



No Analog Analogue: Searchable Digital Archives and Amazon's Unprecedented Search Inside the Book Program as Fair Use

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¶1 In October of 2003, online retailer Amazon launched a system for searching and browsing books called “Search Inside the Book.”¹ For the first time, Amazon has given the public the ability to search and view the full text of over 120,000 books, using an index based on an archive that is easily the largest of its kind.² Thus far, this ambitious system has met with mixed reviews, with copyright owners understandably more wary of it than the consuming public.³

¶2 This program is simply the latest in a long line of technological developments that challenge the existing balance between consumers and producers of copyrightable information. Like the Library of Congress or the Great Library of Alexandria before it, Search Inside the Book could serve in the digital age as a central index to all printed information, at long last providing the public access that stands at one end of the copyright bargain. Congress has recently recognized the importance of sheltering such indices, which would not survive without special protection, through favorable legislation and interpretation.⁴ Despite technological shortfalls in its implementation, then, the fair use affirmative defense to copyright infringement should be available to Amazon for Search Inside the Book.

¶3 This paper begins with an overview of Amazon's prior experiments with e-books, the way in which the Search Inside the Book database is created, and how that database manifests itself to the Amazon user. Part II analyzes the Search Inside the Book program under current copyright law and concludes that the program does infringe copyrights in the indexed works. Part III argues that programs like Search Inside the Book, though infringing, actually serve the purposes of copyright law, and should not create liability for the providers of such programs. Finally, part IV applies the fair use doctrine to Search Inside the Book, assuming that the existing copy-protection measures are improved as indicated and ultimately finding this unconventional program protected as fair use.

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¹ Lisa Guernsey, *In Amazon's Text Search, a Field Day for Book Browsers*, N.Y. TIMES, Nov. 6, 2003, at G7.

² Gary Wolf, *The Great Library of Amazonia*, WIRED, Dec. 2003, at 214. Throughout this paper, the term “index” will be used to refer to search engines in general, and the Search Inside the Book engine in particular, whereas the term “archive” will refer to the database of scanned or otherwise gathered material from which the index retrieves results.

³ Compare, e.g., *id.* (arguing that Search Inside the Book offers an unparalleled ability to discover books of interest), with David K. Kirkpatrick, *Amazon Offer Worries Authors*, N.Y. TIMES, Oct. 27, 2003, at C5 (questioning the right of publishers to authorize participation in the program and revealing shortcomings in Amazon's anti-copying measures).

⁴ See *infra* notes 236-240 and accompanying discussion.

I. SEARCH INSIDE THE BOOK: WHAT IT IS AND HOW IT WORKS

¶4 “E-books” are created by digitizing the text of physical books, converting them into a format that can be read by computer software.⁵ E-book users can manipulate the text electronically, conducting searches, highlighting text and changing the font.⁶ Although e-books usually have copy-protection features that prohibit the user from printing, e-mailing or distributing the text, it is technologically possible to circumvent these features.⁷

¶5 As one would expect of an online-only bookstore, Amazon embraced e-book technology relatively early. It launched its electronic bookstore in November 2000 with 1,000 titles.⁸ However, this represents merely a fraction of Amazon’s total inventory of over 28 million printed books.⁹ In the years since that introduction, the e-book market has faltered, and in some cases even receded. Some booksellers, like Barnes & Noble, have closed their e-book stores entirely.¹⁰ Indeed, the most significant development at Amazon in the last several years has been its continuing expansion into non-book markets, not the development of its e-book store.¹¹

¶6 Thus far, experiments with e-books have simply reaffirmed that “new technologies don’t triumph just because they work well; they have to solve a real problem.”¹² “The book—portable, intuitive to use—is an almost perfect technology,” seeming to offer no problem at all.¹³ But there are technological obstacles in books. They are bulky, take time to transport, and seldom stand up well to aging. Perhaps most importantly, “it’s still shockingly difficult to find information buried in books. Even as the Internet has revived hope of a universal library and Google seems to promise an answer to every query, books have remained a dark region in the universe of information.”¹⁴

A. Amazon’s Plan

¶7 Book industry sales have been virtually flat for the last decade.¹⁵ Amazon sought to mitigate the effect of this stagnation early on through growth and diversification. In 1997, Amazon began selling music and movies through its web site, followed a year later by the addition of toys, electronics, software, video games and home improvement items.¹⁶

¶8 The company also looked to expand by selling products in other companies’ warehouses. In 2001, Amazon began using its website to market products from such retailers as Toys “R” Us and Target.¹⁷ In 2002, it opened an online apparel store, marketing clothing that normally retailed at stores like Nordstrom and Gap.¹⁸ It is important to note that “[Amazon] does not actually take

⁵ Random House, Inc. v. Rosetta Books, 150 F. Supp. 2d 613, 614 (S.D.N.Y. 2001), *aff’d*, 283 F.3d 490 (2d Cir. 2002).

⁶ *Rosetta Books*, 150 F. Supp. 2d at 615.

⁷ *Id.*

⁸ Nancy B. Vermylen, *Book Publishing in the Age of the e-Book*, 4 VAND. J. ENT. L. & PRAC. 190, 193 (2002).

⁹ *Id.*

¹⁰ See Barnes & Noble.com, <http://www.barnesandnoble.com/help/ebooks.asp> (last visited Mar. 21, 2005) (stating that “B&N.com no longer sells or provides support for eBooks”).

¹¹ See Christine Frey & John Cook, *Amazon Posts its First Annual Profits*, SEATTLE POST-INTELLIGENCER, Jan. 28, 2004, at A1.

¹² James Surowiecki, *Books Will Endure, But Will Publishers?*, NEW YORKER, June 19, 2000, at 76.

¹³ *Id.*

¹⁴ Wolf, *supra* note 2, at 516.

¹⁵ Scott W. Pink, *Symposium: Beyond Napster – The Future of the Digital Commons: Publishing in the Digital Age*, 15 TRANSNAT’L LAW. 305, 306 (2002).

¹⁶ Frey & Cook, *supra* note 11.

¹⁷ *Id.*

¹⁸ *Id.*

control of the inventory, as the individual vendors are responsible for fulfilling their orders.”¹⁹ Of course, Amazon collects a fee from the sales.²⁰

¶9 In the meantime, Amazon also sought to derive more revenue from the book market, with mixed success. In 2001, it began charging book publishers to have their books included in Amazon’s emailed recommendations list.²¹ With Amazon charging as much as \$10,000 per title for a recommendation,²² the policy drew sharp criticism, forcing Amazon to agree to disclose whenever publishers pay for placement.²³ Amazon also added customer reviews, a used-book business, and personalized recommendations, each of which have proven to boost book sales.²⁴

¶10 Additionally, as a precursor to the “Search Inside the Book” program, Amazon operated a promotional system called “Look Inside the Book.” This program allowed users to view key pages of books, such as the front and back covers, table of contents and index page. Users could not, however, query for search terms that might appear inside any of the books, other than the usual publisher-supplied keywords.

¶11 Simply put, “Search Inside the Book” is Amazon’s latest attempt to digitize the bookselling process. Google leapt to prominence on the formidable combination of its four-billion-page Internet archive and superior search algorithm.²⁵ For many, the Internet is now the research tool of first resort.²⁶ Following Google’s lead with web content, Amazon aims to create a digital, searchable archive of every published book. Jeff Bezos, Amazon’s founder and CEO, noted that “[i]t is critical that this [program] be understood as a way to get publishers and authors in contact with customers. We’re perfectly aligned with these folks. Our goal is to sell more books!”²⁷

B. Creating the Database

¶12 By digital library standards, the “Search Inside the Book” database is massive. At over 120,000 titles and growing, it already contains roughly as many books as a standard brick-and-mortar bookstore.²⁸ This totals 33 million pages, nearly all of which had to be physically scanned into the archive.²⁹ Perhaps even more impressively, Amazon partnered with over 190 publishers in the initial phase of the program, negotiating the digitization of thousands of bestselling books.³⁰

¶13 The process begins on the Amazon web site, where authors and publishers are asked to submit works to the “Search Inside the Book program, a revolutionary new way to merchandise your books on Amazon.com.”³¹ The appeal touts the system as a way to help customers “discover books that may never have surfaced in previous search results,” and then “do additional searches inside a particular book to confirm that the title is just what they’re looking for.”³²

¹⁹ *Id.*

²⁰ *Id.*

²¹ Carol King, *Amazon.com to Charge for Book Recommendations*, INTERNETNEWS.COM, Feb. 7, 2001, <http://www.internetnews.com/ec-news/article.php/582191>.

²² *Id.*

²³ Frey & Cook, *supra* note 11.

²⁴ Wolf, *supra* note 2, at 218.

²⁵ See Greg R. Notess, *Review of Google*, SEARCH ENGINE SHOWDOWN, <http://www.searchengineshowdown.com/features/google/review.html> (last visited Feb. 10, 2006).

²⁶ PEW INTERNET & AM. LIFE PROJECT, THE INTERNET GOES TO COLLEGE: HOW STUDENTS ARE LIVING IN THE FUTURE WITH TODAY’S TECHNOLOGY 12 (2002), http://www.pewinternet.org/pdfs/PIP_College_Report.pdf.

²⁷ Wolf, *supra* note 2, at 218.

²⁸ Matt Marshall & Charles Matthews, *Amazon's New Search Finds Kudos*, SAN JOSE MERCURY NEWS, Oct. 25, 2003, at C1.

²⁹ *Id.*

³⁰ *Id.*

³¹ Amazon’s Search Inside the Book for Publishers Overview, <http://www.amazon.com/exec/obidos/tg/catalog-guide/guide/-/506469/> (last visited Feb. 10, 2006).

³² *Id.*

¶14 Interested authors and publishers are told that they must be the exclusive rights holders, including copyright, marketing, and promotional rights.³³ They must complete Amazon's Publisher Participation Agreement, and, if approved, submit physical copies of each book they wish to enter into the program.³⁴

¶15 Under the Participation Agreement, rights holders agree to let Amazon conduct "limited promotional activities" on a nonexclusive basis.³⁵ Thus, Amazon obtains the right to "reproduce the entirety of each Book in digital form" and

[t]o display portions of each Book on any Web site owned or otherwise controlled by Amazon.com ... that are targeted at countries for which [the rights holder has] appropriate publishing and distribution rights, in the following manner:

(a) Amazon.com will be able to display excerpts from the Books on the Amazon.com Sites, and a visitor to the Amazon.com Sites will be able to use queries to locate, select, and display short excerpts that include the search terms. The queries would locate, select, and display such excerpts for every occurrence of the search terms.

(b) An Amazon.com account that has provided valid payment information ... will be able to view a limited number of pages within a Book during any single session.³⁶

¶16 For its part, Amazon agrees to "employ commonly available technologies in order to hinder downloading of the displayed portions of each Book."³⁷ The initial term of the agreement is 3 years, during which time termination is forbidden.³⁸ After the initial three-year term, the agreement renews automatically for one-year periods, subject to written termination upon 90-day notice given by either party.³⁹ Finally, Amazon reserves the right to amend the agreement unilaterally, with continued participation in the program by the rights holder constituting implied acceptance of the amended agreement.⁴⁰

¶17 The books must then be scanned into the archive. For the most part, this is done by actually scanning the pages of the physical books, rather than importing digital files.⁴¹ Amazon sends some of the books to scanning facilities in India, the Philippines and other low-wage countries.⁴² For oversized volumes or other books needing special attention, Amazon uses specialty machines in the United States.⁴³ "Some books can be chopped out of their bindings and quickly fed into scanners," while others must have their pages turned one-by-one either by machine or by hand.⁴⁴ The immense task of converting the images into plain text through a process of optical character recognition ("OCR") is handled by idle computers at one of Amazon's backup data centers.⁴⁵ On average, the cost of this process can be as low as \$1 per book.⁴⁶

³³ Amazon's Publisher Information Entry Page for Search Inside the Book, <http://www.amazon.com/exec/obidos/subst/misc/search-inside/publisher-info-dispatch.html> (last visited Feb. 10, 2006).

