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## WHAT LIGHT IF ANY DOES THE GOOGLE PRINT DISPUTE SHED ON INTELLECTUAL PROPERTY LAW?

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As on so many other issues, I come to the question of Google Print — known in polite company as the Google Library Project — as an outsider. I had little knowledge of the particulars of its operation, until I received a cram course on the subject from Michael Heller’s short introductory summary on the details of its operation and its connection to the general law of property rights. Fortunately, now that I have had time to take his remarks into account, I am relieved to report that what I had planned to say in many ways emerges unscathed.

In looking at this topic, I originally thought that I would focus largely on the question of fair use to sort out the Google dispute, given its centrality to the present litigation. That defense may determine whether the company succeeds or fails in litigation, an issue which I think is really very much open to doubt. But on reflection fair use is only one of a cluster of related issues that the Google project raises. The first issue asks whether or not the various opt-out programs that Google creates are sufficient to create consent to the project, which would obviate the need to consider the fair use defense at all. Yet once the consent issue is injected into any discussion, the discussion will quickly turn to the structure of property rights more generally. One small dispute therefore covers many corners of the intellectual property universe.

This last observation ties in with Michael’s previous remark in his introduction, where he notes that I “prefer to be called a classical liberal rather than a libertarian.”<sup>1</sup> Now why should the choice of label matter, when to most people the gossamer distinction is asserted between two

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<sup>1</sup> Wikipedia’s entry on Richard Epstein, [http://en.wikipedia.org/wiki/Richard\\_Epstein](http://en.wikipedia.org/wiki/Richard_Epstein) (“Epstein is known for his cheerful, talkative manner as well as his confident views. He prefers to be identified as a classical liberal rather than as a libertarian.”).

positions that share the common fault of being both too dismissive of state power? Yet for me that difference in approach really matters. The strong libertarian holds up the primacy of property rights and thinks that they are properly subject to transmission or loss in only two ways. First, if you have committed a wrong, you have to sacrifice your property in order to compensate the person whom you have wronged. Second, if you part with your property in a voluntary transaction, you cannot complain of the loss to which you have consented *ex ante*. The classical liberal accepts these two positions, but adds to them a third: property may be taken by state coercion, or with the benefit of state approval, so long as it is conditioned on the receipt of compensation which may be in either cash or kind, and which leaves the party coerced better off than before he was subjected to the use of state power. It is this last position that legitimates the taxation or the eminent domain power.

In the world of intellectual property in general, and in the world of copyright in particular, these forced exchanges sanctioned by the state play a large part, particularly in connection with the area of fair use. The rise of that doctrine is a testament that we can identify certain kinds of settings in which voluntary transactions do not work well, so that it is necessary for the state to institutionalize limited rules that allow private individuals to take and to use for their own purposes intellectual property that is owned and controlled by others. If I were a pure libertarian, this lecture would be very short, because the doctrine of fair use would fall outside the first two heads of the commission of the wrong, or the performance of a promise. But as a classical liberal I have to investigate whether the fair use defense may be made out at all. An absolutist conception of property rights would end the discussion.

To start the analysis, let us go back to where Michael left off in his description of the Google Print initiative. The world contains a huge amount of information, and there is a great desire to organize it for the benefit of all human beings. Many times people are now so enamored of information that they start to anthropomorphize it. They say, for example, that information wants to be free, as if somehow it is held in shackles and is trying desperately to get out in an extreme exercise of its own will. Of course, if you deal with the law of trade secrets, which is a key part of intellectual property, you will quickly discover that information also wants to remain confidential in many contexts. The only way to reach sound results is to get rid of the “want” verb in order to ask a more structural question. Under what circumstances ought information be freely available, and under what circumstances ought it be restricted? We would have a short discussion if we concluded that the system of strong contract or property rights was perfectly ideal for all forms of information, or, alternatively, that it was utterly inappropriate for all forms of information. At that juncture, we could opt for complete privatization on the one hand, or for pure public domain status on the other. But the reason why this area is so difficult is that we in fact all intuitively gravitate toward mixed solutions. The source of our disagreements is exactly *which* mixed solutions get us closest to the ideal conclusion.

