sup>99</sup> Thus, the “heart”<sup>100</sup> of a book should not be found by an objective standard, but rather subjectively “by the very information sought by the user.”<sup>101</sup> Nonetheless, the court held that Google’s snippet-search function is not sufficient to serve as a substitute for consumer’s need for the book that is being searched.<sup>102</sup>

Despite this holding, the court recognized “that the snippet function can cause *some* loss of sales,” but was not convinced that there was a meaningful or significant effect “upon the potential market for or value of the copyrighted work.”<sup>103</sup> Furthermore, the court reasoned the snippet function provides a “cumbersome, disjointed, and incomplete nature” of the book that will rarely satisfy “searcher’s interest *in the protected aspect* of the author’s work.”<sup>104</sup> However, the plaintiffs asserted, and the court did not address, that loss should also be viewed on a macro-scale, because there was strong “competitive landscape and immense commercial value” for

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<sup>97</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 482 (1984) (internal citations omitted).

<sup>98</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208 (2d Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3357 (U.S. Dec. 31, 2015) (No. 15-849).

<sup>99</sup> Reply Brief for Plaintiffs-Appellants at 16–17, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (No. 12-4829), 2014 WL 3795603.

<sup>100</sup> *Harper & Row Publishers, Inc.*, 471 U.S. at 565 (1985). The “heart” of a text are the text’s “most powerful passages” in all of its chapters, that “carry the definitive quality of the original,” and “qualitatively embodied . . . [the author’s] distinctive expression.” *Id.* (internal citations omitted).

<sup>101</sup> *Id.* at 22.

<sup>102</sup> *Authors Guild*, 804 F.3d at 223.

<sup>103</sup> *Id.* at 224 (citing 17 U.S.C. § 107(4) (2012)).

<sup>104</sup> *Id.* at 224–25.

an online database of copyright-protected books.<sup>105</sup> As a result of this decision, others who would have potentially licensed and paid for the right to use a copyrighted work can now proceed to do so without a license, “forever precluding authors from realizing a new revenue stream while further entrenching Google’s monopoly.”<sup>106</sup> Although this factor may weigh slightly in Google’s favor based on lack of evidence, the plaintiffs’ argument is fairly compelling.

While the Second Circuit did not address the plaintiffs’ macro-scale argument, the Seventh Circuit may have analyzed it and considered it with great importance. As the Seventh Circuit stated, “[w]e think it best to stick with the statutory list, of which the most important usually is the fourth (market effect).”<sup>107</sup> Thus, under the Seventh Circuit precedent, a reviewing court would have taken a deeper look at the economic effects on the copyrighted authors and if the court found significant market harm, the court might have held against fair use. This is especially true if the court viewed the first factor through the lens of the fourth factor. Since transformative uses theoretically do not generate considerable market harm, a finding of such harm would weigh against the notion that the use is transformative in the first place. Therefore, although the Seventh Circuit in *Kienitz* found for fair use, it may have found this argument persuasive enough to rule in favor of the Authors Guild.

##### 5. *Over-Arching Concerns in the Application of Fair Use*

Overall, the Second Circuit got it right. In resolving the tension between the first and fourth factor in this case, the benefit to the public clearly outweighs countervailing concerns. However, one is left with a lingering sense of injustice for the Authors Guild. The writers are forced to take on the economic burden of serving the public interest, even though they are not necessarily in the best place to do so. The burden for the public good is placed on “the little guy.” This, in turn, limits their resources and ability to produce even more

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<sup>105</sup> See Brief for Appellants at 12, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) No. 12-4829, <https://www.authorsguild.org/wp-content/uploads/2014/10/2014-Jul-24-AGvGoogle-AG-Reply-Brief.pdf>.

<sup>106</sup> *Id.* at 13.

<sup>107</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

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creative and scholarly works in the future, which undermines the ultimate goal of copyright law.<sup>108</sup>

Some might question the soundness of the four-factor fair use analysis, which has been deemed the “most trouble-some in the whole law of copyright”<sup>109</sup> because courts seem to apply the doctrine on a case-by-case basis.<sup>110</sup> Here, the Second Circuit based its decision on the notion that fair use was designed to serve the public good, and that Google’s service serves the public good by providing digitized information that greatly aids research and the flow of information. However, notable counterarguments include the significant economic impact on the creative community and the long-term harm that results from granting Google a “de facto monopoly.”<sup>111</sup>

As a result, the court was forced to pick between two evils—preventing public access to information now or preventing access in the future. Ruling against the Authors Guild posed a real harm to many in the writing industry, which may nonetheless harm the public in the future. Conversely, ruling against Google would have imposed an immediate harm to the public’s ability to access information and further society’s pursuit of knowledge. Fair use acts as an “on/off” switch, which forces one party to be a winner and the other party to be a loser. However, as fair use is applied to benefit the public, sometimes the burden on the losing party is simply too great. Therefore, a different legal avenue ought to be pursued.