³⁴ *Id.*

³⁵ Amazon's Search Inside!™ Participation Agreement, <http://www.amazon.com/exec/obidos/tg/feature/-/530169/> (last visited Feb. 10, 2006).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Wolf, *supra* note 2, at 217.

⁴² *Id.*, at 218

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*, at 219.

⁴⁶ *Id.*, at 218.

C. Using the Index

- ¶18 Once the book has been scanned, converted to plain text and indexed in the system, the work is available to the Amazon user as part of “Search Inside the Book.” On most Amazon pages, a search box near the top serves as the starting point for a typical search.⁴⁷ The user enters a word or phrase in this box and clicks a button labeled “GO!” to initiate the search.⁴⁸ On the results page, books that are a part of “Search Inside the Book” have excerpts below them, with the search terms highlighted.⁴⁹ Users can either click to see a list of all references to the term in that particular book, or click on the excerpt's page number to see an image of the entire page on which the excerpt appears.⁵⁰ Once on an image page, users can browse forward or back two pages within the book, or they can search the book for other terms.⁵¹
- ¶19 There are some limitations, however. While there is no charge for the service, users must have an account at Amazon with a credit card on file in order to view the page images, although this is not required to view the plain-text excerpts that constitute the initial search results.⁵² Users also cannot view more than twenty percent of any single book, nor more than a few thousand pages per month.⁵³ Furthermore, the right mouse button is disabled through a JavaScript command that runs automatically on the Amazon web page, preventing users from right-clicking on the page image and selecting “Save Picture As...” or viewing the image properties to retrieve the location of the image.⁵⁴
- ¶20 To illustrate, suppose that a sewing hobbyist is interested in the works of Sewing Hall of Fame inductee Sandra Betzina. After typing “Sandra Betzina” into the Amazon search box, the system would return a page of about twenty results. First among these is *Fast Fit*,⁵⁵ complete with an excerpt from a page upon which Betzina’s name appears. Clicking on the title “Fast Fit” takes the user to the book’s page, which has the usual pricing information and reviews along with the new “Search Inside the Book” search box.⁵⁶ The user can also click on an image of the book’s cover, titled “SEARCH INSIDE!™”, which redirects the user to a browseable version of the book.⁵⁷ From there, the user can either enter in new search terms or simply browse through the book page-by-page until he reaches the page-viewing limit.

II. SEARCH INSIDE THE BOOK INFRINGES COPYRIGHTS

- ¶21 “[T]he Copyright Act grants the copyright holder ‘exclusive’ rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies”⁵⁸ Thus, “anyone who trespasses into [the copyright holder’s] exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, ‘is an infringer of the copyright.’”⁵⁹ Yet not all copying is copyright infringement.⁶⁰ For instance, copying is permitted with

⁴⁷ See Amazon.com Homepage, <http://www.amazon.com/> (last visited Feb. 10, 2006).

⁴⁸ Amazon’s Search Inside the Book: How It Works, <http://www.amazon.com/exec/obidos/tg/browse/-/10197021/> (last visited Feb. 10, 2006).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Wolf, *supra* note 2, at 218.

⁵⁴ Nettle, More on Amazon’s Search Inside the Book (Nov. 3, 2003), <http://www.nettle.com/archives/000063.html>.

⁵⁵ SANDRA BETZINA, *FAST FIT: EASY PATTERN ALTERATIONS FOR EVERY FIGURE* (2003).

⁵⁶ See Amazon’s Fast Fit: Easy Pattern Alterations for Every Figure, Book Description Page, <http://www.amazon.com/exec/obidos/tg/detail/-/1561586498/> (last visited Feb. 10, 2006).

⁵⁷ See *id.*

⁵⁸ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432-33 (1984).

⁵⁹ *Id.* at 433 (quoting 17 U.S.C. § 501(a) (2000)).

⁶⁰ Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

a license or assignment from the copyright owner,⁶¹ and anyone may reproduce a copyrighted work for a “fair use.”⁶²

¶22 Search Inside the Book, which requires the copying and distribution of the entire text of copyrighted works, implicates the copyrights in those works.⁶³ As will be discussed, Amazon has not secured adequate permission from copyright owners to engage in this copying and distribution.⁶⁴ Furthermore, Amazon’s current implementation is not a fair use of these works, nor is it subject to any other limitation or affirmative defense.⁶⁵ “Search Inside the Book” therefore constitutes copyright infringement on a massive scale.

A. *Prima Facie Copyright Infringement*

¶23 The Supreme Court has declared that for a *prima facie* case of copyright infringement, “two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁶⁶ While some small portion of the greater than 100,000 books involved in “Search Inside the Book” might be in the public domain, Amazon seems to have targeted only the most profitable and popular books for early inclusion in the program,⁶⁷ works that undoubtedly continue to enjoy copyright protection today.⁶⁸ The copying conducted to create the archive in “Search Inside the Book” is the functional equivalent of photocopying,⁶⁹ the most literal and complete form of copying possible. With “Search Inside the Book,” it is thus relatively simple to make out a *prima facie* case of copyright infringement against Amazon.

B. *No License*

¶24 “[T]he existence of a license, exclusive or nonexclusive, creates an affirmative defense to a claim of copyright infringement.”⁷⁰ To its credit, Amazon did seek to contract with those who hold the relevant rights to create the database for “Search Inside the Book.” Given the nature of the project, however, what those rights would be remains unclear. While the system could be viewed as merely producing excerpts for the user to peruse before buying, the more persuasive position is that these are in fact e-books, where access to the end-user is relatively limited but the digital version is nonetheless a complete rendering of the underlying book. To determine what it is that Amazon has created and whether that creation was properly licensed, it is best to begin with the publishing contract.

1. *The Publishing Contract*

¶25 At its most basic, a publishing contract is an exchange of promises between the author and the publisher. The author grants the publisher the exclusive rights to publish the author’s book (usually in hardcover format) and sell additional rights to others.⁷¹ Those additional rights might include the

⁶¹ See *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (citing *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 559 (9th Cir. 1990)).

⁶² *Sony*, 464 U.S. at 433 (citing 17 U.S.C. § 107 (2000)).

⁶³ See discussion *infra* Part II.A.

⁶⁴ See discussion *infra* Part II.B.

⁶⁵ See discussion *infra* Parts II.C, II.D.

⁶⁶ *Feist*, 499 U.S. at 361.

⁶⁷ See discussion *supra* Part I.A.

⁶⁸ These books are generally protected as “literary works” under the Copyright Act. See 17 U.S.C. § 102(a)(1) (2000).

⁶⁹ See discussion *supra* Part I.B.

⁷⁰ *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (citing *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 559 (9th Cir. 1990)).

⁷¹ DONALD E. BIEDERMAN ET AL., *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 505 (4th ed. 2001). Of course, in the rapidly evolving world of publishing, newer contracts may deviate substantially from the model described here. This is of little consequence, however, so long as the model given is largely accurate for the bulk of the works subject to indexing by Search Inside the Book or similar endeavors.

right to publish the work in other formats or to create derivative works such as audio books.⁷² In return, the publisher promises to register the copyright for the book in the author's name, publish the book within a set amount of time, and use the publishing house's best efforts to promote the book and its author.⁷³

¶26 In consideration for his promise, the publisher pays the author an advance.⁷⁴ The advance is a sum of money that approximates, in the publisher's opinion, the amount of money the book is expected to earn through retail sales, sales to libraries, and sales of subsidiary rights.⁷⁵ Usually, the author receives half of the advance upon signing the contract, and the remaining half upon publication.⁷⁶ Once a work has "earned" its advance, the author is entitled to a percentage of the profit from further sales, called a "royalty rate."⁷⁷ A typical royalty rate is ten percent of the list price, which is the publisher's suggested retail price.⁷⁸ The author might also be rewarded for exceptional sales with an "escalator" clause, providing for a hike in the royalty rate should sales surpass certain benchmarks.⁷⁹

¶27 The modern publishing contract typically also contains a provision dealing with the license of electronic rights and rights derived from "technologies not yet known."⁸⁰ This is sometimes phrased as a right to license the work in "other media," usually encompassing use of the content in computer programs, audio recordings, and motion pictures.⁸¹ The scope of these forward-looking provisions is often a point of contention between the author and the publisher, particularly given the ambiguity of the language commonly employed.⁸²

2. Contract Interpretation: *Random House, Inc. v. Rosetta Books*

¶28 The recent *Random House, Inc. v. Rosetta Books*⁸³ case illustrates the difficulty presented by these "new use" situations. The case examined "who owns the rights to sell digital versions of previously published books."⁸⁴ The court held that, absent specific contract language to the contrary, authors retain digital book rights and can either sell them to their publishers or license the rights to third parties.⁸⁵

¶29 Random House had long-standing publishing contracts with a number of famous authors, such as William Styron, Kurt Vonnegut, and Robert Parker.⁸⁶ These contracts granted Random House the right to "print, publish and sell the works in book form."⁸⁷ Rosetta Books, an electronic publishing house, sought to publish electronic versions of these works.⁸⁸ Rather than license electronic rights in the works from Random House, however, Rosetta Books contracted directly with the authors for those rights.⁸⁹

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 513.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 510.

⁸¹ *Id.*

⁸² See, e.g., *Random House, Inc. v. Rosetta Books*, 150 F. Supp. 2d 613, 613 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 490 (2d Cir. 2002).

⁸³ *Id.*

⁸⁴ David D. Kirkpatrick, *Random House Sues Over Rights to Publishing E-Books*, N.Y. TIMES, Feb. 28, 2001, at C5.

⁸⁵ *Rosetta Books*, 150 F. Supp. 2d at 623.

⁸⁶ *Id.* at 613.

⁸⁷ *Id.* at 614.

⁸⁸ *Id.*

⁸⁹ *Id.*

¶30 Random House sued Rosetta Books for copyright infringement and tortious interference with its contracts, and sought to enjoin Rosetta Books from selling the works in electronic form.⁹⁰ The case turned on the interpretation of contracts entered into decades earlier.⁹¹ Random House argued that the grant to publish the work “in book form,” the requirement that it “publish the work at its own expense and in such a style and manner and at such a price as [Random House] deems suitable,”⁹² and the contracts’ non-compete clauses⁹³ all led to the inescapable conclusion that Random House alone had acquired the right to publish the works as e-books.

