Progress, Innovation and Technology: A Delicate Google Balance

Robert J. Reis
University at Buffalo School of Law
PROGRESS, INNOVATION AND TECHNOLOGY: A DELICATE “GOOGLE” BALANCE

ROBERT I. REIS †

ABSTRACT

This article presents observations, questions, and commentary focusing on present and future copyright and patent paradigms. Part I addresses the expansion of substantive content rights, the dramatic extension of term duration of copyright, and the revolutionary expansion of new technologies that are core to fundamental objectives and benefits of copyright. It notes the escalating fixation of Congress and the courts on protection of intellectual “property” rights when often it appears in contravention of constitutional purpose. Part II addresses the tension created by Google’s adventures in information technologies, particularly those at the fringe of private rights and constitutional purpose. While Google’s search engine, data collection, use of data, presentation of data, forays in operating systems, and smart devices present copyright, patent, privacy, and social issues, the catalyst for a copyright paradigm shift is likely inherent in Google’s Book project and litigation stemming from their growing stable of smart devices built on the Android Operating System. The tension is created by Google’s global presence, ubiquity, and incessant technological innovation - factors collectively setting the stage for a fundamental shift in the distribution, and use of intellectual content. These activities are consistent in purpose with constitutional purpose but, in current contexts, incompatible with and “rivalrous” to exclusive rights granted under current copyright and patent regimes.

† Robert I. Reis, Professor of Law, State University of New York Buffalo School of Law - Co-Director Intellectual Property Concentration Program.
TABLE OF CONTENTS

I. The Journey Begins: Sailing to the Distant Land of Progress: A Gratuitous Parable on Copyright
   A. Early Warnings and Constitutional Purpose: A Lineal Progression
   B. The Great Divide: When Coincidence Becomes Consumptive and Rivalrous

II. Google: Fueling the Paradox: The Winds of Change

III. Conclusion

---

I. THE JOURNEY BEGINS: SAILING TO THE DISTANT LAND OF PROGRESS: A GRATUITOUS PARABLE ON COPYRIGHT

The second decade of the 21st century finds the good ship “Copyright” sailing to the land of “Progress.”[^1] The course is difficult through the fog created by ambiguities, clichés, and unsubstantiated myths of progress spurred by monopolistic private rights and legends of resulting public benefit. The vessel is leaking badly with excesses of appropriated cargo from the public domain[^2] and derivatives. The lower decks are littered with construction materials deemed necessary to fix leaks and wall off those designated as infringers and pirates[^3]. There is little, if any, current

---

[^1]: The word "progress" was selected because of the critically narrow interpretation given it in *Eldred v. Ashcroft*, 537 U.S. 186, 213-14, 215 (2003) (rejecting the use of progress as purpose and limitation in the creation of copyrights). There is considerable scholarship that refutes the Eldred Court’s interpretation of the framers’ intent in using “progress” in U.S. CONST., art. I, § 8, cl. 8. These scholars regard “progress” as a substantive goal to be treated as mandatory, not prefatory; see generally, Malla Pollack, *What is Congress Supposed to Promote? Defining ‘Progress’ in Article I, Section 8, Clause 8 of the U.S. Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754 (2002); see also, Vivian J. Fong, *Progress: Are We Making Progress?: The Constitution As A Touchstone For Creating Consistent Patent Law And Policy*, 11 U. PA. J. CONST. L. 1163 (2009); Dotan Olitar, *The (Constitutional) Convention On IP: A New Reading*, 57 UCLA L. Rev. 421 (2009).


[^3]: See, e.g., The Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-02 (2006) (anti-circumvention provisions); Digital Economy Act 2010, available at http://www.legislation.gov.uk/ukpga/2010/24/introduction/enacted (Last visited June 23, 2011); One that didn't make it was the Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004). The bill was proposed to the Senate by Orrin Hatch and was directed at the intentional inducement of copyright violations. While it was represented as
empirical evidence that the rewards of exclusive rights and economic gain are coincident with the purpose of public benefit. Ledger books have never justified the need for excess baggage that eschews distributive creativity and innovation in the spread of enabling knowledge. Assumption and recantation have replaced the not so "common sense" that understood the relationship of reward to the purpose and good of the nation. The good ship "Copyright" will have a difficult journey to the promised land of "Progress" unless it jettisons some of the appropriated cargo that make paper laws fragile in rapidly changing times. These are times that bear witness to "dazzling" technologies for creative use that excite and fuel contemporary normative disconnects. The course must be altered and set with clear restatement of public benefit, requirement of validation, and empirical proof that the means (copyright and patent) serve the ends of public benefit.\(^5\) Legislative rules and judicial decisions must return to a balance that ensures focus on public benefits (ends), not merely the aggregation of wealth from reward in the private sector.\(^6\) There should be no more protection of the means than necessary to ensure minimal detriment to the public beneficial user and the goals of societal progress. Private rights must be put to positive public beneficial use or be deemed abandoned or terminated. To this end, there should be "no right" of a non-user for the public benefit as an incident of the copyright. At this leg of the voyage, are private rights necessary for spurring innovation and creation? Are there other regimes spurring more creation, innovation, and progress? Why mortgage the future and prevent for any period of time the very seeds of creativity and innovation?\(^7\)

neutral and not contrary to copyright purpose, it died an early death. Some of the language of the proposed legislation is reminisced in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S.Ct. 2764, (2005).