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<sup>108</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208 (2d Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3357 (U.S. Dec. 31, 2015) (No. 15-849) (“The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption . . . . Thus, while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.”).

<sup>109</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)).

<sup>110</sup> *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>111</sup> *Where We Stand*, THE AUTHORS GUILD (Last Visited Jan. 29, 2016) (citing Judge Denny Chin). <https://www.authorsguild.org/where-we-stand/authors-guild-v-google/>.

#### IV. AN ALTERNATE SOLUTION: COMPULSORY LICENSING

Two fundamental concepts underlying copyright law are incentivizing people to produce creative works<sup>112</sup> and promoting the public's access to creative works.<sup>113</sup> The *Authors Guild v. Google* verdict falls short on both accounts. Financial harm to the authors is clearly asserted by the Authors Guild in the form of lost future revenues that would have resulted from future licenses. The harm to the public is more obscure. On the surface, there seems to be a strong benefit to the public because people can now access a greater wealth of information online for free. However, this law also helps Google maintain a monopoly on digitized content, and a lack of competition between companies can often adversely affect the public. As fair use provides an imperfect solution, this Recent Development strives to set forth a more effective solution that does not necessarily harm the Authors Guild.

One solution existing in intellectual property law, originating in patent law, but that has also been adopted by copyright law,<sup>114</sup> is compulsory licensing. A compulsory license, sometimes referred to as a statutory license, is a remedy that allows access to copyrighted works or other intellectual property without permission of or against the wishes of the intellectual property right holder.<sup>115</sup> Specifically pertaining to copyrights, a compulsory license is an unwritten contract that allows a user immediate access to copyrighted works without first obtaining permission from the copyright owner. The user then retroactively pays a fee to the copyright holder.<sup>116</sup> In this scheme, the license must be granted to the class of users if they

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<sup>112</sup> “The purpose of copyright is to create incentives for creative effort.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984).

<sup>113</sup> The monopoly created by copyright thus rewards the individual author in order to benefit the public. *Id.* at 477.

<sup>114</sup> Carlos M. Correa, *Intellectual Property Rights and the Use of Compulsory Licenses: Options for Developing Countries*, TRADE-RELATED AGENDA, DEVELOPMENT AND EQUITY WORKING PAPERS 3 (1999), [http://www.iatp.org/files/Intellectual\\_Property\\_Rights\\_and\\_the\\_Use\\_of\\_Co.pdf](http://www.iatp.org/files/Intellectual_Property_Rights_and_the_Use_of_Co.pdf).

<sup>115</sup> Jarrod Tudor, *Compulsory Licensing in the European Union*, 4 GEO. MASON J. INT'L COM. L. 222 (2013).

<sup>116</sup> Yafit Lev-Aretz, *The Subtle Incentive Theory of Copyright Licensing*, 80 BROOK. L. REV. 1357, 1376 (2015).

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satisfy certain statutory requirements, and depending on the statute, the price mechanism is set in advance, as determined by Congress.<sup>117</sup>

The demand for an efficient licensing systems has been “steadily present in copyright reality” between different creative markets.<sup>118</sup> Consumers recognize the indirect harm through the lack of licensing options that prevents access to various works of authorship that a licensing system could otherwise allow for, and the resultant proliferation of piracy.<sup>119</sup> Content consumption has many benefits, allowing consumers to be exposed to greater social, cultural, and educational concepts as well as encouraging authors to create new content by drawing inspiration from pre-existing works. Particularly, compulsory licensing has previously been adopted in response to the emergence of new technology<sup>120</sup> in order to promote efficiency and transfers, and access to work that would not otherwise be available under the pre-existing copyright scheme.<sup>121</sup>

The major benefits of a compulsory license are efficiency and certainty.<sup>122</sup> Compulsory licensing promotes efficiency in two ways: (1) pre-determined contractual stipulations that eliminate negotiation costs, and (2) built-in administrative support that “allows parties to economize on recordkeeping, royalty distribution,

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<sup>117</sup> *Id.*

<sup>118</sup> Such demand is present because there is currently a lack of licensing alternatives available in copyright law and this deficiency has generated a variety of concerns. *Id.*

<sup>119</sup> *See id.* at 1373.

<sup>120</sup> *Id.* at 1376.

<sup>121</sup> *Id.* at 1378. “The rise of digital technology rendered existing licensing models unfit for the mass of creative users wishing to employ copyrighted materials, and thus, intervening in the market failure through compulsory licensing mechanisms seems adequate. By removing the difficulties involved in identifying and locating rightholders, bargaining over licensing fees, and transferring assets, compulsory licenses lessen transaction costs and allow many transfers that would not otherwise occur.” *Id.*

<sup>122</sup> *Id.* at 1376–77. Furthermore, compulsory licensing has the ability to enhance “speech diversity” because it allows for people to use works in a way they would otherwise fear constitute infringement. *Id.* at 1374. In particular, “[w]hen a compulsory licensing model is prescribed, Congress acknowledges that, for a specific use of a protected work, the conventional copyright allocation does not appropriately effectuate copyright social utility objectives.” *Id.* at 1376.