¶31 The United States District Court for the Southern District of New York disagreed. The court found that the words “in book form” were intended to be narrowly interpreted,⁹⁴ and that the industry definition of the term “book” meant only a printed bound book.⁹⁵ The publishing contract also included other language that supported a limited interpretation, such as separate licenses for special editions, Braille editions, and other formats.⁹⁶ The court noted that, if the phrase “book form” was intended to cover all formats, then this other language would have been superfluous, an interpretation that could not stand.⁹⁷

¶32 The “style and manner” discretion left to Random House and the non-compete clauses were deemed irrelevant to the scope of the rights inquiry, appearing as they did completely distinct from the “grant of rights” section of the contract.⁹⁸ The “style and manner” discretion was thus declared only to apply to the “appearance of the formats granted to Random House” in the general grant of rights section of the contracts.⁹⁹ The scope of the non-compete clauses was similarly limited.¹⁰⁰

¶33 This case demonstrates two important copyright principles. First, the rights to the content of a work are distinct from the rights to publish the work in a given form. Thus, even when publishers properly acquire the right to publish a work in “book” form, they do not thereby acquire rights to the underlying content that would preclude independent publishing in other forms.¹⁰¹ Second, publishing contracts should be interpreted narrowly to favor the original copyright owner in situations of ambiguity. This suggests that courts will not imply a grant of electronic rights where there is no explicit transfer of those rights to the publisher.¹⁰²

¶34 When Amazon’s Search Inside the Book program is put in the context of this precedent, the conclusion is inescapable. While newer contracts, particularly those drafted in light of *Rosetta Books*, include explicit grants of electronic rights, many existing publishing contracts do not.¹⁰³ Broad, forward-looking provisions such as those that grant the right to exploit the work in “all media now

⁹⁰ *Id.*

⁹¹ *Id.* at 615-17.

⁹² *Id.* at 620.

⁹³ *Id.* at 620-21.

⁹⁴ *Id.* at 620.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 620-22.

⁹⁹ *Id.* at 620.

¹⁰⁰ *Id.* at 621-22.

¹⁰¹ At least, not without specific contract language to the contrary.

¹⁰² This is by no means an established rule. Indeed, the Second Circuit noted in affirming *Rosetta Books* that New York “has arguably adopted a restrictive view of the kinds of ‘new uses’ to which an exclusive license may apply when the contracting parties do not expressly provide for coverage of such future forms.” *Random House v. Rosetta Books LLC*, 283 F.3d 490, 491 (2d Cir. 2002). There is a complete lack of uniformity on this issue among the courts, and even within the Second Circuit itself. *See, e.g.,* *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 (2d Cir. 1968), *cert. denied*, 393 U.S. 826 (1968) (holding that a broad grant of motion picture rights included television rights); *see also* *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 855 (9th Cir. 1988) (holding that a license to use a musical composition in a film exhibited “by way of television” did not include videocassette rights); *Rey v. Lafferty*, 990 F.2d 1379, 1391 (1st Cir. 1993), *cert. denied*, 510 U.S. 828 (1993) (holding that videocassette rights for the *Curious George* books were not included within a grant of television rights because video technology did not exist at the time the contract was made). Despite these differing standards, or perhaps *because* of them, the fact remains that Amazon has almost certainly included works in Search Inside the Book without the appropriate license for this heretofore untemplated use.

¹⁰³ 1 JOHN KENNEDY, ET AL., *INTERNET LAW AND PRACTICE* § 12:19 (2002). The fact that future contracts are increasingly likely to address electronic rights does not substantially change the analysis here. *See* discussion *infra* Part III.D.

known or hereafter conceived or created,¹⁰⁴ which are uncommon in older publishing contracts,¹⁰⁵ might otherwise support Amazon's use of the works.¹⁰⁶ Thus, in securing digitization rights only from publishers,¹⁰⁷ Amazon has hinged Search Inside the Book on the ability of those publishers to grant rights that they may not possess,¹⁰⁸ at least not for every book in their catalog. Indeed, one unusually candid publisher confessed that "Amazon is asking for rights we're not sure we have the right to give."¹⁰⁹

3. Excerpt Rights: *New York Times Co. v. Tasini*

¶35 Most publishing contracts grant the publisher the right to use portions of the work for promotional purposes.¹¹⁰ Amazon's position, of course, is that the program simply delivers these promotional excerpts, albeit on a more interactive level.¹¹¹ Udi Manber, Amazon's Chief Algorithms Officer and head of the Search Inside the Book program, claims that "[t]he point is to help users find a book ... not to make a new source of information."¹¹² When it comes to shorter works contained within a whole, however, this position is untenable.

¶36 For anthologies or practical works, such as cookbooks and travel guides, the twenty-percent page-view limit imposed by Amazon is not adequately restrictive. One can easily acquire a single recipe, poem, restaurant recommendation or even an entire short story without implicating this limitation. To use the earlier Betzina example, suppose that the user browses through the table of contents and realizes that he is primarily interested in taking flat pattern measurements, a topic covered on pages 32 through 35.¹¹³ Using "flat pattern measurements" as the search term, the user can go directly to page 32 and then browse forward through the remainder of the relevant section, perhaps even printing the pages for later reference. This ability is particularly troubling given the recent Supreme Court decision in *New York Times Co. v. Tasini*.¹¹⁴

¹⁰⁴ See, e.g., *Chambers v. Time Warner, Inc.*, 123 F. Supp. 2d 198, 200 (S.D.N.Y. 2000) (discussing contracts granting a record company the right to exploit certain sound recordings "by any method now known, or hereafter to become known"). Again, the probable inclusion of such language in future contracts is likely inconsequential to the analysis of this and any similar future program. See discussion *infra* Part III.D.

¹⁰⁵ KENNEDY, *supra* note 103, § 12:19.

¹⁰⁶ "Where such language is included, the new use is usually found to fall within the scope of the license (absent extenuating circumstances or language to the contrary)." *Id.* at n.4. "By contrast to the result under United States copyright law, such a 'future technology' clause would convey at most a right to a compulsory license under Dutch copyright law, and would be worthless under German copyright law." 3-10 NIMMER ON COPYRIGHT § 10.10 n.21.6 (citing Cohen Jehoram, *Netherlands*, INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 4(1)(a)(ii); Dietz, *Germany, Federal Republic*, INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 4[2][a]). Although beyond the scope of this paper, such a conflict is worth noting given the Internet's global accessibility.

¹⁰⁷ Amazon's initial announcement of the Search Inside the Book program heralded its partnerships with 190 publishers. See Guernsey, *supra* note 1. Many of these publishers also act as distributors for smaller publishers, such as those specializing in reprint collections and anthologies of both fiction and nonfiction, who often do not do their own fulfillment. See *Scrivener's Error, Amazon and Retrograde Motion* (Oct. 28, 2003), <http://scrivenerserror.blogspot.com/2003/10/amazon-and-retrograde-motion-there.html>. When acting as distributors, these larger publishers do not have the rights of publishers, as those rights are only granted to and retained by the small publishers. Unfortunately, when they contracted with Amazon, some of these large publishers also authorized the inclusion of works for which they are merely the distributor. There is even some evidence that pure distributors, with no publishing role whatsoever, also authorized the inclusion of some works, clearly acting beyond the scope of their license. See *id.*

¹⁰⁸ In some respects, Amazon's Participation Agreement for Search Inside the Book is so poorly formulated as to make compliance with copyright principles nearly impossible. See Amazon's Publisher Information Entry Page for Search Inside the Book, *supra* note 33. For instance, the form requires that the applicant "be the exclusive rights holder (including copyright and marketing/promotion rights) of the titles [they] wish to submit." *Id.* Yet, as discussed above, authors usually retain the copyright in the book, while granting the promotional rights exclusively to the publisher, thus it is very unlikely that any one entity interested in the program would be the exclusive rights holder of all of the rights Amazon requires. See BIEDERMAN, *supra* note 71. Furthermore, the applicant must agree to let Amazon "reproduce the entirety of each Book in digital form" and warrant that they "have the right to grant the permission set forth in [the] agreement." Amazon's Publisher Information Entry Page for Search Inside the Book, *supra* note 33. Individual authors whose works make up a collection or anthology each retain their own copyrights, however, so the only way one could submit a multi-rights-holder book through this process would be to acquire the reproduction rights from each contributing author, something unlikely to happen in the real world.

¹⁰⁹ Jim Milliot, *Publishers Grudgingly Cooperate With Amazon Database Effort*, PUBLISHERS WEEKLY, Sept. 15, 2003, at 10.

¹¹⁰ BIEDERMAN, *supra* note 71.

¹¹¹ See Amazon's Search Inside the Book for Publishers Overview, *supra* note 31.

¹¹² Wolf, *supra* note 2, at 218.

¹¹³ BETZINA, *supra* note 55, at 32-35.

¹¹⁴ *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

¶37 The *Tasini* case involved a group of freelance writers whose contributions to periodicals were subsequently licensed by the periodicals for inclusion in electronic databases.¹¹⁵ In their contracts with the periodicals, the writers had granted the periodicals the right to “reproduce and distribute” the individual works in “any revision of that collective work,”¹¹⁶ but had not explicitly granted any electronic rights.¹¹⁷ The periodical publishers asserted that under Section 201(c) of the Copyright Act,¹¹⁸ which grants the owner of a copyright in a collective work the right to publish any revision of that collective work, they had the right to reproduce the work in electronic form as a revision of the work.¹¹⁹ They compared this use to the transfer of periodicals to microfilm.¹²⁰ In the electronic database, however, “each article is presented to, and retrievable by, the user in isolation, clear of the context the original print publication presented.”¹²¹ The authors argued that, because the electronic database stripped the articles from their original context in the periodicals,¹²² it impermissibly exploited the value of the individual articles rather than that of the collective work.¹²³

¶38 The Supreme Court, in a split decision, sided with the authors.¹²⁴ Relying on the statutory language of Section 201(c), the majority held that the word “revision” does not cover a use that “[does] not perceptibly reproduce articles as part of the collective work to which the author contributed.”¹²⁵ Given the nature of the database, the Court pointed out that “[s]uch a storage and retrieval system effectively overrides the Authors’ exclusive right to control the individual reproduction and distribution of each Article.”¹²⁶

¶39 Similarly, authors whose individually copyrighted works appear in collections or anthologies can argue that Search Inside the Book effectively extinguishes their exclusive rights in the individual works. Amazon might claim that the index is more analogous to microfilm than the databases in *Tasini* because the user is presented with images that place the individual works in context within the collective work. The Court in *Tasini* stated that, “[u]nder § 201(c), the question is not whether a user can generate a revision of a collective work from a database, but whether the database itself perceptibly presents the author’s contribution as part of a revision of the collective work.”¹²⁷ In Search Inside the Book, however, each page is currently presented separately as a single, complete image outside of the book context. Furthermore, the user can manipulate the data in ways that are not possible with microfilm. The inclusion of the individual works in the database diminishes the

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 488.

¹¹⁷ *Id.* at 489.

¹¹⁸ 17 U.S.C. § 201(c) (2000). The Act provides that:

Copyright in each separate contribution to a collective work is distinct from the copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Id.

¹¹⁹ See *Tasini*, 533 U.S. at 488-89.

¹²⁰ *Id.* at 501.

¹²¹ *Id.* at 487.

¹²² *Id.* at 488.

¹²³ *Id.* at 498.

¹²⁴ *Id.* at 488.

¹²⁵ *Id.* at 501-02.

¹²⁶ *Id.* at 503-04.

¹²⁷ *Id.* at 504. Based largely on this language from *Tasini*, the Second Circuit recently ruled against a group of freelance photographers, finding that the digital version of National Geographic magazine that included their works was a “revision” within the scope of Section 201(c). *Faulkner v. Nat’l Geographic Enters., Inc.*, 409 F.3d 26 (2d Cir. 2005). According to the court, the digital version, dubbed “The Complete National Geographic” and distributed on CD-ROM discs, “present[ed] the underlying works to users in the same context as they were presented to the users in the original versions of the Magazine” as “an electronic replica of the pages of the Magazine.” *Id.* at 28. This holding is directly contrary to that of an Eleventh Circuit decision on the identical facts four years prior. See *Greenberg v. Nat’l Geographic Soc’y*, 244 F.3d 1267 (11th Cir. 2001). Furthermore, *Faulkner* failed to recognize that *Tasini* concerned articles, not photographs, and was brought by writers, not photographers, and thus involved issues of “media neutrality” not present in *Faulkner* or *Greenberg*. See *Tasini*, 533 U.S. at 502. Ideally, the Supreme Court will promptly resolve this circuit split.

value of those works and inhibits their further exploitation. Under *Tasini*,¹²⁸ this use clearly goes beyond the scope of whatever license Amazon might claim to reproduce and distribute excerpts for promotional purposes.