Google Print, in effect, presents the happy situation in which massive technological improvements now permit us to create machine readable copies of virtually everything in print, so that search can be reduced to typing in the key word or phrase in order to identify the relevant texts. You do not have to read a text from beginning to end to find the exact place where they were talking about the International House of Pancakes. You type in the words “International House of Pancakes” or “IHOP” and there it is. It is a tremendous assist in access to knowledge. So Google Print took a group of libraries — including Oxford, Harvard, Michigan, and the New York Public Library (but it really does not matter which they are) — and made this proposal: it will take all sources in each library and convert it into machine readable form so that it is

accessible online. Then, once Google has made the master copy, it will let users gain access to snippets that show a couple of instances of the designated term surrounded by a short passage that places it in context.

How does this use of the material of others square itself with the commands and prohibitions of copyright law? There are two parts to the analysis. The first is the classical libertarian analysis of property rights subject to an override by consent. The second is the mushier and more difficult area of fair use that plumbs the logic of forced exchanges. Then, to make matters a little more difficult than they otherwise might have been, Google deftly proposed that if rights holders want to opt out of the program, all they have to do is give notice to Google, which will no longer include their works in its data base.

So why then are the publishers and authors now suing given that this opt-out provision has been made available to them? Because all opt-outs are not created equal. The problem would have been solved if the opt-out had simply required Harper & Rowe to send a letter saying that all its titles still under copyright protection are excluded forthwith from Google Print. At that particular point the whole imbroglio would end. But what Google has stated is this: the authors and publishers who want to opt out from our particular system have to go through an additional hoop, by specifying with some degree of particularity the name of the book, its various identification numbers, and dates of publication. So what Google would like authors and publishers to do, at their expense but for its benefit, is to prepare a list that will cost it x-thousand-dollars in order to escape its clutches. Google does not own the copyrights, so why is it in a position to dictate what goes on? And if it may do so, then why not any rival business that hopes to enter the same market niche with its own set of opt-outs?

I am not entirely happy with Google's clever strategy which treats the decision not to opt out as though it were a form of consent. The issue here has precedents outside the modern law of copyright as one of the chestnuts of contract law. Years ago, for example, I was involved as an expert witness in a difficult dispute over the use of negative options in the cable TV business. The analysis there started with the simplest hypothetical: somebody delivers a magazine to your doorstep and says if you don't like it you can return it, and if you don't return it the owner will treat it as though it has been sold, and send you a bill. The prompt reply is that this tactic fails if pressed into service to create initial relationships between strangers, because the autonomy principle means that no one can give you the choice between A and B, where either alternative leaves you worse off than you were before, that is, under the status quo ante. The only way to stop these strategies is to allow you to read the magazine at your free will and pleasure, and not pay them a dime. The reason for this hard-line approach is not to offer the ultimate in fairness and equity. Rather, the rule is adopted because it serves a useful forcing function. Once people know that they are worse off with this strategy than with procuring consent, they will no longer seek to circumvent the rule with strangers. The severe sanctions force potential wrongdoers to walk the straight and narrow, by using voluntary channels for marketing standard products.

By the same token, it is risky to dismiss this opt-out approach in all cases. Thus the same common law that looks askance at trapping strangers takes a different view toward opt-outs that arise during the course of continuing relationships. In these cases, the opt-outs are needed to prevent the disruption of ongoing commerce. To give the classic example: I am a credit card company; you borrow money from me. The credit card is now up for renewal, but the base interest rate is moving up by one point in response to shifts in underlying market rates of interest. What firms ordinarily do is use an opt-out contract so that the cardholder takes the increased rates unless he or she notifies the firm that the new terms are unacceptable, which they rarely are.