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and payment charging.”<sup>123</sup> The rightsholder will likely benefit through sales and revenue. Although the rightsholder “might receive less compensation *per use*,” the rightsholder could nevertheless be much better off financially because of the total revenue generated from an increased number of license transfers.<sup>124</sup> From a policy perspective, compulsory licenses are desirable because they communicate the message that a “copyright has its price”<sup>125</sup> and users are required to pay when accessing work that was generated by others.

However, there are also legitimate concerns when contemplating compulsory licenses. While compulsory licensing offers certainty and efficiency, fair use offers flexibility. There is a concern that copyright owners may be forced by statute to act against their wishes in cases where they otherwise would have an exclusive right to decide how to release their works.<sup>126</sup> Others raise concerns that compulsory licensing’s “flat rate pricing schemes fail to differentiate between derivative uses varying in quantitative size and qualitative importance,”<sup>127</sup> that the costs involved in maintaining an accurate tracking system could also prove expensive, and that if the tracking system fails, rightholders may end up underpaid.<sup>128</sup>

Nevertheless, proponents of compulsory licensing find that it is successful in the intellectual property field,<sup>129</sup> and see it as a tool to mitigate the impact of exclusive rights and thus facilitate the public’s ability to access information and creative works.<sup>130</sup> Therefore, compulsory licensing can offer many benefits in digitized books, by allowing the authors the certainty that they will

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<sup>123</sup> *Id.* at 1376–77.

<sup>124</sup> *Id.* at 1378.

<sup>125</sup> *Id.* at 1379.

<sup>126</sup> *Id.* (A salient disadvantage to compulsory licensing is that “the government expropriates property rights without cause and interferes unduly with market mechanisms.”).

<sup>127</sup> *Id.* at 1380. “The flat rate associated with compulsory licensing models also negates rightholders’ ability to participate in price discrimination—a practice that may augment social welfare by adding to the owner’s income and by allowing more people to engage in the market of creation.” *Id.*

<sup>128</sup> *Id.* at 1381.

<sup>129</sup> *Id.* at 1376.

<sup>130</sup> See Correa, *supra* note 115, at 2.

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be able to obtain royalties for their work, while still allowing for an efficient system and means for Google to create a digitized library to supplement their search engine. Thus, a compulsory license allows the public to search the copyrighted materials while still satisfying the basic needs of both parties. This Recent Development will first examine existing international and American laws, and then suggest how compulsory licensing can be specifically implemented in the case of *Authors Guild v. Google* to reform copyright law in the field of digitalized books.

A. *International Compulsory Licensing and the Berne Convention*

International analysis of copyright law and compulsory licensing is noteworthy because American copyright law does not exist completely independently from other countries. International copyright law is connected to other countries through multilateral agreements like the Berne Convention.<sup>131</sup> There are two articles in which the Berne Convention explicitly allows compulsory licensing: Broadcasting and Related Right<sup>132</sup> and Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto.<sup>133</sup> However, the Berne Convention specifically prohibits Compulsory Licensing for Cinematographic and Related Rights.<sup>134</sup>

The Berne Convention refers to compulsory licensing for Broadcasting and Related Rights in its language: “It shall be a matter

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<sup>131</sup> JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 564 (Erwin Chemerinsky et. al. eds. 4<sup>th</sup> ed. 2015) (citing *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)). The United States is a signatory to the Berne Convention. The purpose of joining the Berne Convention is “to ensure protection of its citizens’ creative works outside its own boundaries.” And thus, “[a]dherence to the Berne Convention will ensure strong, credible U.S. presence in the global marketplace and is also necessary to ensure effective U.S. participation in the formulation and management of international copyright policy.” *Id.* (quotations omitted).

<sup>132</sup> Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, 828 U.N.T.S. 221, S. Treaty Doc. No. 99-27, 99th Cong. (1986) (revised at Paris, July 24, 1979) art. 11 [hereinafter *Berne Conv.*].

<sup>133</sup> *Id.* at art. 13.

<sup>134</sup> *Id.* at art. 14.

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for legislation in the countries of the Union to determine the *conditions*,<sup>135</sup> where the term “conditions” references compulsory licensing.<sup>136</sup> It provides an analogous statement for the Right of Recording and Musical Works.<sup>137</sup> If a nation decides to implement a compulsory license, this language allows the nation to do so as long as it follows specific conditions.