¶40 The situation is similarly dire for book-length manuscripts. One can reassemble without extraordinary difficulty the entire work from the collection of ‘excerpts’ that Amazon provides, particularly the unlimited text results.¹²⁹ As an analogy, consider a publisher releasing a collection of ten different excerpts to the public for promotional purposes, each comprising ten percent of the book. A complete version of the work could be assembled from those excerpts, particularly if they were initially released in digital form. When the released sections are so close to the complete work, it is unreasonable to think of the released portions as the “excerpts” typically authorized by publishing contracts.

¶41 The natural conclusion, then, is that Amazon has created a digital archive of e-books for the Search Inside the Book index. As they exist in the database, and, for the most part, as they appear to the user, the e-books are exact digital renderings of their physical counterparts. Yet, almost certainly, many of the publishing contracts from which Amazon claims to have derived its license to create and display the e-books¹³⁰ do not grant the publishers the requisite electronic rights to the underlying works.

C. No Fair Use

1. The Fair Use Affirmative Defense

¶42 The fair use defense, codified in the 1976 Copyright Act,¹³¹ reads as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (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.

¶43 The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹³²

¶44 According to the Supreme Court, the four statutory factors are to be considered “together in light of copyright’s purpose [of promoting science and the arts].”¹³³ Case law plays a heightened role in understanding and applying the fair use doctrine, as Congress recognized that the doctrine’s codification in the Copyright Act was merely a restatement of the present judicial state.¹³⁴ Indeed,

¹²⁸ See *id.* at 503-04.

¹²⁹ See discussion *infra* Part II.C.2.

¹³⁰ Scrivener’s Error, *supra* note 107.

¹³¹ 17 U.S.C. § 107.

¹³² *Id.*

¹³³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹³⁴ See House Rep. on the Copyright Act of 1976, H.R. REP. NO. 94-1476, at 66 (1976).

“courts must be free to adapt the doctrine to particular situations on a case-by-case basis” given this “period of rapid technological change.”¹³⁵

2. Fair Use Precluded by Technological Shortfalls

¶45 Ultimately, this paper takes the position that Search Inside the Book should be considered a fair use of the copyrighted books it indexes.¹³⁶ As it is currently implemented, however, it is certainly not a fair use of those works. This is entirely due to the current technological implementation of Search Inside the Book, the shortfalls of which allow the exploitation of the underlying works to the severe detriment of the market for the originals. Although no one fair use factor is said to be dispositive,¹³⁷ the fourth factor¹³⁸ is so heavily swayed by these technological problems that fair use is simply unavailable as an affirmative defense to Amazon’s infringing activity in its current manifestation of Search Inside the Book.¹³⁹

¶46 The crux of the problem is that browsing before buying is not the full extent of what the user is currently able to do with Search Inside the Book. Several techniques, some more complicated and time-consuming than others, may be employed to frustrate or completely circumvent Amazon’s current copy-protection schemes. More importantly, some authors’ interests are harmed even when users act within the intended confines of the system.

¶47 Although Amazon has indeed hindered downloading of the images with a JavaScript trick, one need only disable JavaScript to easily download the images.¹⁴⁰ Furthermore, one can acquire the Internet address of the image from either the image properties page or the source code of the Amazon page. This address can later be used to retrieve the image from any browser, outside the context of the Amazon web site and with no downloading restrictions. Once acquired, these page images easily can be converted to plain text with OCR software.¹⁴¹

¶48 The page-view limiting system is also not terribly effective. For instance, if users flip forward two pages from the search result, they theoretically should not be able to move any further along in the book. Yet if users simply type in some key phrase from the current page of the book, they can follow the search result back to that page, with the renewed ability to browse forward two pages. They can then repeat this process up to the twenty-percent limit for each book. Once reached, this limit is also easily circumvented by creating multiple user accounts. Alternatively, users can work in concert, each taking one-fifth of the book and then assembling their collection into one complete work. This option would likely be particularly appealing to college students, who are known to work collaboratively in these situations.¹⁴²

¹³⁵ *Id.*

¹³⁶ See discussion *infra* part IV.

¹³⁷ See *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 21 (S.D.N.Y. 1992), *aff’d*, 60 F.3d 913 (2d Cir. 1994), *cert. denied*, 516 U.S. 1005 (1995).

¹³⁸ That is, the one that looks to “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4) (2005).

¹³⁹ An exhaustive analysis of every fair use factor, including market harm, is conducted below. See discussion *infra* part IV.B. The first three factors are considered under the system as it is currently implemented, whereas the fourth is analyzed as if Amazon had corrected the technological deficiencies outlined in this section. See *id.* When coupled with new fair use policies, derived in part from Congress’ recent moves in favor of digital information location tools, these corrections would be enough to move Search Inside the Book well into the ambit of the fair use doctrine. See *id.*

¹⁴⁰ See More on Amazon’s Search Inside the Book, *supra* note 54. Of course, such a workaround might violate the anti-circumvention provisions of the Digital Millennium Copyright Act. 17 U.S.C. § 1201 (2000).

¹⁴¹ One attorney posted this account of his findings:

Using a 56k dialup connection, it took me less than six minutes to get a “free” copy of a 9,000-word article in investigating one of my clients’ collections of academic works. It’s an important, indeed seminal, work in that field; and it took less than five minutes thereafter to run the result through OCR software and get a compact, editable version that could easily have been posted on the Internet through any of the various pirate sources.

Scrivener’s Error, *supra* note 107.

¹⁴² In a letter to its members about Search Inside the Book, the Authors Guild hypothesized this type of (mis)use:

A student could easily grab the relevant chapter or two out of a book without paying for it. Students certainly have the time and most likely the inclination to do so, and, with the help of some willing colleagues,

¶49 The page limitations are not applied to the initial search results, which list every occurrence of the search term in context with a brief excerpt of plain text from the book. Thus, one can use a leapfrog technique similar to that above, repeating searches and collecting excerpts in order to eventually assemble a complete plain-text version of the work. There is no need for multiple accounts or accomplices, as Amazon places no limit on this type of search. Indeed, anyone with moderate computer programming skills could fully automate this process, creating a text “ripper” akin to the software used to extract digital audio from compact discs.

¶50 As noted above, authors whose individually copyrighted works appear in collections or anthologies can assert, per *Tasini*, that Search Inside the Book effectively extinguishes their exclusive rights in the individual works. In the current implementation, the inclusion of these works in the database diminishes their value and inhibits their further exploitation, a market effect that, given the fourth fair use factor,¹⁴³ does not comport with a finding of fair use.

D. No Library Exemption

¶51 The Copyright Act also provides a lengthy, complex exemption for certain copying conducted by libraries and library users.¹⁴⁴ The exemption is itself subject to numerous caveats, chief among them that reproduction or distribution must not be made for “any purpose of direct or indirect commercial advantage.”¹⁴⁵ “The ‘advantage’ that would negate the exemption ‘must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit making motivation behind the enterprise in which the library is located.’”¹⁴⁶ Even if Amazon could somehow argue that its motivation is not commercial, at least not in the first instance, the library exemption would not apply to Search Inside the Book because of the separate exception for “systematic reproduction or distribution.”¹⁴⁷ Because Search Inside the Book is plainly systematic in its copying and digitization of books, Amazon’s access to the library exemption is likely precluded.

III. SEARCH INSIDE THE BOOK SHOULD NOT BE PROHIBITED BY COPYRIGHT LAW

¶52 Central libraries are typically seen as national treasures. In ancient Egypt, the Great Library of Alexandria was esteemed throughout the western world as a scholar’s dream, a grand repository of human knowledge.¹⁴⁸ The United States Library of Congress is a modern equivalent, preserving for posterity ordinary and extraordinary works alike. Indeed, many of the works contained in the Library of Congress were submitted in exchange for copyright protection. As we move into the digital age, it seems inevitable that those works will either fade into archival obscurity, or find new life in digital form. Search Inside the Book is the beginning of this rebirth, Alexandria’s Great Library for the digital age. As such, copyright law should adapt to this new technology, as it has in the past, to foster, rather than inhibit, its benefit to society.

A. The Balancing Act: Copyright Law and Technological Change

¶53 “Copyright law is the child of technology.”¹⁴⁹ As technological developments have steadily introduced more effective and less expensive methods of disseminating knowledge and creativity, the role of copyright “has been to mediate between those who produce and those who consume this

could print out the entire texts of books in the program.

Authors Guild, *Amazon’s New Database Likely to Help Sales of Some Works, May Undermine Others* (Oct. 24, 2003), http://www.authorsguild.org/news/10_24_03.htm.

¹⁴³ See 17 U.S.C. § 107(4).

¹⁴⁴ See 17 U.S.C. § 108 (2000).

¹⁴⁵ *Id.* at § 108(a)(1).

¹⁴⁶ 2-8 NIMMER ON COPYRIGHT § 8.03 (2005) (quoting H.R. REP. NO. 94-1476, at 75 (1976)).

¹⁴⁷ 17 U.S.C. § 108(g)(2).

¹⁴⁸ THEODORE VETTROS, *ALEXANDRIA: CITY OF THE WESTERN MIND* (2001).

¹⁴⁹ Paul Goldstein, *Copyright in the New Information Age*, 40 CATH. U. L. REV. 829 (1991).

information.”¹⁵⁰ In this capacity, copyright must balance competing interests by allowing creators sufficient control over new markets in order to preserve the copyright incentive to produce new creative works, while avoiding stifling new technologies of dissemination.¹⁵¹ Thus “[t]he setting of the copyright balance is not immutable; rather, each significant technological progress may alter the balance of control between authors and users, in turn eventually prompting a new legal calibration.”¹⁵²

¶54 Yet “[t]hroughout its history, copyright law has had difficulty accommodating technological change.”¹⁵³ The current copyright system began as a “model devised for print media, and expanded with some difficulty to embrace a world that includes live, filmed and taped performances, broadcast media, and, most recently, digital media.”¹⁵⁴ Each technological development has brought with it confusion, litigation, and ultimately a recalibration of the copyright balance.

¶55 Xerox’s introduction in 1960 of the model 914 photocopier brought photocopying to the masses.¹⁵⁵ Although photocopying was possible before 1960, even popular in certain academic environments, this machine represented a significant advancement in copy quality, ease of use and affordability.¹⁵⁶

The new-found ability of thousands of libraries to reproduce printed works alarmed publishers, particularly those in the business of publishing scientific or scholarly journals, who feared that they would go out of business if many of their potential subscribers could read cheaply photocopied articles rather than purchase expensive subscriptions to entire volumes.¹⁵⁷

¶56 In a decision later upheld by an equally divided Supreme Court,¹⁵⁸ a Court of Claims concluded in *Williams & Wilkins Co. v. United States* that library photocopying of medical journals was a fair use.¹⁵⁹ The court recognized the case as “part of a larger problem which continues to plague our institutions with ever-increasing complexity—how best to reconcile, on the one hand, the rights of authors and publishers under the copyright laws with, on the other hand, the technological improvements in copying techniques and the legitimate public need for rapid dissemination” of information.¹⁶⁰ The publishing industry then turned to Congress, and as a result of extensive lobbying, library photocopying was sharply curtailed under the Copyright Act of 1976.¹⁶¹

¶57 Less than a month after Congress passed the 1976 Act, two motion picture studios filed an action for direct and contributory copyright infringement against the manufacturer, distributors, retailers, advertisers and an individual user of the Sony Betamax videocassette recorder (VCR).¹⁶² When the case finally reached the Supreme Court, after nearly a decade of litigation, the Court recognized the delicate balance of copyright.¹⁶³

As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task

¹⁵⁰ *Id.*

¹⁵¹ Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1614 (2001).