The alternative is to find that all sorts of payments are blocked, with finance charges and confusion. Who needs the hassle? Why would anyone opt out when the competition is faced with the same cost pressures? The basic intuition in now is exactly the opposite of what it is in the stranger case: we believe that 99 percent of all cardholders want to have the renewal. The credit card company is not targeting a random portion of the population. It is looking at its current customers who know the drill. The prior relationship, which changes rates in accordance with some predetermined and well-known formula, allows the negative option to work. The opt-out rule minimizes transactions costs and stabilizes business relationships precisely because of the antecedent consent, which is of course not present with Google Print.

The situation with my cable TV dispute did, however, generate real ire by offering existing customers new services on an opt-out basis. The prices were low, the opt-out was easy, and the popular resentment was so enormous that a groundswell of opposition led to legislation that stopped the practice, which would have died anyhow for marketing reasons. There turn out to be powerful differences between interest rate or price adjustments, and altered relationships. People are more touchy in practice than the typical economic analysis presupposes. And authors and publishers are in many instances more touchy than most. People want explicit choices even if they increase by some measurable amount the transaction costs needed to run the system. My own straight law and economics approach (which takes hold over me in weak moments) does not give sufficient weight to common psychological responses.

That public response helps explain the complaint filed by the Association of American Publishers against Google in federal court.<sup>2</sup> Nowhere in the complaint do they actually mention the opt-out provision. They simply say that the Google copies are made without their consent. The bulk of the complaint then addresses the various class action issues of commonality and the like. For the publishers, ground zero is fair use.

Before turning to fair use, however, it is important to understand how Google Print deals with a question that is now before the Supreme Court, which lies at the heart of recent disputes over the structure of intellectual property, including a spirited debate between myself and Eben Moglen in 2004 at Columbia, having to do with the now famous case of *Intel v. Hamidi*.<sup>3</sup> That case asked in a related context a disarming question. What does it mean to speak about an exclusive right? The copyright statute says that every person shall have an exclusive right to publish or to distribute certain kinds of works, meaning that they are the only ones who can engage in that activity.

Suppose somebody turns out to violate that particular right. What is the remedy that the court will award? To the formalist, the answer is absolutely clear. If you are the person who has the sole right to do this specified activity, and can exclude everybody else from the production or redistribution of the material in question, the only relief that is symmetrical with the right that has been granted is injunctive relief, a court order that will stop the offender from further distribution or publication of the copyrighted material. This tough rule has exactly the same function as the no duty rule in the case of the unwanted magazines. By enjoining the activity, the copyright holder is able to prevent wrongdoers from bypassing voluntary transactions by way of license or purchase for the copyrighted material. Using injunctions, of course, does not remove the need for damages with respect to any previous unlawful activities. The copyright owner may

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<sup>2</sup> Complaint, *McGraw-Hill Co., Inc. v. Google Inc.*, No. 05CV8881 (S.D.N.Y. Oct. 19, 2005).

<sup>3</sup> *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003).

strip the infringer all of the profits gained from the violation or, alternatively, make good the copyright holder's loss. Ideally, a court should pick whichever number is higher, in order to remove any incentive for potential competitors to avoid doing business with the copyright holder.

*Cracks in the Absolute Property Wall.* At least as a first approximation, therefore, the basic structure of copyright law seems to favor the hard libertarian view that contract is the only proper way to acquire property rights that belong to another. Does that position actually prevail today? There are many cases in which the modernists in intellectual property law have come to the conclusion, which I think is erroneous, that this rule of absolute exclusion is not appropriate. In its place, they often argue courts should adopt some form of equitable balancing of a full array of public and private interests before granting injunctions.