When the agreement was last amended in 1979, the drafters contemplated appropriate language for extant mediums, such as for broadcasting and musical works.<sup>138</sup> The rules for compulsory licenses for broadcasting were set forth as many governments demonstrated an interest in the medium “because of its powerful informatory, educational and entertainment role.”<sup>139</sup> On the other hand, the language for musical works was inserted as a “pragmatic compromise that was already emerging at the national level between musical copyright owners (mainly publishers) and the newly emerging recording industry.”<sup>140</sup>

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<sup>135</sup> *Id.* at art. 2. “It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.” *Id.*

<sup>136</sup> Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, 31 (WIPO) (April 5, 2003) (hereinafter Ricketson, *WIPO Study*) (“The reference to ‘conditions’ in Article 11bis(2) is usually taken to refer to the imposition of compulsory licenses, but the form of these licenses is left to national legislation to determine.”).

<sup>137</sup> Berne Conv., *supra* note 133, art. 13 “Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.” *Id.*

<sup>138</sup> Berne Conv., *supra* note 133, art. 11, 13.

<sup>139</sup> Ricketson, *WIPO Study*, *supra* note 137, at 30.

<sup>140</sup> *Id.* at 29.

The Berne Convention took place long before the development of the Google Library Project. Although it is impossible to know precisely what the drafters would think about digitized books, and the drafters did not discuss licensing of books in the main body of their text, they did discuss the potential for developing country book translation licensing in the Appendix of the Berne Convention.<sup>141</sup> It provided that developing countries might choose to implement licensing systems for “printed or analogous forms of reproduction.”<sup>142</sup> For developing countries, the Berne Convention wanted to implement a licensing scheme for written works as it was “principally concerned with such things as encyclopedias and anthologies, schoolbooks, manuals on physics, chemistry, engineering, space-exploration, etc., and not the latest song hit or the new London or Paris stage success.”<sup>143</sup> Thus, although there is no specific licensing provision for written works as there is with music and broadcasting, the drafters of the Berne Convention would have allowed for flexible treatment for applying compulsory licensing to books. However, the drafters believed that compulsory licenses should be constructed in a way that was fair and just.<sup>144</sup> Thus, in the spirit of the Berne Convention, it appears that although compulsory licensing is certainly not the go-to for copyright

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<sup>141</sup> Berne Conv., *supra* note 133, Appendix art. 2.

<sup>142</sup> *Id.*

<sup>143</sup> World Intellectual Property Organization, *Guide to the Berne Convention for the Protection of Literary and Artistic Works*, Publication no. 615(E), WIPO 153 (1978).

<sup>144</sup> The language of “equitable remuneration” and determining what would have been paid if there are no compulsory licenses in place can be seen as the drafters ensuring that any compulsory licenses adopted by countries should be fair and just. See Ricketson, *WIPO Study*, *supra* note 137 at 30. (“If a country imposes reservations and conditions under Article 13(1), these must not be ‘prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by the competent authority.’ As noted above, this is normally taken to mean that the conditions and reservations which are imposed will take the form of compulsory licenses. Its effect is certainly to exclude provisions which enable the free recording of works, or to permit this for less than an equitable remuneration . . . the role of the competent authority is crucial, as it will have to make a notional judgment as to what amount would have been negotiated in the absence of a compulsory license.”(citing Berne Convention)).

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legislation, it is acceptable to address specific problems that arise if drafted thoughtfully.

As the Berne Convention is an international agreement, it is not indicative of country-specific compulsory licensing law. European courts have applied compulsory copyright licensing laws as seen for example in the *Magill*<sup>145</sup> case. Decided in the European Court of Justice,<sup>146</sup> *Magill* involved local television stations in Ireland that refused to license their program guides to Magill Company,<sup>147</sup> which sought to publish a comprehensive television guide.<sup>148</sup> The stations asserted their copyright protections, but the European Court of Justice upheld a compulsory copyright license that forced the stations to hand over their materials to Magill.<sup>149</sup> In the analysis, the court found that the local television stations had a factual monopoly over the production and publication of their weekly listings because the “listings are a by-product of the programme scheduling process, carried out and known only to the programme planners themselves.”<sup>150</sup> The court further acknowledged that “the listings only become marketable products when the schedules themselves

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<sup>145</sup> Commission Decision 89/205/EEC of 21 December 1988, Case IV/31.851, *Magill TV Guide/ITP, BBC and RTE*, 1989 O.J. (L78) 43, 44, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989D0205&qid=1454970750223&from=EN> [hereinafter *Magill Commission Decision*]; see Joined Cases C-241/91 P & C-242/91 P, *Radio Telefis Eireann, Indep. Television Publ'ns Ltd v. Comm'n*, 1995 E.C.R. I-743, 4 C.M.L.R. 718 (1995), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61991CJ0241&from=EN>.

<sup>146</sup> The European Court of Justice is comprised of one judge from each EU country and eleven advocates general. *Court of Justice of the European Union*, EUROPEAN UNION (last visited Mar. 4, 2016), [http://eurpa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://eurpa.eu/about-eu/institutions-bodies/court-justice/index_en.htm).