¹⁵² *Id.*

¹⁵³ Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 277 (1989).

¹⁵⁴ Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19 (1996).

¹⁵⁵ See Christopher Jensen, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 551 (2003).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 551-52.

¹⁵⁸ See *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975).

¹⁵⁹ *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1362 (Ct. Cl. 1973).

¹⁶⁰ *Id.* at 1385.

¹⁶¹ See Jensen, *supra* note 155, at 552.

¹⁶² See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429 (C.D. Cal. 1979).

¹⁶³ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.¹⁶⁴

¶58 The Court cautioned that “[i]n a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.”¹⁶⁵

¶59 In a 5-4 decision reversing the judgment of the Circuit Court, which had reversed the District Court below it,¹⁶⁶ the Court held that the use of the Betamax VCR by private individuals in their homes for their own private purposes, such as time-shifting, was fair use and therefore noninfringing.¹⁶⁷ The Court also found that Sony, as the manufacturer, marketer and distributor of the VCR and Betamax tapes, was not a contributory infringer.¹⁶⁸ If the underlying act was in fact fair use, there can be no contributory liability for infringement. Furthermore, applying the patent law doctrine relating to staple articles of commerce, the Court found that the VCR was “capable of substantial noninfringing uses” and thus Sony could not be held liable as a contributory infringer.¹⁶⁹ Importantly, the Court reformulated the fair use doctrine, establishing a presumption that all unauthorized commercial use would be unfair.¹⁷⁰ “The reformulation’s most troubling aspect for users of developing technology is that it makes fair use, a doctrine developed in the context of unauthorized commercial use of copyrighted works, presumptively unavailable for any commercial endeavor.”¹⁷¹

¶60 The Internet, a teeming network of instant information exchange, provided the backdrop for a more recent major clash between copyright and cutting-edge technology. Two decades after the events in *Sony*, at the height of the Internet boom, five major record producers sued Napster, “an Internet start-up that enables users to download MP3 music files without payment,” for vicarious and contributory copyright infringement.¹⁷² The Napster software allowed users to log-on to the Napster system and share MP3 music files with other users simultaneously logged-on to the system.¹⁷³ The Napster servers would facilitate the exchange, providing a centralized index of all shared files and enabling specific transfers between individual client computers.¹⁷⁴ The content of the music files, however, was transferred directly between users in a “peer-to-peer” fashion, not through the Napster servers.¹⁷⁵

¶61 The District Court for the Northern District of California granted a preliminary injunction against Napster, Inc., on the grounds that Sony had successfully showed a strong likelihood of success on the merits of their claim for contributory infringement.¹⁷⁶ On appeal to the Ninth Circuit, amicus briefs in support of Napster expressed a common concern that copyright not stifle the advance of technology.¹⁷⁷ “Napster’s peer-to-peer file sharing system is an example of an enormously promising technology that gives individual consumers enhanced control over the information they

¹⁶⁴ *Id.* at 429.

¹⁶⁵ *Id.* at 431.

¹⁶⁶ See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981).

¹⁶⁷ *Sony*, 464 U.S. 417 at 454-55.

¹⁶⁸ *Id.* at 456.

¹⁶⁹ *Id.*

¹⁷⁰ See *id.* at 449.

¹⁷¹ Litman, *supra* note 153, at 349.

¹⁷² *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000).

¹⁷³ *Id.* at 901.

¹⁷⁴ *Id.* at 906.

¹⁷⁵ *Id.* at 907.

¹⁷⁶ *Id.* at 927.

¹⁷⁷ See, e.g., Amended Brief Amicus Curiae of Copyright Law Professors in Support of Reversal, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401, 00-16403), available at <http://www.law.wayne.edu/litman/napster/Amicus.pdf>.

find, save and transmit over the Internet.”¹⁷⁸ Acknowledging this delicate issue, the Ninth Circuit attempted “to make a clear distinction between the architecture of the Napster system and Napster’s conduct in relation to the operational capacity of the system.”¹⁷⁹ Contributory liability will not lie “merely because the structure of the system allows for the exchange of copyrighted material.”¹⁸⁰

¶62 Napster’s specific implementation of that system, however, compelled condemnation in the view of the Ninth Circuit. Unlike the Betamax VCR of *Sony*, the Napster system allowed for monitoring of potentially infringing activity after the technology was distributed to users.¹⁸¹ Thus, while Sony could not be expected to police the home usage of Betamax consumers, Napster could remove or block access to files copyright owners identified as infringing.¹⁸² Finding liability in such a situation would not prohibit the dissemination of the technology, as it would with the VCR. Rather, it would encourage those who implement the technology to take greater heed of copyright interests or promote the development of systems of which monitoring is not possible. Although the latter has unfortunately proven to be the preferred route of subsequent peer-to-peer software developers,¹⁸³ the Ninth Circuit eliminated the need to “bootstrap” infringing uses to lawful uses in order to maintain the availability of a desired technological advance, at least where usage can be policed.¹⁸⁴

¶63 Search Inside the Book is the product of new technology that allows the efficient, accurate and effective conversion of entire libraries into a single searchable digital archive. Yet the works in those libraries are largely protected by copyright and are thus presumably protected from such wholesale copying. Once again, this new technology provides the impetus to reexamine the copyright balance.

B. *The Primary Purpose of Copyright*

¶64 In rebalancing the copyright equation, it is prudent first to examine the purposes behind copyright. Copyright law in the United States has its origin in the Constitution. “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁸⁵ Although this is clearly an economic incentive for creators of protectable works, “there is abundant authority that the primary purpose of the clause is to promote the arts and sciences for the public good, not to grant an economic benefit to authors and inventors.”¹⁸⁶ Indeed, the Supreme Court has said that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”¹⁸⁷ Thus, “the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”¹⁸⁸

¶65 As copyright scholars have observed, the copyright monopoly is therefore based on two principles.¹⁸⁹ It first presumes that the promotion of creative activities is in the greater public interest.¹⁹⁰ To this end, it grants a temporary monopoly to creative authors, believing as a second

¹⁷⁸ *Id.* at 1.

¹⁷⁹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001).

¹⁸⁰ *Id.* at 1021.

¹⁸¹ Ginsburg, *supra* note 151, at 1641.

¹⁸² *Id.*

¹⁸³ In the wake of the *Napster* decision, file-sharing systems that are difficult to monitor, such as the Gnutella or FastTrack/Kazaa systems have grown in popularity. See Gnutella.com home page, <http://www.gnutella.com/> (last visited Feb. 10, 2006); Kazaa home page, <http://www.kazaa.com/> (last visited Feb. 6, 2006).

¹⁸⁴ See Ginsburg, *supra* note 151, at 1641-42.

¹⁸⁵ U.S. CONST. art. I, § 8, cls. 1,8.

¹⁸⁶ *Ladd v. Law & Tech. Press*, 762 F.2d 809, 812 (9th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986).

¹⁸⁷ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

¹⁸⁸ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹⁸⁹ See, e.g., 1-1 NIMMER ON COPYRIGHT § 1.03 (2004).

¹⁹⁰ *Id.*

principle that this is “a necessary condition to the full realization of such creative activities.”¹⁹¹ It is this latter principle that has proven the most contentious, as commentators and courts have struggled to pinpoint how much incentive is needed to spur creation, and when the copyright monopoly might excessively hinder public access to creative works.

¶66 This public access is the key underlying principle of the copyright clause. Copyright is a “limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product.”¹⁹² Public access is paramount. “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”¹⁹³ This access need not be unlimited, however. It is all too often that, “in seeking to make the author’s works widely available by freeing them from copyright restrictions, [advocates for greater public access] fail to realize that they are whittling away the very thing that nurtures authorship in the first place.”¹⁹⁴

C. Copyright Deposits and the Library of Congress

¶67 The Library of Congress, established as a legislative library in 1800, espouses this public access principle with its copyright deposit requirement.¹⁹⁵ “The first U.S. copyright law was approved in 1790, but the practice of depositing items registered for copyright protection in libraries for use was not enacted until 1846, when the newly established Smithsonian Institution and the Library of Congress obtained the privilege.”¹⁹⁶ Expanding on the original one-copy requirement, the copyright revisions of 1870 stipulated that two copies of every book, pamphlet, map, print, photograph, and piece of music be deposited in the Library.¹⁹⁷ Failure to deposit with the Library of Congress resulted in a forfeiture of copyright.¹⁹⁸ In the latter half of the 17th century, over 40 percent of its volumes and at least 90 percent of its map, music, and graphic arts collections were acquired through copyright deposit.¹⁹⁹

¶68 “Today, copyright is still one of the Library’s major acquisitions sources.”²⁰⁰ Together with a complex web of library exchanges and overseas offices, copyright deposits are part of a daily inflow of 22,000 items per day, of which the Library retains 10,000.²⁰¹ The Copyright Act currently dictates that “the owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of such publication,” two copies or phonorecords of the best edition of that work.²⁰² Although deposit is no longer required for copyright protection,²⁰³ it is required for copyright registration.²⁰⁴ The Library of Congress then has unfettered access to these deposits, as “all copies, phonorecords, and identifying material deposited are available to the Library of Congress for its collections, or for exchange or transfer to any other library.”²⁰⁵

¹⁹¹ *Id.*

¹⁹² *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

¹⁹³ *Aiken*, 422 U.S. at 156.

¹⁹⁴ *Sony*, 464 U.S. at 481 n.34 (citation omitted).

¹⁹⁵ See Library of Congress, *Jefferson’s Legacy: A Brief History of the Library of Congress*, <http://www.loc.gov/loc/legacy/loc.html> (last visited Feb. 10, 2006).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Ladd v. Law & Tech. Press*, 762 F.2d 809, 813 (9th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986).

¹⁹⁹ *Jefferson’s Legacy*, *supra* note 195.

²⁰⁰ *Id.*

²⁰¹ LIBRARY OF CONGRESS, STRATEGIC PLAN: INTRODUCTION: BACKGROUND AND FUTURE DIRECTION FOR THE LIBRARY OF CONGRESS (2004), <http://www.loc.gov/about/history/pdfs/04-08StrategicPlan8-14.pdf>. Of course, one wonders what happens to the other 12,000 items. Unfortunately, the Library does not make this information readily discernable.

²⁰² 17 U.S.C. § 407(a) (2000).

²⁰³ *Id.*

²⁰⁴ 17 U.S.C. § 408(a) (2000).

²⁰⁵ 17 U.S.C. § 704(b) (2000).