Let me just mention a couple of these particular cases. The first case, which is now before the Supreme Court, is *eBay v. MercExchange*.<sup>4</sup> The case involves patents, but the issue tracks that in copyright law. In its most dramatic form, *eBay* asks (although the opinions below are silent on the issue) whether certain "trolls" (who inhabit the patent world) are entitled to injunctions as a matter of course. The definition of a troll is always up for grabs. In some cases, the troll is someone with an invalid patent who seeks to strengthen his position by suing lots of parties, and then using the licenses that he acquires from some defendants (often on favorable rates to the alleged infringer) as evidence of the patent validity in suits against other parties.

In the *eBay* situation, however, the patent was adjudged valid and infringed, so in this context the troll language is directed solely to the question of remedial choice. One way to put the question is whether the injunction should be allowed only to people who practice the patent, or who license it actively, or who choose not use it in order to develop other more attractive, if substitute, forms of intellectual property in their portfolios. To my mind if that is what a troll is, then the nasty label is inappropriate. Licensing, for example, is just a perfect example of specialization. If I own a patent, I can decide whether to use it, or to sell it, or to license it. If I decide to take alternative number three to the exclusion of numbers one and two, I should be able to use that advantage. Presumably, I will get the highest maximum for my return. My activities will not generate any social distortions, because the only way that I can get high revenues by that particular strategy is to satisfy my customers by charging them less for the use of the patent than it is worth to them. So the proper exploitation of a patent should be left to the decision of its owner. We want judges to remember that the last useful job for the patent law is the creation of industrial policy. Our proper task is more modest: just enforce the property rights created by the system and let the industrial policy be designed by a vast array of decentralized actors. In this particular context, a legal system that denies discretion over the choice of remedies actually implements a kind of Hayekian principle of the unplanned economy by keeping the state far away from making strategic and investment decisions.

In *eBay* the Supreme Court is now being asked to relax this rule of injunctive relief in circumstances where the patent holder did not engage in any actions amounting to laches or estoppel, that is, the tardy assertion of rights, or the creation of an impression in alleged infringers that it is all right for them to practice the patent. I have no doubt that the law can, in extreme cases, relax any rule. A good classical liberal always recognizes necessity cases that soften the absolute nature of any property right. The most famous case, which I hope every law

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<sup>4</sup> *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005), *cert. granted*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 733 (U.S. Nov. 28, 2005) (No. 05-130).

student is familiar with, is *Vincent v. Lake Erie*,<sup>5</sup> where the owner of a ship was said to be allowed to remain at somebody else's dock in order to save himself from imminent destruction, even though he was required to pay compensation afterward. The question in this context is far removed from situations of necessity, which might exist if some rare drug were needed to combat a deadly plague. Instead, the more humdrum issue in *eBay* is whether to treat damages after breach as the standard remedy. I think that this approach is wholly unsound. Let me explain why that is the case, and then relate the discussion back to Google Print.

Our basic intuition is this: if there are just two people in the world, someone who owns a thing and someone who would like to own it, you may not care overmuch which way you assign the property rights. If the legal rule allows for the creation of a compulsory license through the payment of damages, the original owner can buy back that thing in a simple two party transaction. But in a world of property rights, patents are often assembled into complex portfolios. Now thousands of individuals and firms may in principle be allowed infringe at will on the patent and pay only damages, depending on the vagaries of the public interest standard. What sense is there to a world in which an inventor has to sue in thousands of cases to negotiate thousands of compulsory licenses under judicial supervision? Anybody who has ever looked at "simple" licensing agreements in all sorts of industries realizes that they are often very thick, complicated volumes. You do not know what the terms of those licenses are going to be in the abstract. They have to be negotiated out pretty much on a case-by-case basis. What happens is that if the courts start to allow compulsory licenses by giving damages as a remedy, they open up too many opportunities for strategic behavior, and thus obscure all the information about how markets and transactions ought to be structured through voluntary dealing. I think that one does not want to say that we would relax the rules of property rights to the extent that permanent damages or compulsory licenses become the remedy of choice. The great question that the Supreme Court is going to have to decide in this *MercExchange* case is where they wish to tweak the remedy of injunctive relief, if they wish to tweak them at all.