<sup>147</sup> “*Magill TV Guide Ltd*, Dublin, was established in order to publish in Ireland and Northern Ireland a weekly magazine containing information on forthcoming television programmes available to television viewers in the area.” *Magill Commission Decision*, *supra* note 146 at 44.

<sup>148</sup> *Id.* at 44.

<sup>149</sup> “Accordingly the only remedy possible in the present case is to require ITP, BBC and RTE to supply each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and to permit reproduction of those listings by such parties.” *Id.* at 50.

<sup>150</sup> *Id.* at 48.

are finalised (subject to last minute changes), a short time before transmission.”<sup>151</sup> It is impossible for third parties to produce reliable listings without first obtaining the listings from the corresponding broadcasting organizations or the rights owners of the listing.<sup>152</sup> As a result, third parties are economically dependent on the broadcasting organizations and rightsholders, who are in the dominant position.<sup>153</sup> The court reasoned “that an abuse is committed if an undertaking in a dominant position limits production or markets to the prejudice of consumers.”<sup>154</sup> Here, the television stations committed abuse by limiting the scope of their licensing policies, which prevented production and sale of TV guides, which had an ultimate effect of restricting competition and prejudicing consumers.<sup>155</sup>

Through this reasoning, the court mingles copyright and compulsory licensing with concepts of antitrust and fair competition.<sup>156</sup> In *Authors Guild*, similar concerns have been raised that Google may have a de facto monopoly with its search engine’s ability to provide the snippet-function as a result of the decision. What can be gleaned from international and European laws is that copyright law should not be considered in a vacuum and that compulsory licensing can be an appropriate remedy when there are antitrust concerns resulting from copyright holder’s right to exclusive use. In the international sphere, the Berne Convention permits the use of compulsory licenses and other countries have embraced the notion to solve certain problems. Compulsory licensing has worked in other countries and the legal concept is accepted internationally as a useful remedy for certain copyright

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 49.

<sup>155</sup> *Id.*

<sup>156</sup> Antitrust and fair competition largely fall outside the scope of this paper, however, there are US cases that deal with these issues. *See* *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (“Mandatory selling on specified terms and compulsory patent licensing at reasonable charges are recognized antitrust remedies.”); *United States v. Besser Mfg. Co.*, 343 U.S. 444, 447 (1952); *United States v. General Electric Co.*, 115 F. Supp. 835, 843-46 (D.N.J. 1953).

issues. Though *Magill* is certainly not binding on the United States, it is a helpful illustration and provides a broader perspective when looking at American compulsory licensing law.

B. *American Law: Example of Compulsory Licensing under Section 115*<sup>157</sup>

Like European law, compulsory licensing is not a foreign concept in American law. Compulsory licensing in the United States dates back to the era of phonograph record players when musicians sold more than sheet music.<sup>158</sup> When phonographs were novel, and thus not paying royalties, Congress amended the statute for copyright owners to control “mechanical reproduction” of their works.<sup>159</sup> However, Congress was suspicious of the market power of the Aeolian Company,<sup>160</sup> which produced piano rolls, and thus enacted a compulsory licensing scheme for the first time.

Codified under 17 U.S.C. § 115 for nondramatic musical works, making and distributing phonorecords is subject to compulsory licensing.<sup>161</sup> The statute defines phonorecords as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed.”<sup>162</sup> Simply put, § 115 allows a person to distribute a new sound recording of a musical work, if that has been previously distributed to the public, by or under the

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<sup>157</sup> See 17 U.S.C. §§ 115, 118, 111(c), 114(d) (2012). Instances where compulsory licensing included non-dramatic musical compositions, public broadcasting, retransmission by cable systems, subscription digital audio transmission, and non-subscription digital audio transmission such as Internet Radio. *Id.*

<sup>158</sup> COHEN ET AL., *supra* note 132, at 413.

<sup>159</sup> *Id.*

<sup>160</sup> “The Aeolian Corporation was one of the largest and most successful piano companies in American History. Established in 1903, Aeolian originally built its empire on the new-found popularity of the player piano. Aeolian went on to be a leading builder of all types of pianos and organs in America and Europe, and most of their pianos during this time were of excellent quality.” *Aeolian*, ANTIQUE PIANO SHOP (last visited Mar. 4, 2016), <http://antiquepianoshop.com/online-museum/aeolian/>; *Aeolian Halls – A History of Concerts Inspired by the Pianola*, PIANOLA INSTITUTE (last visited Mar. 4, 2016) <http://www.pianola.org/factsheets/aeolianhalls.cfm>.

<sup>161</sup> 17 U.S.C. § 115 (2012).

<sup>162</sup> *Id.* § 101.