¶69 The Supreme Court has thus recognized that the purpose of the deposit requirement is to enforce contributions of desirable books to the Library of Congress.²⁰⁶ This is a legitimate purpose under the Copyright Clause, as “the deposit requirement . . . directly furthers the purpose of promoting arts and sciences by adding to the collection of our national library.”²⁰⁷ Furthermore, this national library is for public use.²⁰⁸ “The Library’s mission is to make its resources available and useful to the Congress and the American people and to sustain and preserve a universal collection of knowledge and creativity for future generations.”²⁰⁹

¶70 Over the years, this national library has grown to be the largest repository of human knowledge in history.²¹⁰ In the electronic age, the Library recognizes the need to pursue digital archiving and distribution. It aims “to make its collections maximally accessible to Congress, the government and the public through such means as the National Digital Library Program.”²¹¹ Indeed, the National Digital Information Infrastructure and Preservation Program (“NDIIPP”) is a broad Library effort to “collect, archive and preserve the burgeoning amounts of digital content, especially materials that are created only in digital formats, for current and future generations.”²¹² This effort will eventually involve the conversion of content found only in printed books. “America, as a knowledge-based democracy, needs to maximize its utilization of . . . the knowledge contained in books” through a “distributed national network for preserving and making accessible digital material.”²¹³

¶71 Since its inception in 2000, however, NDIIPP has done little more than plan and award grants to research institutions to develop systems to preserve “at-risk” digital content.²¹⁴ It has not digitized any analog content. Similarly, the National Digital Library Program has focused solely on “reproductions of primary source materials to support the study of the history and culture of the United States.”²¹⁵ Though it has digitized analog content, it has not broadened this narrow scope since it was launched in 1995.²¹⁶

¶72 As the Internet rapidly emerges as the research tool of first resort, demand is growing for searchable digital indices of analog content. The Library recognized this early on, noting that “[p]atterns of use of the World Wide Web already demonstrate that teachers, scholars, and students will want to refer to items in the digital realm.”²¹⁷ In creating its own digital archive, however, the Library has only added content “after a full risk assessment . . . determined the legal status of items and identified rights owners or other parties to the extent possible,” waiting for “[p]ermission or authorization . . . from known rights owners or other parties for rights such as copyright.”²¹⁸ This has crippled the archive, denying access to the most popular and useful works, and consequently preventing the creation of a complete searchable archive.

²⁰⁶ *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 41 (1939).

²⁰⁷ *Ladd v. Law & Tech. Press*, 762 F.2d 809, 815 (9th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986)

²⁰⁸ *Id.* at 813.

²⁰⁹ Library of Congress, About the Library: Welcome Message from the Librarian of Congress, <http://www.loc.gov/about/index.html> (last visited Feb. 10, 2006). Interestingly, the reference here to “the Congress” is not an anachronism based on the Library’s initial mission, as the Congress does indeed continue to make frequent use of the collection.

²¹⁰ *See* LIBRARY OF CONGRESS, *supra* note 201.

²¹¹ Library of Congress, About the Library: Frequently Asked Questions, <http://www.loc.gov/about/faqs/index.html> (last visited Feb. 10, 2006).

²¹² Library of Congress, Welcome to the NDIIPP, <http://www.digitalpreservation.gov/index.php?nav=1&subnav=1> (last visited Feb. 10, 2006).

²¹³ LIBRARY OF CONGRESS, *supra* note 201, at 1-2.

²¹⁴ *See* Press Release, Library of Congress, Library of Congress Announces Awards of \$13.9 Million to Begin Building a Network of Partners for Digital Preservation (Sept. 30, 2004), http://www.digitalpreservation.gov/about/pr_093004.html. “At-risk” content is that which is created only in digital form, and is therefore “at much greater risk of either being lost and no longer available as historical resources, or of being altered -preventing future researchers from studying them in their original form.” *Id.*

²¹⁵ Library of Congress, National Digital Library Program, <http://memory.loc.gov/ammem/dli2/html/lcndlpl.html> (last visited Feb. 10, 2006).

²¹⁶ *See id.*

²¹⁷ *Id.*

²¹⁸ Library of Congress, Rights and Restrictions, <http://memory.loc.gov/ammem/dli2/html/rights.html> (last visited Feb. 10, 2006).

¶73 Despite some laudable efforts, the Library is therefore not fulfilling its mission of making “its resources available . . . to . . . the American people.”²¹⁹ This notion of public “availability,” as an enduring part of the purpose of copyright,²²⁰ must be understood within its historical and technological context. For instance, when the Library of Congress was first established, it was only 30 or so miles from the mean center of the U.S. population.²²¹ Today’s population is centered nearly 800 miles to the west.²²² Even with intervening advances in transportation technology, it is now much more difficult for the average citizen to visit the Library of Congress. The Library has nevertheless failed to compensate for this decreased physical availability by taking advantage of new technology to create a complete digital archive that can be accessed instantaneously, anytime and anywhere.

D. Online Indexes: The Commercial Solution

¶74 Where government programs have fallen short, Amazon has rapidly and efficiently assembled a searchable index based on an expanding digital archive of content that already rivals brick-and-mortar bookstores for scope and modernity. It is comprised almost entirely of copyrighted material, the same material to which the Library of Congress, and thus the public, ostensibly has access through the copyright deposit requirement. Amazon, however, is a private entity, motivated by profit and sustained by the market. This is both the key to its overwhelming success and a potential cause for concern.

¶75 Commercial indices have become very powerful. The Internet search engine, for instance, has emerged as the most useful and popular tool for Internet navigation. Google, the Internet’s most popular search engine, serves as the web site of first resort for a large portion of Internet sessions.²²³ Google’s power derives from its immense web index, coupled with search algorithms adept at correctly prioritizing results. The weakness of this system, however, is that the entire business is vulnerable to any competitor that builds a better search engine.

¶76 If there is one source of publicly available information that can match Google’s index for size and utility, it is the contents of books.²²⁴ With Search Inside the Book, Amazon is the sole online resource for this unfathomable depth of information.²²⁵ This index does not suffer from Google’s weakness, either, as it is the product of both negotiated contracts²²⁶ with hundreds of publishers and a massive scanning and processing endeavor.²²⁷

¶77 Amazon insists that its interests are closely aligned with those of authors and publishers.²²⁸ Intuitively, this seems true, as all three parties benefit from the sale of books. Yet Amazon, it may be argued, has far more to gain than either of the other two. Amazon is shifting power away from those who own copyrighted material towards those who offer information about where this material can be

²¹⁹ Library of Congress, *supra* note 209.

²²⁰ Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

²²¹ See U.S. Bureau of the Census, Population and Geographic Centers, <http://www.census.gov/population/censusdata/popctr.pdf> (last visited Feb. 10, 2006).

²²² See *id.*

²²³ Chris Sherman, *Google Gains in Popularity, But Will It Last?*, SearchEngineWatch (June 16, 2004), <http://searchenginewatch.com/searchday/article.php/3368371>.

²²⁴ Wolf, *supra* note 2.

²²⁵ *Id.*

²²⁶ As discussed *supra* Part II.B, the legal weight of these contracts is not yet certain.

²²⁷ Wolf, *supra* note 2. As one might expect, Google has reacted with a book search engine of its own, Google Book Search, which then stole the spotlight from Search Inside the Book. Print. See Barbara Quint, *Google Beta Tests Book Search Service, NewsBreaks* (Dec. 22, 2003), <http://www.infotoday.com/newsbreaks/nb031222-2.shtml>. Recognizing the controversy of such a program, Google has also instituted a campaign to present Google Book Search as useful to consumers and authors alike. See *Hear What People Are Saying About Google Book Search*, <http://books.google.com/googlebooks/info.html> (last accessed Feb. 10, 2006). Google’s propaganda notwithstanding, Google Book Search suffers from technological deficiencies in its copy protection mechanisms similar to those of Search Inside the Book. See *Posting of isometrck to Kuro5hin*, <http://www.kuro5hin.org/story/2005/3/7/95844/59875> (Mar. 8, 2005, 05:13 EST).

²²⁸ Wolf, *supra* note 2.

found.²²⁹ Even when Amazon uses this immense archive only as a catalog, “a decade of Internet history proves that the catalog is exactly what you want to own.”²³⁰ A uniquely useful search engine draws traffic, traffic that reliably translates to increased sales and advertising revenue.

¶78 Moreover, the untapped potential for further commercial exploitation of this database is enormous. It could act as a full digital library, allowing unfettered public access for a monthly or annual fee. It could be tied to an electronic royalty system that automatically compensates authors when their work is accessed, for which Amazon could collect a service fee. It could even be adapted to a “print-on-demand” service, whereby Amazon could partner with authors to print books directly from the archive as they are ordered. Also, like Google, Amazon can license its search engine to others, providing Search Inside the Book results on non-Amazon web sites.²³¹

¶79 The commercial aspects of Search Inside the Book, however, are not incompatible with the public good. Granted, Amazon’s primary intention, as stated in press releases and throughout the signup process, is to create an index that helps Amazon users find books that they will ultimately purchase.²³² Yet this arrangement is substantially the same as any other Internet search engine. Google, as the premier Internet search engine, derives nearly all of its revenue from advertising.²³³ This motivates Google to improve and expand their search engine, as a better search engine will lead to more users, and more users will lead to greater advertising revenue.²³⁴ Thus, the commercial potential of the Google database is ultimately what sustains and improves that same Google database. Similarly, the commercial applications of Search Inside the Book are precisely what have made it so much more successful than the under-funded, under-inclusive government programs that preceded it.²³⁵

¶80 With the Digital Millennium Copyright Act (“DMCA”) and its limits on service provider liability,²³⁶ Congress recognized the importance of commercial information location tools like Google and Search Inside the Book. The House Report notes that “[i]nformation location tools are essential to the operation of the Internet; without them, users would not be able to find the information they need.”²³⁷ Congress therefore enacted legislation “to promote the development of information location tools . . . by establishing a safe harbor from copyright infringement liability for information location tool providers.”²³⁸ Commentators have thus concluded that “courts should scrutinize with great care any claim that a legitimate indexer is liable for infringement. Whether under the doctrine of fair use or otherwise, *bona fide* sites instead should be immunized from liability.”²³⁹ Search Inside the Book is not subject to the specific exemption provided in the DMCA,²⁴⁰ but the principle embodied in that section nevertheless applies to Amazon as the provider of a legitimate information location tool. Courts should therefore give Amazon wide latitude in the operation of this important indexing resource.

¶81 Consider the alternative. In some cases, Amazon may be able to legitimately acquire digitization rights in bulk from large publishers, particularly for works with contracts drafted after the watershed

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Indeed, Amazon has even created a new all-purpose search engine to compete with Google, incorporating the Search Inside the Book database. *See* A9, <http://www.a9.com> (last visited Feb. 10, 2006).

²³² *See, e.g.*, Amazon’s Search Inside the Book for Publishers Overview, *supra* note 31.

²³³ Google Investor Relations: Financial Data, http://investor.google.com/fin_data.html (last visited Feb. 10, 2006).

²³⁴ In this sense, it is clear that Amazon’s interests are also closely aligned with those of Amazon users.

²³⁵ *See* discussion *supra* Part III.C.

²³⁶ 17 U.S.C. § 512 (2000).

²³⁷ H. REP. NO. 105-551(II), at 58 (1998).

²³⁸ *Id.*; *see also* 17 U.S.C. § 512(d).

²³⁹ 3-12B NIMMER ON COPYRIGHT § 12B.05 (2004).

²⁴⁰ The language of the exemption is clearly directed at protecting service providers from liability for the infringing acts of others, rather than direct infringement. *See* 17 U.S.C. § 512(d); *see also* NIMMER ON COPYRIGHT, *supra* note 239 (“[T]he instant exemption cannot serve as a subterfuge for wholesale copying of another’s work on the pretext that it is being undertaken solely to create a complete and faithful ‘index’ to that [work].”).

of *Rosetta Books*,²⁴¹ or renegotiated in light of *Tasini*.²⁴² Most publishing contracts, however, simply do not grant these rights to publishers.²⁴³ Thus, if Amazon were forced to acquire the applicable rights to each and every work included in Search Inside the Book, it would in most cases have to negotiate with the individual author.²⁴⁴ Multiply these negotiations by tens or even hundreds of thousands,²⁴⁵ perhaps more when one accounts for all of the individual works included in collections or anthologies, and the cost becomes prohibitive. In other words, transaction costs would make Search Inside the Book economically impractical, absent accommodation from copyright law.