It was interesting that in the appellate court, the Federal Circuit, the issue of injunctive relief was not even treated as a very difficult one on the facts of that case.<sup>6</sup> They spent three or four pages on it. Now it turns out that the law professors and everybody, including myself, is involved in one way or another in writing amicus briefs, because there is no doubt that it goes right to the fundamental structure of property rights, and is in my judgment probably the most important patent case to come along in many a year.<sup>7</sup>

The second case, now before the Supreme Court that examines the role of absolute property rights is *eBay v. Bidder's Edge*.<sup>8</sup> The question there is whether or not one firm can send, without authorization, its various little spiders through somebody else's website in order to compute and gain information about the bids on various items up for sale. These intruders are called auction aggregators. Instead of just going to eBay, the auction aggregator allows you, the

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<sup>5</sup> *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

<sup>6</sup> *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323 (Fed.Cir. 2005).

<sup>7</sup> See, e.g., Brief of Various Law & Economics Professors as Amici Curiae in Support of Respondent, *eBay, Inc. v. MercExchange, L.L.C.*, (U.S. filed March 10, 2006) (Richard A. Epstein, R. Polk Wagner, and E. Scott Kieff); Brief Amici Curiae of 35 Intellectual Property Professors in Support of the Petition for Certiorari, *eBay, Inc. v. MercExchange, L.L.C.*, (U.S. filed Sept. 26, 2005) (Mark A. Lemley).

<sup>8</sup> *eBay v. Bidder's Edge*, 100 F.Supp.2d 1058, cert. granted, \_\_\_ U.S. \_\_\_, 126 S. Ct. 733.

customer, to compare items that are sold on multiple sites. I was quite active in that case at the appellate stage and, in the end, the strong absolute right prevailed against the claims of privilege. The explanation for that outcome was remarkably simple. eBay is quite happy to trade with other people in order to increase the potential scope of its business, so there is an active voluntary market governing access. Therefore, the law should not create a situation that allows circumvention of the market simply by paying hard-to-determine level of damages. The damages would be difficult to calculate because in these funny IP situations, neither standard measure of damages works well. The benefit conferred upon the defendant in virtue of its breach is very difficult to calculate, as is the lost income to the plaintiff from the defendant's breach. The strong property rule obviates these difficulties over valuation. In addition, it allows for the orderly inclusion of other nonprice terms that drop out of the picture in any damage suit.

The third case that falls into this particular category is *Intel v. Hamidi*,<sup>9</sup> which led to the spirited debate between Prof. Moglen and myself. There the defendant had been dismissed from Intel for cause, or so the company claimed. The ex-employee then proceeded to break in to use Intel's e-mail entry system to distribute on several occasions his own missives to 35,000 or so Intel employees and send them into various states of unhappiness and shock by spreading rumors. Intel did not pursue Hamidi for defamation, but it did pursue its novel trespass to chattels claim. The position that I have defended, and that I will defend again in one or two sentences, is simply this: if you are allowed to use the self-help remedy to keep somebody else off, then if self-help fails for various reasons, injunctive relief should always be allowed. What the California court, by a narrow 4-3 majority, decided is that there may be circumstances where self-help is perfectly legitimate, but legal assistance in the form of permanent injunctive relief is not. It is a kind of argument which I regard as simply too subtle for words. It is the kind of case in which cat-and-mouse games are going to be played. Once it is clear that the conduct is going to be a wrong, the full set of remedies ought to be available. One reason for using the injunction is to avoid figuring out, yet again, when there are violations of property rights, how serious the damage is or how we quantify it. What we want the law to do is to steer people into the path of voluntary transactions.

The *Intel* case is extremely instructive since it involved no voluntary transaction. Nor is that a surprise. There is no amount that Mr. Hamidi could have paid Intel to persuade it to let him use its facilities in order to defame the company to its own workers. The right solution in that case is no voluntary contract. The moment you let Hamidi to use Intel's servers, the law deviates from the dominant private solution (i.e. no contract is the efficient outcome) by allowing the party with the lower value use to dominate the institution as against the party with the stronger value use.