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authority of the copyright owner.<sup>163</sup> Thus, this allows artists to record “covers” of musical works created by other artists.<sup>164</sup> The new recording need not be identical to the previous work, as the compulsory license includes the privilege of rearranging the work to conform it to the recording artist’s interpretation.<sup>165</sup> For example, in recording a cover of a song, the recording artist might chose to make stylistic alterations or change a word. Congress enacted § 115 because by 1995 it had recognized that “digital transmission of sound recordings was likely to become a very important outlet for the performance of recorded music” and that “these new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners.”<sup>166</sup>

Furthermore, there remains some flexibility in the law as the compulsory license not mandatory but allows any creator and distributor of phonorecords to negotiate directly with the copyright holder.<sup>167</sup> In the event the copyright owner cannot be reached, the recording artist can use the compulsory licensing provisions.<sup>168</sup> However, if the recording artist does not pay the compulsory license to the copyright holder, then the recording artist has committed infringement. Despite these statutory provisions, the compulsory license is not the means by which creators typically obtain permission for musical works.<sup>169</sup> Instead, it is more common for a creator to contract for a song through the Harry Fox Agency<sup>170</sup> in

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<sup>163</sup> See *id.* § 115.

<sup>164</sup> COHEN ET AL., *supra* note 132, at 413.

<sup>165</sup> *Compulsory License for Making and Distributing Phonorecords*, COPYRIGHT OFFICE 2, <http://copyright.gov/circs/circ73.pdf>.

<sup>166</sup> Marybeth Peters, *Section 115 Compulsory License*, COPYRIGHT OFFICE (Mar. 11, 2004) <http://www.copyright.gov/docs/regstat031104.html>.

<sup>167</sup> *Compulsory License for Making and Distributing Phonorecords*, *supra* note 165.

<sup>168</sup> *Id.*

<sup>169</sup> COHEN ET AL., *supra* note 132, at 414.

<sup>170</sup> *What does HFA do?* HFA (last visited Mar. 4, 2016), [https://www.harryfox.com/publishers/what\\_does\\_hfa\\_do.html](https://www.harryfox.com/publishers/what_does_hfa_do.html). The Harry Fox Agency (HFA) “is the leading provider of rights management, licensing, and royalty services for the U.S. music industry and was established in 1927 by the National Music Publishers’ Association (NMPA) as an agency to license, collect,

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New York City through a music publisher or use of Songtrust.<sup>171</sup> The statutory compulsory license does not affect the rates paid by the recording artist, but it is rare that the agreed license rate would exceed a rate that would otherwise be set by the Copyright Royalty Judges.<sup>172</sup>

As seen through phonorecords, compulsory licensing has already been successfully adopted in America. The concepts and structure from this existing scheme provides a foundation that can be built upon and applied to a different creative medium under copyright law: electronic books.

### V. APPLYING COMPULSORY LICENSES TO BOOKS

In what has been coined as the Google Book Search (“GBS”) settlement, Google and the Authors Guild independently created a scheme that resembles compulsory licensing.<sup>173</sup> In fact, if the district court had approved the GBS settlement, it would have been “tantamount to legislative reform”<sup>174</sup> because “Google was planning to make no effort to get actual consent from class members, who instead would have been deemed to have consented by virtue of their membership in a class whose counsel negotiated the settlement, supposedly on their behalf.”<sup>175</sup> Thus, compulsory licensing is especially fitting for this medium because it is a solution to which both parties have already agreed.

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and distribute royalties on behalf of musical copyright owners. HFA issues mechanical licenses for products manufactured and distributed in the U.S. A mechanical license grants the rights to reproduce and distribute copyrighted musical compositions (songs) for use on CDs, records, tapes, ringtones, permanent digital downloads, interactive streams and other digital formats supporting various business models, including locker-based music services and bundled music offerings.” *Id.*

<sup>171</sup> COHEN ET AL., *supra* note 132, at 414 (“Songwriters who have not contracted with a music publisher may utilize Songtrust, an entity that has arrangement with Harry Fox as well.”).

<sup>172</sup> *Id.*

<sup>173</sup> Pamela Samuelson, *The Google Book Settlement As Copyright Reform*, 2011 WIS. L. REV. 479, 482–83 (2011) (“It would, in effect, give Google a compulsory license to commercialize millions of out-of-print books[.]”).

<sup>174</sup> *Id.* at 515.

<sup>175</sup> *Id.*

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The current system of fair use may seem to offer flexibility by allowing courts to grapple with the fact-specific issues of each case. However, fair use functions as an “on/off switch.”<sup>176</sup> In fair use cases, courts can find infringement and hold the defendant liable or find fair use. If court finds infringement, the third party may not be able to use the work at all if they are unable to receive consent from the author. However, if the court finds fair use, the copyright owner does not receive any compensation. Thus, the fair use system is rigid because it only allows for binary outcomes. In contrast, compulsory licensing allows for a middle ground where neither party is severely disadvantaged and the public retains its ability to access all the information.