¶82 Fortunately, there is no reason that copyright law should not accommodate Search Inside the Book, as it ultimately serves the same purpose as copyright. Provided that the current technological deficiencies are rectified,²⁴⁶ the index merely allows users to find books they otherwise would have missed, fostering rather than supplanting book sales. Indeed, in the first five days of the program, sales growth for titles included in Search Inside the Book outpaced growth for titles not in the program by 9 percent.²⁴⁷ These additional sales lead to increased royalties for the copyright holders.²⁴⁸ The program thus increases the copyright incentive to produce and distribute creative works by increasing the potential payoff for authors. This is particularly true for authors of relatively unpopular or obscure works. As the database becomes more inclusive, results from these artists' works will be just as likely to show up as results from bestsellers,²⁴⁹ a democratization of the publishing system that would surely incentivize any struggling author.

¶83 The incentive is also heightened by other possible aspects of the program. As mentioned above, authorized copies may be printed directly from the digital archive as a part of a "print-on-demand" service, effectively eliminating the notion of "out-of-print." Furthermore, the affordability of digital shelf-space will permit the indefinite storage of titles in the database, allowing books to be found and purchased long after they have been pulled from retail store shelves. If adding to the useful life of a copyright is a desirable method of increasing the incentive to create, as recent copyright term extensions seems to suggest,²⁵⁰ then the additional longevity promised by Search Inside the Book comports well with prevailing views on copyright. With only slight modification, the system could also be used to market and sell e-books, should they become more popular. For authors, this would decrease the cost of entry into the e-book market, which would add further to the monetary incentive to create.

²⁴¹ See discussion *supra* Part II.B.2.

²⁴² See discussion *supra* Part II.B.3.

²⁴³ KENNEDY, *supra* note 103. For the most part, of course, publishing contracts after *Rosetta Books* will explicitly include grants of electronic rights. Thus, future digital archiving efforts will be able to legitimately license rights for an increasing selection of works merely through negotiations with large publishers. In absolute values, however, this does not necessarily decrease the number of works that must be licensed from individual authors to be properly included in the database. Given the huge commercial and cultural value of society's analog back-catalog, and barring the unlikely scenario of the renegotiation of a substantial proportion of existing publishing contracts, publishing's digital future cannot solve the licensing problems created by its analog past. Given the uncertain future of the publishing industry, this number may actually *increase* over time.

²⁴⁴ See discussion *supra* Part II.B.

²⁴⁵ Indeed, any truly ambitious digital archive will attempt to include all of the nearly 200,000 published literary works registered with the Copyright Office each year. See U.S. COPYRIGHT OFFICE, 106TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2003 63 (2003), available at http://www.copyright.gov/reports/annual/2003/Annual_Report_2003_Full.pdf. Even accounting for the reduced ambiguity of future publishing contracts, there simply is no cost-efficient way to acquire digitization licenses for enough of these 200,000 works to create a meaningfully-comprehensive archive.

²⁴⁶ This assumption will remain in place for the remainder of this section. The specific measures necessary to rectify these inadequacies are presented in detail below. See discussion *infra* Part IV.A.

²⁴⁷ Press Release, Amazon.com, Amazon.com Announces Sales Impact from New Search Inside the Book Feature (Oct. 30, 2003), <http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-newsArticle&ID=465155>. The formats of some books actually create a disincentive to buy under the present implementation of Search Inside the Book, but this is a technological problem that Amazon will need to rectify in any case. See discussion *infra* Part IV.A.

²⁴⁸ The particulars of each author's royalty agreement with his or her publisher will dictate the extent of that benefit, of course.

²⁴⁹ This assumes, of course, that individual authors opt to submit their own works, as is their right.

²⁵⁰ See 17 U.S.C. §§ 302-04 (2000).

¶84 Current and potential authors are not the only beneficiaries under Search Inside the Book. Under the copyright bargain, the public must also benefit in this exchange of rights for access. The program represents a public benefit in two distinct ways. As stated above, the promise of increased book sales, for both present and future authors, will boost the incentive that stimulates artistic creativity. Copyright law is premised on the notion that greater artistic creativity is itself a public benefit.²⁵¹ At the same time, Search Inside the Book provides greater public access to copyrighted material. This public access is not used to deny copyright holders their promised rewards. Rather, the access merely allows the public the full enjoyment of their end of the copyright bargain, with an enhanced ability to find and consume creative works without diminishing the monetary incentive that lead to their creation.

¶85 In protecting online providers of information location tools, Congress itself rebalanced the copyright equation. At the potential expense of copyright holders, Congress demonstrated a willingness to support these commercial activities when they result in great public benefit, despite the great power this allocates to private entities. Likewise, courts have singled out digital indexes as important and worthy of protection, even when commercial.²⁵² Search Inside the Book is an inspired, effective, and market-oriented solution to the problems facing the publishing industry in the digital era. It increases accessibility in the ever-more-saturated book market, connecting consumers and books with unsurpassed ease, agility and accuracy. It provides an excellent platform for future growth, with opportunities to expand into e-books, “print-on-demand” publications, or other new markets. It is a new and valuable information location tool that serves the fundamental purpose of copyright law: “to stimulate artistic creativity for the general public good.”²⁵³ As the underlying archive grows, so too does the potential of this unprecedented database, and unlike the government’s tepid efforts, the promise of this program is not empty.

IV. LEGITIMIZING SEARCH INSIDE THE BOOK

¶86 Historically, copyright law has adapted to new technologies and new media, allowing them to grow and flourish through various shelters and exemptions.²⁵⁴ Search Inside the Book, as a technological innovation with clear copyright implications, should be allowed to progress free of copyright restrictions. Specifically, provided that certain technological issues are remedied, Search Inside the Book should be considered a “fair use” under copyright law. This would require another reformulation of the fair use doctrine,²⁵⁵ this time taking into account Congress’ stated goal of protecting valuable digital information location tools.²⁵⁶

¶87 Under the current law, the fair use affirmative defense provides a non-exclusive list of several types of use that may be permissible, such as criticism, comment, scholarship or research.²⁵⁷ The use

²⁵¹ See discussion *supra* Part III.B.

²⁵² See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir 2003).

²⁵³ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

²⁵⁴ See discussion *supra* Part III.A; see also Litman, *supra* note 154, at 27. In an extensive analysis of the interplay between copyright law and new technologies, copyright scholar Jessica Litman gives this survey:

Player pianos took a large bite out of the markets for conventional pianos and sheet music after courts ruled that making and selling piano rolls infringed no copyrights; phonograph records supplanted both piano rolls and sheet music with the aid of the compulsory license for mechanical reproductions; the jukebox industry was created to exploit the copyright exemption accorded to the “reproduction or rendition of a musical composition by or upon coin-operated machines.” Radio broadcasting invaded everyone’s living rooms before it was clear whether unauthorized broadcasts were copyright infringement; television took over our lives while it still seemed unlikely that most television programs could be protected by copyright. Videotape rental stores sprang up across the country shielded from copyright liability by the first sale doctrine. Cable television gained its initial foothold with the aid of a copyright exemption and displaced broadcast television while sheltered by the cable compulsory license.

Id. at 27-28 (footnotes omitted).

²⁵⁵ Such a reformulation would be similar to the reformulation in *Sony*. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

²⁵⁶ See H. REP. NO. 105-551(II), *supra* note 237, at 58; see also 17 U.S.C. § 512(d) (2000).

²⁵⁷ See 17 U.S.C. § 107 (2000).

made by Amazon in Search Inside the Book, the creation and implementation of digital information location tools, should be read into the existing copyright statute as an additional form of fair use. This view is validated by an analysis of the four fair use factors, under which the use in a mended Search Inside the Book is logically fair.

A. Needed Changes

¶88 The fact that Congress favors digital information location tools does not excuse Amazon from exercising due diligence in its execution of Search Inside the Book, particularly if it is to be considered a fair use. “Fair use presupposes ‘good faith and fair dealing.’”²⁵⁸ As it stands now, Search Inside the Book is peppered with technological flaws. Amazon must make changes to this system to comport with both copyright law and sound business practices.²⁵⁹

¶89 The technological copy-protection measures must be strengthened to ensure that the system acts as an index to these works, and nothing more. For collections, anthologies, travel guides, cookbooks and other works comprised of short, useful segments, the system should not use complete page images. Instead, the presented pages should be cut either horizontally, vertically or diagonally, and presented to the user only in those portions, so as not to implicate *Tasini* by displaying the entire individually copyrighted work.²⁶⁰ To prevent full-text “ripping,” the search limits should be applied to the searches that produce plain-text results, as they are to the searches that produce page images. Cookies and automated Internet address monitoring should be used to block users that abuse the system by creating multiple user accounts or colluding with other users, perhaps by locking out accounts based on patterns of use within similar geographic locations. Since Amazon is clearly able to label the images with a small copyright notice at top and bottom, it should also watermark the page images with a large, dark, diagonal copyright notice across and underneath the text. This would inhibit the conversion of the works to plain text with OCR technology. Finally, these page images should be split into eight or more separate tiles for each page, each representing one-eighth or less of the complete page, and each with its own separate image file. The page images can be automatically aligned to appear as complete pages as results are displayed within Search Inside the Book. This would make it significantly more difficult to obtain complete page images, and much more complicated to reassemble the pages into useful works.

B. Search Inside the Book as Fair Use

¶90 We can now reanalyze Search Inside the Book under the fair use doctrine, this time making the crucial assumption that Amazon meticulously implements the changes listed above.²⁶¹ Considering the fair use factors²⁶² in turn and in aggregate, Search Inside the Book should be considered a fair use of the copyrighted works.²⁶³ Although commercial and thus presumptively unfair, this type of use is highly transformative and is favored by both Congress and precedent cases. Despite the fact that

²⁵⁸ *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 149 (S.D.N.Y. 1968) (quoting John Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832, 832 (1968)).

²⁵⁹ Beyond the technical implementation, the application process must also be revised. Amazon should recognize the multitude of rights that often exist in a single book and the potential for multiple rights-holders that this creates. The signup page should therefore no longer require that the applicant be the exclusive holder of both copyrights and promotional rights for the work. Instead, it should require license of only the relevant copyrights. Similarly, the Participation Agreement should allow applicants to vouch only for the copyrights they possess, rather than the work in its entirety.

²⁶⁰ See *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001); see also discussion *supra* Part II.B.3. This specific measure, like the others listed here, is merely a suggested method of securing the Search Inside the Book database. So long as the system properly disables access to complete works and prohibits copying of any kind, the particular means to achieve this end are not relevant.

²⁶¹ This reanalysis is in stark contrast to the earlier analysis, *supra* Part II.C.2, where fair use was definitively precluded by Amazon’s failure to adequately protect the included works from misuse. Implementing the changes suggested above, *supra* Part IV.A, or changes similar in consequence, substantially changes the analysis under the fourth fair use factor. See discussion, *infra* Part IV.B.4.

²⁶² See discussion *supra* Part II.C.1; see also 17 U.S.C. § 107 (2000).

²⁶³ This assumes, of course, that the technological changes detailed above are properly implemented. See discussion *supra* Part IV.A.

these works are heavily protected by copyright law, and that the copying is substantial, this use is actually more likely to benefit than harm the market for the original works. On the most important factors, this use is decidedly fair, and thus the analysis militates toward a finding of fair use.