*Cutting Back on Absolute Rights: The Overflight and Spectrum Cases.* How does the analysis of these issues come back to haunt us in sorting out the multiple layers of Google Print? Well, here again it is possible to make some fairly serious mistakes. One of the mistakes that was found in the *Intel* case was also made by Larry Lessig in a provocative but misguided blog on the subject.<sup>10</sup> He compared Google Print with property rights in the upper atmosphere. Exposing the weaknesses of this analogy shows the tension between the classical liberal position and the libertarian position on property rights.

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<sup>9</sup> *Intel v. Hamidi*, 71 P.3d 296 (Cal. 2003).

<sup>10</sup> Lawrence Lessig, *Free Culture*, [http://libreria.sourceforge.net/library/Free\\_Culture/intro.html](http://libreria.sourceforge.net/library/Free_Culture/intro.html).

As a good Roman lawyer (i.e. as a professor who regularly teaches that subject) the famous *ad coelum* rule: *cuius est solum, eius est usque ad coelum et ad inferos*, which in English reads, to whom the land belongs, to him belongs also to the sky and to the depths. This pithy rule reminds us that property in land operates in three dimensions. On one of those dimensions, if you own the surface of the world, you own it all the way up to the heavens. Now how far to go was not difficult to decide in Roman times. Go all the way up. Nobody cared if you owned Alpha Centauri this minute, because it happened to sit directly over your property. In practice, this exaggerated rule meant that you could build above the ground, and, at the same time, you could prevent other people from building overhangs over your particular property. The *ad coelum* portion of the rule helped create more efficient bundles of property rights in three dimensions, just as the *ad inferos* portion (that related to the depths), helped create a more efficient environment for sorting out mineral rights. To see why, suppose the dominant rule held that ownership of the surface gave the owner exclusive air rights only up to three feet. Now all construction of four foot high buildings comes to a halt. Perhaps you would want to have a limit of one-thousand or two-thousand feet, but at least in those days there was no reason to have any upper limit at all. There was no one else who could enter.

Along comes the airplane, and it can fly overhead, high or low. To apply the truncated system of property rights in land that I just mentioned means that the *ad coelum* system of property rights creates an absolute right to exclude all persons from the upper airspace. Marry that conclusion with the automatic injunction rule and you have a perfect recipe for technological paralysis which works to no one's long term benefit. No one for starters will be able to fly from San Francisco to New York, even on the most jagged path, if they must get the consent of every land owner whose property lies under the plane's intended path. You realize quite quickly that this "system" is so inefficient that nobody in his right mind could ever think that it represents an ideal response to the air transportation problem. So at that point the determined realist just says: I am just going to open up the upper airspace, full stop. But the answer is not so simple. Somebody will say: look, there are vested rights under these circumstances. How ought they be terminated and why? If you are working within the classical liberal framework, the proper response is that the state could terminate these property rights, but only if it supplies some compensation for the property rights that have been lost. That is the first part of the argument. And it seems to me that it is unexceptional. There is a reason for doing it – open public access to the higher space meets the public use test even before the *Kelo*<sup>11</sup> case.

But what is the compensation? Here is where one has to think a little bit out of the conventional box. The original cases on takings typically dealt with situations where a piece of land was taken and cash was provided in exchange. But there is nothing about the basic constitutional formula which says the compensation can only be provided in cash. It is perfectly appropriate to think of a compensation mechanism in which you give people in-kind rights which are of equal or greater value to the property rights, here in the upper airspace, that they have been forced to surrender. Now by requiring every landowner to surrender the rights to exclude others from his property, the state is giving every landowner the right to fly over everyone else's property under the same terms and conditions.