Compulsory licensing can be created separate from the world of fair use and softens fair use’s hard line by allowing for an alternative. The compulsory license should be narrowly tailored, similar to the law concerning producing and distributing phonorecords that embody a musical work that had been previously distributed to the public.<sup>177</sup> Thus, instead of not being able to reproduce an entire pre-existing song, a recording artist is able to perform that song as long as he pays the appropriate fee. If Congress were to adopt a similar compulsory license provision for phonorecords, it could also draft the statute narrowly tailored to digitized books.

In contemplating how to draft such a provision, the GBS settlement drafted in October 2008 is a valuable resource. In the settlement, Google agreed to pay \$125 million, \$45 million of which would have gone to the rightsholders of copyrighted works that had been infringed and \$34.5 million would have gone to a newly created Book Rights Registry, “an organization that would track down and distribute fees to authors.”<sup>178</sup> Furthermore, Google specified it would pay 63% “of all revenues earned by Google through uses of Books in Google Products and Services,” which

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<sup>176</sup>Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1383 (2014).

<sup>177</sup> See COHEN ET AL., *supra* note 132, at 413.

<sup>178</sup> *Where We Stand*, THE AUTHORS GUILD (Jan. 29, 2016), <https://www.authorsguild.org/where-we-stand/authors-guild-v-google/>.

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would also be distributed by the Registry.<sup>179</sup> In turn, Google would no longer be liable for copyright infringement.<sup>180</sup> The settlement also benefitted the public by including more access to out-of-print books, additional ways to purchase copyrighted books, institutional subscriptions to millions of books online, and free access from American libraries.<sup>181</sup>

Ultimately, the settlement was not approved in a hearing by Judge Chin, who ruled in March 2011 that the settlement was not “fair, reasonable, and adequate” to the class on whose behalf it was negotiated.<sup>182</sup> As the settlement functioned largely as a compulsory license, it was not suitable for a judge to accept as a settlement.<sup>183</sup> However, this settlement is evidence that a compulsory license is a legal avenue both parties are willing to accept.

Specifically, this settlement is proof that it is possible to propose a compulsory licensing scheme that can be beneficial to creators, an online vendor, and the public. If a compulsory license is to be adopted, it should not unduly burden either side and thus not harm either industry. Perhaps most importantly, the compulsory licensing scheme will ensure that the public will still have easy access to information that it will have under the current law where Google is granted fair use.

A compulsory license benefits Google because it provides efficiency. Under this scheme, there is a presumption that Google can copy the work without worrying that an author will be difficult to find or refuse permission. Google would simply have to pay a fee. This is vital because Google was already investing a great deal of money in the project by scanning and indexing books and creating

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<sup>179</sup> Amended Settlement Agreement at 24, *The Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) <https://www.authorsguild.org/wp-content/uploads/2014/10/2009-Nov-13-AGvGoogle-Amended-Settlement-Agreement.pdf>.

<sup>180</sup> *Id.*

<sup>181</sup> Press Release, Authors Guild, Joint PUBLIC FAQ 1, <https://www.authorsguild.org/wp-content/uploads/2008/10/Press-FAQs-10.28.08.pdf>.

<sup>182</sup> Samuelson, *supra* note 174, at 482.

<sup>183</sup> *See* Samuelson, *supra* note 174, at 539 (stating “courts should engage in heightened scrutiny of the certifiability of a settlement class when the settlement would, in effect, achieve legislative outcomes”).

the snippet-feature. The company did not want to undergo the hassle of “seek[ing] advance permission, on a book-by-book basis, for every in-copyright book merely to serve snippets.”<sup>184</sup> In addition to being too time-consuming, Google also believed it would “cost too much to allow an effective market to form.”<sup>185</sup> Thus, if Google had lost the fair use claim, its project may have become impracticable and it would have had to drop the endeavor all together.

A compulsory license also benefits the authors because it provides certainty. The authors receive guaranteed revenue, whereas the current law prohibits an author from obtaining any compensation. In the current scheme, the authors do not collect any compensation because Google is able to use their work for free under fair use. Thus, the compulsory license, at the very least, will ensure that the authors get *some* revenue. In drafting the compulsory license, Congress will need to be sensitive to market forces. There are different revenue systems that can be adopted. Although a flat rate is the simplest, it is not preferable because not all books are of equal value. There are different pricing scheme possibilities such as a tiered system, in which different categories of books receive different amounts of compensation, or, as seen in the Google Books settlement, a special algorithm can be created. As this issue arose with the advancement of technology, Congress should use likewise use technological advancements in resolving the problems inherent in digitized books.

As Google is copying tens of thousands of books, author fees will quickly accumulate. Google claims it is not making any direct profit from the Library Project.<sup>186</sup> Imposing the fee will either require Google to find a way to generate money from this endeavor or force Google to decide to drop the project entirely. However, if Google drops the project, the public will have diminished access to information—a situation that copyright law is designed to avoid.