1. *The Nature of the Use*

¶91 The first fair use factor is the purpose and character of the use.²⁶⁴ Amazon's use of the copyrighted material is clearly commercial in nature. With Search Inside the Book, Amazon aims not only to sell more books, but also to boost traffic to its web site from people drawn to the search engine's unique features. This, in turn, boosts sales of non-book items at Amazon. Furthermore, the program cultivates brand loyalty and encourages spending, as users must create Amazon user accounts with payment information simply to use the special search features.²⁶⁵ As a commercial use, Search Inside the Book is therefore presumptively unfair.²⁶⁶

¶92 Nevertheless, commercial use alone is not enough to end the inquiry under the first factor.²⁶⁷ "Even assuming that the use had a purely commercial purpose, the presumption of unfairness can be rebutted by the characteristics of the use."²⁶⁸ The Supreme Court has identified the central question as "whether and to what extent the new work is 'transformative.'"²⁶⁹ A work is transformative when it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."²⁷⁰ A transformative use is therefore more likely to be seen as "fair."²⁷¹

¶93 The focus is thus on how and why the copyrighted work is used. Amazon must not engage in use that "simply repackages [the works] to facilitate their transmission through another medium,"²⁷² such as the conversion of books to e-books. However, "if copyrightable expression in the original work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings--this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."²⁷³

¶94 This situation is very similar to that in *Kelly v. Arriba Soft Corp.*²⁷⁴ In that case, the United States Court of Appeals for the Ninth Circuit held that the creation and use of "thumbnail" versions of copyrighted images in an Internet search engine was fair use.²⁷⁵ Defendant Arriba maintained a search engine that displayed results in the form of small pictures, which were scaled-down versions of images it had gathered and catalogued while scouring the Internet.²⁷⁶ Plaintiff Kelly was a photographer who operated a website promoting books of his work.²⁷⁷ When Kelly realized that thirty-five of his photographs had been copied into the image search engine, he brought a claim against Arriba for copyright infringement.²⁷⁸

²⁶⁴ 17 U.S.C. § 107(1) (2000).

²⁶⁵ Amazon's Search Inside the Book: How It Works, *supra* note 48.

²⁶⁶ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) ("[E]very commercial use of copyrighted material is presumptively . . . unfair.").

²⁶⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²⁶⁸ *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152 (9th Cir. 1986).

²⁶⁹ *Campbell*, 510 U.S. at 579 (quoting Pierre Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

²⁷⁰ *Campbell*, 510 U.S. at 579.

²⁷¹ *Id.*

²⁷² *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

²⁷³ *Castle Rock Entm't v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (quoting Pierre Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

²⁷⁴ 336 F.3d 811 (9th Cir. 2003).

²⁷⁵ *Id.* at 815, 822.

²⁷⁶ *Id.* at 815.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

¶95 As in *Arriba Soft*, the use of the books in Amazon’s program serves a different function than the use of the books by authors and publishers, “improving access to information on the internet versus artistic expression.”²⁷⁹ The court in *Arriba Soft* concluded that “it would be unlikely that anyone would use Arriba’s thumbnails for illustrative or aesthetic purposes.”²⁸⁰ Similarly, there is little likelihood that Search Inside the Book would “supplant the need for the originals.”²⁸¹ Severe technological restrictions prevent copying and downloading by users, and limit access to only small portions of each book. Consequently, Search Inside the Book is useful only for finding the right book, not as a replacement for the book itself. Amazon’s use therefore does not supersede that of the authors and publishers, but instead creates a new and useful source of information.

¶96 Like *Arriba Soft*, Amazon’s system will “benefit the public by enhancing information-gathering techniques on the Internet.”²⁸² This use, though commercial, is highly transformative and, most importantly, has been recognized by Congress as vitally important in the information age.²⁸³ This first factor thus weighs strongly in favor of a finding of fair use.

2. *The Nature of the Copyrighted Work*

¶97 The second fair use factor is the nature of the copyrighted work.²⁸⁴ This factor recognizes that “some works are closer to the core of intended copyright protection than others.”²⁸⁵ That is, creative works are intentionally afforded more protection than fact-based works,²⁸⁶ and are thus less prone to the fair use affirmative defense. Books, of course, vary greatly in the level of creativity they represent. They are nevertheless considered very close to the core of intended copyright protection, even when based heavily in fact.²⁸⁷ This factor weighs against a finding of fair use.

3. *The Amount and Substantiality of the Portion Used*

¶98 The third fair use factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”²⁸⁸ “[T]he extent of permissible copying varies with the purpose and character of the use.”²⁸⁹ Thus “[i]f the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her.”²⁹⁰ This factor therefore warrants an examination of precisely how much Amazon needed to copy in order to serve the purpose of Search Inside the Book.

¶99 To define the purpose broadly, Amazon intended to create a searchable index based on the full text of copyrighted books. It also intended to allow browsing of the contents of the book as it appears in physical form, requiring digital images of the book pages. Amazon, then, copied no more or less than necessary, as it needed the entire visual and textual contents of each book to achieve this goal.

¶100 One might also look to the language Amazon uses to solicit submissions from authors and publishers. The purpose given here is to allow users to “discover books that may never have surfaced

²⁷⁹ *Id.* at 819.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 820. Again, this analysis assumes that the program is properly implemented with adequate technological safeguards. See discussion *supra* Part IV.A.

²⁸² *Arriba Soft*, 336 F.3d at 820.

²⁸³ See discussion *supra* Part III.D.

²⁸⁴ 17 U.S.C. § 107(2) (2000).

²⁸⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

²⁸⁶ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001).

²⁸⁷ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (finding the unpublished memoirs of former President Ford subject to copyright protection). *But see Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (considering, but ultimately rejecting, copyright protection for white pages that lacked originality in selection, coordination, or arrangement).

²⁸⁸ 17 U.S.C. § 107(3) (2000).

²⁸⁹ *Campbell*, 510 U.S. at 586-87.

²⁹⁰ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820-21 (9th Cir. 2003).

in previous search results,” and then “do additional searches inside a particular book to confirm that the title is just what they’re looking for.”²⁹¹ To accomplish this, Amazon arguably could have used far less material from each book, perhaps an amount closer to that of the preexisting “Look Inside the Book” program.²⁹²

¶101 Given this slight discrepancy, we turn again to precedent. The *Arriba Soft* court found that copies of entire images were necessary to meet the purpose of the image search engine.²⁹³ Likewise, a court would probably find that copying of the entire book is necessary for a full-text book search engine. This factor therefore weighs in favor of a finding of fair use.

4. *The Effect of the Use on the Copyrighted Work*

¶102 The fourth fair use factor is “the effect of the use upon the potential market for or value of the copyrighted work.”²⁹⁴ The market effect of the use is key to the fair use inquiry, as “[t]he incentives for creativity that the copyright monopoly is designed to encourage are most threatened when the infringing use diminishes potential sales of the original work, interferes with the marketability of the copyrighted work, or reduces demand for the original.”²⁹⁵ For this reason, the fourth factor is generally regarded by both commentators and courts as the most important in the fair use analysis.²⁹⁶

¶103 Regarding this factor, the Supreme Court has said that a work that supersedes the original acts as a market replacement for it, making it likely that market harm will occur.²⁹⁷ On the other hand, when the use is transformative,²⁹⁸ market substitution and thus harm is less certain.²⁹⁹ As Judge Posner put it,

copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, is not fair use.³⁰⁰

¶104 Analysis under this factor is obviously related to that of the first, particularly with regard to “transformative” uses.

¶105 For any chance of success under this factor, Amazon simply *must* shore up its copy-protection measures.³⁰¹ Should that happen, however, Search Inside the Book would complement rather than supplant the market for the copyrighted books of which it is comprised. Early sales figures clearly reflect the fact that the system promotes the purchase of the underlying works, not the use of the program as a substitute for purchase.³⁰² Given that the intended design presents the user with only a small section of each work, the index merely encourages further consumption of the underlying

²⁹¹ Amazon’s Search Inside the Book for Publishers Overview, *supra* note 31.

²⁹² See discussion *supra* Part I.A.

²⁹³ *Arriba Soft*, 336 F.3d at 811.

²⁹⁴ 17 U.S.C. § 107(4) (2000).

²⁹⁵ Jayashri Srikantiah, *The Response of Copyright to the Enforcement Strain of Inexpensive Copying Technology*, 71 N.Y.U. L. REV. 1634, 1663 (1996).

²⁹⁶ *Id.*

²⁹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

²⁹⁸ Notice the inclusion here of an important term from the first factor, “transformative.” See discussion *supra* Part IV.B.1. Recall, furthermore, that the analysis under the first factor made reference to superseding the market for the original work. See *id.* Such interplay between the factors is neither uncommon nor unwarranted. “[I]f the four factors should not be treated in isolation—‘All are to be explored, and the results weighed together, in light of the purposes of copyright.’” 4-13 NIMMER ON COPYRIGHT § 13.05 (quoting *Campbell*, 510 U.S. at 577).

²⁹⁹ *Campbell*, 510 U.S. at 591.

³⁰⁰ *Ty, Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) (internal citation omitted).

³⁰¹ Otherwise, the analysis is no different from that above, *supra* Part II.C.2.

³⁰² See Press Release, Amazon.com Announces Sales Impact From New Search Inside the Book Feature, *supra* note 247. This impact occurred despite the obvious fact that Amazon has *not* yet implemented strengthened anti-copying measures, which should yield additional sales benefits to included works. See discussion *supra* Part IV.A.

copyrighted products, and therefore does not diminish potential sales, interfere with marketability, or reduce demand for the original works.

¶106 Amazon's digitization of copyrighted print publications might constitute entering a derivative market, which could cut against a finding of fair use. "Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works."³⁰³ This new market is the market to license works for indexing in a searchable full-text database. Yet Amazon's use of the works in this derivative market is beneficial to the copyright owners, as it drives further sales. Much like commentary or criticism, this is the type of derivative use that fair use was designed to protect for the sake of market efficiency.

[P]ublishers want their books reviewed and wouldn't want reviews inhibited and degraded by a rule requiring the reviewer to obtain a copyright license from the publisher if he wanted to quote from the book. So, in the absence of a fair-use doctrine, most publishers would disclaim control over the contents of reviews. The doctrine makes such disclaimers unnecessary. It thus economizes on transaction costs.³⁰⁴

¶107 The same can be said of Search Inside the Book. Just as one can safely presume that most businesses want to be included in the yellow pages of the phone book, the great majority of authors want to be included in this index. Obtaining the necessary rights from each of these authors would be prohibitively expensive.³⁰⁵ The fair use doctrine permits this use without permission, thus economizing on transaction costs.

¶108 Under this fourth factor, assuming that Amazon strengthens its anti-copying measures as described above, the proven benefit to the original market and the copyright policies favoring this type of derivative use point clearly to a finding of fair use.

CONCLUSION

¶109 With Search Inside the Book, Amazon has used new technology to create a database with unrivaled potential. Eyeing the underlying archive of complete digital books as an untapped resource, some have suggested that Amazon's new program will fuel enthusiasm for overturning the current publishing and copyright regime.³⁰⁶ For many, the idea of a universal digital library of all books is enormously appealing, and something worth striving towards.³⁰⁷

¶110 Search Inside the Book, however, is not a library. It is an index to copyrighted material, allowing the public to find information buried deep within the pages of printed books, efficiently and effectively, for the first time in history. Amazon should ensure that this remains its function by correcting the flaws in its implementation, and courts should allow this new and productive use to flourish as Congress intended under the protection of the fair use doctrine.

³⁰³ UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

³⁰⁴ *Tj*, 292 F.3d at 517.

³⁰⁵ See discussion *supra* Part III.D.

³⁰⁶ Wolf, *supra* note 2.

³⁰⁷ *Id.*