We then have to check this swap against the eminent domain standards for just compensation. The first test asks whether or not we think in the gross that the gains are larger than the losses that have been suffered. If the outcome of the forced switch is a positive sum gain, then we ought to allow it. We could do a detailed empirical analysis to figure out whether

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<sup>11</sup> *Kelo v. City of New London, Conn.*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 24 (2005).

or not airline transportation is or is not a net boon to the economy. If you come out with the answer no, I will publish your work as a learned disquisition on the power of economic analysis, but I will not believe a word of it. So breaking the logjam has real positive effects.

The second inquiry that we have is whether somebody is done in by virtue of this exchange, that is, comes out on the short end of the deal. It turns out, here, we can identify two kinds of cases at the extremes with intermediate cases all along the line. The first type of case involves a plane that is flying up at 20,000 feet, which folks can peer at from a distance. We would say its overflight causes no direct damage down below. You can fly your plane over somebody's land at 20,000 feet; they can fly over your land at the same altitude. But the moment those planes come close to the ground, the direct overflight, for sure, creates a genuine overflight and/or nuisance risk, and in some cases could crash into buildings. The correct response, which the law has taken 90 percent of the time is that whenever landowners who are being hurt are subject to a disproportionate burden compared to everybody else then we will give them some explicit cash compensation. For low overflights, if there is damage, we will compensate. For high overflights we will not. That means in effect that the state uses implicit in-kind compensation for the high-flyers and cash for the low-flyers.

The point of this digression is to dispute the claim that Google Print is in reality like the overflight case, or worse, that it is really like the situation where spectrum is transmitted over private property between a broadcast tower and a home receiver. If absolute property rights are ill-adapted for these cases, then why are they not inappropriate for Google Print, given that Google is also in the same transmission business? This analogy is flawed, and for this reason. The overflight cases are *never* just about the choice of remedy. Damages are blocked along with injunctions. Now the property right *flips over* to avoid the holdout question. No one would ever think of using the same kind of opt-out that Google built into its proposal. We will not allow Farmer Jones out in Kansas to say: normally I am in this overflight game, but I am going to opt out, and if you want to fly over my land you have to pay whatever entry fee I stipulate. You do not allow that option with the broadcast spectrum either. These cases involve a complete inversion of property rights because the blocking risk is too great for anyone to have it. Now that the rights do flip over, the operators of the air space can enjoin interference from other planes or other broadcasters. The old absolute rights position applies but only to the reconfigured rights. We force uniform compliance to our new regimes.

*Back to Google Print And Fair Use.* Returning to Google Print, for Google to have a working library, does it have to include every book in the universe for its project to have some value? The answer to that question is clearly no. It can offer something valuable even if it has a limited collection. To justify the suspension of the property rights of copyright owners, it is necessary to find some other justification that goes beyond an appeal to the simple fact that major advances in information technology increase for reasons outside the actions of its owners the value of certain types of literary works. The additional condition that you need to have is a network industry, where the failure of cooperation by one could destroy the value for all, as with overflights and broadcasting. Google Print does not satisfy this condition.

We can now direct the fair use arguments in the Google Print dispute more directly. Recall that if you have strong consent in fact, fair use is off the table because we return to a market setting. When consent fails, or is resisted, why then should some people be allowed to use copyrighted material for their own benefit, without having to pay the owner? I would approach that question this way. First, ask whether a copyright holder could get voluntary

consent under these circumstances. Sometimes he can. Second, ask whether the insistence on consent by copyright holders will lead to a sound social solution.