Google has various options to generate revenue if it has to start paying the authors. Google can start adding advertisements to the

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<sup>184</sup> *Id.* at 562, n. 176.

<sup>185</sup> *Id.*

<sup>186</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208 (2d Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3357 (U.S. Dec. 31, 2015) (No. 15-849).

service or start charging people for the services it provides, such as an annual fee for unlimited access. An alternate method for generating revenue would be for Google to take its snippet function a step further by allowing consumers to buy Google's electronically scanned books, and, correspondingly, have a compulsory licensing scheme that adopts a bookstore model by which authors receive revenue.

*A. Taking it one step further - the Bookstore Model*

If a compulsory licensing method is adopted, it is necessary to visualize how it would work practically in the real world. Since Google is almost acting as a bookstore, the compulsory licensing scheme can mimic the concept of a bookstore. Google currently allows customers to browse books but the customers cannot directly buy these books from Google. This is because Google only has the right granted by fair use to use the snippet function. The snippet function is the online equivalent to walking into a bookstore and reading only parts of a book. This function allows a consumer to get a general feel of the book, and extract some information out of the book for free, without the added value intrinsic in book purchase.

If Google's Library Project functioned like a bookstore, everyone would benefit. To create the snippet function, Google has already scanned and created entire digital copies of every book. A compulsory licensing scheme allows Google to adopt the "high-risk" option that local bookstores use for local authors. Thus, people can read parts of the book for free, and they can buy the book directly from Google that are not otherwise available. In turn, Google will pay a certain percentage of the book, for example the standard 60%, to the author once the book is purchased by a consumer. This should not be a difficult system to implement because Google already has a system where it sells books on Google Play.<sup>187</sup> Combining Google Play with the resources of the Google

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<sup>187</sup> This paper suggests Google can expand on its pre-existing marketplace to sell e-books that it has created that have otherwise not been made available. See Margaret Rouse, *Google Play (Android Market)*, SEARCH MOBILE COMPUTING (Mar. 4, 2016), <http://searchmobilecomputing.techtarget.com/definition/Google-Play-Android-Market> ("Google Play . . . is the official app store for Android

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Library Project should not burden Google. Google will likely adopt this relatively simple solution rather than risk losing all the capital it invested in the Library Project. The public will still be able to access all the online information from books, Google will benefit, and there will be more royalties paid to the authors.

Furthermore, the settlement suggested that Google was planning to use the electronic library of books they created for more than the snippet function. The agreement would allow Google to “display out-of-print books to users and charge licensing fees for copyrighted works. Additionally, the settlement required Google to provide portals in every public library and more than 4,000 colleges and universities in the U.S., allowing widespread access.”<sup>188</sup> Creating a compulsory licensing scheme that treats this technology as an electronic bookstore will promote efficiency and allow for the possibility of these goals to still be fulfilled

This solution is consistent with fair use as Google is still able to provide snippets of the text. However, this proposal allows for authors to profit by including a purchasing method. It benefits the public because kindle and tablet users may have a preference for a digital copy of the text. Perhaps people may need the text immediately and cannot wait for it to ship or the book is not at a nearby bookstore. Certain books, such as orphan works where the rightsholders are indeterminable, may not be available at all. Thus, it is almost wasteful to not to allow the use of the Google Library Project to function as a bookstore where authors can profit. The ultimate goal in *Authors Guild v. Google* was to allow for a greater dissemination of knowledge to the general public. Adopting this scheme will satisfy this goal of copyright law. Millions of works will be accessed in a way that was never previously possible, while allowing for the efficiency and certainty the Google and the Authors Guild need to successfully continue on in their respective industries.

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Smartphones and tablets. Google makes . . . books available for purchase and download through the store.”).

<sup>188</sup> Authors Guild v. Google, THE AUTHORS GUILD (Jan. 29, 2016), <https://www.authorsguild.org/where-we-stand/authors-guild-v-google/>.

## VI. CONCLUSION

*Authors Guild v. Google* encompasses fair use issues but suffers from the limitations of the doctrine. Although compulsory licensing may seem to be a rigid and hands-on approach, it is preferable to fair use that currently functions as an on/off switch and does not adequately address all issues. Under the confines of fair use, the law is not able to adequately adapt to certain novel technologies, such as digitized books. Thus, Congress should consider compulsory licensing, a concept familiar in copyright and intellectual property law. By adopting compulsory licensing, Congress can ensure that the public receives greater access to information online while also ensuring revenue to authors and efficiency for Google.

With the advancement of technology, copyright law cannot stay stagnant. The process of selecting and purchasing books is becoming digitized. If Google and Amazon are to become the next major bookstores, the law should accommodate authors so that they can profit as they have in the past.

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