For example, suppose what happens when Margaret Mitchell writes *Gone with the Wind* in a world that has no doctrine of fair use. For starters, it means that the only people whom the author designates will be allowed to mention the book by name, since the title is copyrighted. Many of these self-selected critics are likely, quite naturally, to agree heartily with the author. I think we would all conclude that this outcome marks a desperately stupid social equilibrium, because it precludes any intelligent criticism by independent people. Ironically, the best of authors will be hurt by this harsh edict, because if they in fact control the agenda, their pre-approved critics will never have credibility. A smart copyright owner might therefore allow all critics some blanket right of limited use for criticism. The doctrine of fair use reaches that same result more generally by removing the copyright holder's right to blockade. It is therefore no accident that the doctrine of fair use began with reportage and criticism. The comments are not persuasive unless some bits of the work can be marshaled to persuade the reader of the soundness of the critic's view, without letting him quote so much of the work as to go in competition with the original author. The basic rule is not unlike one which allows critics to use a trade name to criticize goods even though its owner is the only one who can use the name for to sell goods. In both cases, the owner's consent disrupts the orderly flow of information.

Where else might it make sense, outside the context of a network industry, to relax the usual rules demanding the consent of the owner? There is at most only a little help from the statutory definition of fair use.<sup>12</sup> That provision starts by giving its general blessing to criticism, comment, news reporting, teaching and scholarship. It then provides a list of factors that is supposed to determine whether the defense of fair use should be allowed "in any particular case." Unfortunately, this list was not drafted with an eye to the current controversy, so that it does not supply us with any definitive answer to the question. The first factor asks about the purpose and character of the use to which the work is directed. Thus, a charitable or a non-profit organization will get a little bit more leeway than a for-profit operation. The charming question here is which side of the line are Google and its library partners on? The service is offered for free, yet the advertisement revenue drives the business. Do we even care which side of the line this case is on?

Factor two says look at the nature of the work. Fine, but what are we going to see? Not very much. Factor three asks what fraction of the work is going to be reproduced. Of course that is extremely difficult to determine. The limit on the number of snippets per work suggests only a tiny fraction. But the basic contract requires Google to reproduce the entire work for setting up its own internal platform. It is not clear which offers the proper frame of reference.

Factor four asks about the impact of the publication on the profitability of the author's work. Sorting that out creates the problem with choosing the right baseline. For some publications, it is clear that the works are dead in the current environment. Google will help bring them back to life. For these works, the transaction has a net positive benefit. In addition, we can be confident that the transaction costs needed to sort out the rights for these low-value works exceed the gains from the transaction itself. So to insist on consent is to shut some fraction of the market down. The basic attitude is to be somewhat sympathetic to the fair use defense because it enriches the copyright holders just as it enriches Google. But for other works the transaction costs of negotiation are low relative to value, and here the voluntary market would normally allow copyright holders to share some fraction of this new revenue stream by

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<sup>12</sup> 17 U.S.C. § 107.

direct payments, even though they are probably better off from the Google project, via increased sales, without any sharing arrangement with Google at all. Nonetheless here the case for the fair use defense is much weaker.

At this point, somewhat surprisingly, the fair use and the opt-out provisions point in the same direction. Thus it makes sense to use the opt-out (in the simplest possible form) for old works where few wish to opt out. But it does not make sense to use that where the rights have a high value, so that copyright holders will have to opt out countless times with all sorts of persons who have designs on their valuable work. Recent works and still actively marketed works of any age should be included. Exactly where the line between these various classes should be drawn is hard to say, for one feature of the modern technology is the rise of microtransactions that allow for efficient transfers of ever smaller packets of rights. If this is correct, then one easy proxy is to say that opt-outs survive for old works that generate only below some fixed amount in sales, but not otherwise. For the more valuable works, we could easily envision contracts that call for payments by Google by the number of hits, so that there is no reason to bypass the market at all. At this point, we do have a higher set of transaction costs in order to secure a somewhat different distribution of the cooperative surplus that is generated by the combined efforts of copyrighted works and new technology. But I would not lament this loss unduly, for the protection of unanticipated income streams, which as a generic class are now routinely anticipated, supplies yet another incentive for the creation of copyrighted works in the first place.

So in the end there is a small, and shrinking place, for some fair use defense. As transaction costs get lower, the case for voluntary markets gets stronger. That is not an observation about the distinctive features of emerging markets. It is an application of the transaction costs economics of Ronald Coase to a modern setting.