\(^6\) See Golan v. Gonzales, 501 F.3d 1179 (10th Cir. 2007); but cf. Golan v. Ashcroft, 310 F. Supp. 2d 1215 (D. Colo. 2004) (10th cir. states that the reward to authors and inventors is the purpose for granting exclusive rights while the district court notes the delicate between private rights, public interest, and the desired progress which flows from those means).

\(^7\) See, Tim Harford, *How to fire up the Innovation Engine*, WIRED, Vol. 19.06 June 2011. He presented constructs to fuel innovation in stark contrast to what may be an outmoded model of reward creating exclusive rights for limited times: "...there are two solid models that have already proven effective at cracking problems and pushing past plateaus.
A. Early Warnings and Constitutional Purpose: A Lineal Progression

There were any number of early warnings by scholars concerned with the future of intellectual activities and expansion of copyrights as a means to the end of progress.\(^8\) It is more than likely that early copyrights served this function, albeit limited little by way of bounds and the designation of "limited [t]imes," "original," and "progress" as purpose. The coincidence of reward for contribution to progress was reasonably based on faith and the implicit belief that through publication and the expansion of knowledge, protected private rights would be put to public use through emulation, adaptation, integration, and expansion of knowledge.\(^9\) The transition to the gratuitous characterization of the constitutional reward as property was coincident with the onset of systematic denigration of the public beneficial interest. In the period to follow, copyright expanded in subject matter from literal protection of the right to make copies to inclusion of derivative uses that previously may have been understood as the \textit{quid pro quo} for private rights and progress. The copyright interest was, in fact, granted during this period for a limited time, and often regarded as a justification for privatization simply by referencing the reversion of that interest to the

---

8 See generally JESSICA LITMAN, DIGITAL COPYRIGHT (Prometheus Books 2001); LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic Books 1999); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (N.Y. Univ. Press 2001).

9 See Computer Assocs. Int'l v. Altai, 982 F.2d 693, 696 (2d Cir. 1992) (Article I, section 8 of the Constitution authorizes Congress "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." The Supreme Court has stated that "the economic philosophy behind the clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . . ." Mazer v. Stein, 347 U.S. 201, 219, 98 L. Ed. 630, 74 S. Ct. 460 (1954). The author's benefit, however, is clearly a "secondary" consideration. See United States v. Paramount Pictures, Inc., 334 U.S. 131, 158, 92 L. Ed. 1260, 68 S. Ct. 915 (1948). "The ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 45 L. Ed. 2d 84, 95 S. Ct. 2040 (1975). Thus, the copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation. In applying the federal act to new types of cases, courts must always keep this symmetry in mind. \textit{id}).
public domain at the termination of the copyright. These elements of
limitation are consistent with the notion of limited powers granted to
the federal government by the states. They are also in turn consistent with
the power then delegated in the Constitution to Congress. Without these
words of limitation and purpose, the acts of Congress may well have been thought
as ultra vires. There were few serious challenges to congressional acts early
on, likely because of the minimal restrictions upon duration and the “right”
of fair use by the public as a balance between private rights and public
benefit.

The later part of the 19th century began the change in the balance
between private rights and the fair use of the incidents of creativity.
*Folsom v. Marsh*\(^{10}\) was the first case to set forth standards for fair use
limitation, encompassing the non-literal copying of published works using
less than the entire original work. It also is the first case to use “pirate” and
“pirated” as a characterization of an alleged infringer\(^{11}\) which has
pejoratively haunted public use ever since. The accepted course of
challenging intellectual property has generally been “inside the box,”
manipulating and questioning within the bounds set by legislation and
cases.\(^{12}\) There has been little by way of effective public challenge to the
power of Congress in the adversarial process.\(^{13}\) A similar observation can
be made of representation of the public interest in Congress.\(^{14}\) The primary

---

\(^{10}\) *Folsom v. Marsh*, 6 Hunt Mer. Mag. 175, 9 F. Cas. 342, (Circuit Court, D.
Massachusetts, Oct Term 1841) (hereinafter Folsom).

\(^{11}\) *Id.* at 345.

\(^{12}\) Professor Goldstein noted that one size does not fit all, that fair use should be context
driven and that new technologies not considered by the copyright statute have equities of
(“What cases in this category have more or less in common is a new technology, of course:
the technology’s general omission from the Copyright Act; the increasingly broad and
systematic, rather than episodic, use of the new technology by consumers; [and] a
consequently increasing aggregate social value of the use[,] . . . [T]he absence of one or
more of these features predicts that no serious claim of fair use will be made for the new
technology . . . . These new technology cases have equities and efficiencies - and politics - of
their own. . . .”). In addition, the “Fair Use: ‘Incredibly Shrinking’ or Extraordinarily
Expanding” conference analyzed the multiple facets and limitations of conventional
analysis. See Charles von Simson, *Kernochan Conference Analyzes Changing Contours of
february 2008/fairuse.

\(^{13}\) Note the relatively limited amicus participation in *Eldred v. Ashcroft*, 537 U.S. 186
(2003), and the exponential growth of public participation in *Grokster*, in which over 60
Amicus briefs were filed (raising the specter of future litigation involving the Google Book
Project and Amended Settlement); see also, Robert I. Reis, *The Public Beneficial Interest in
the Intellectual Commons: The Implications of the Public Trust Doctrine and Necessary
Standing to Represent the Public Interest*, http://www.law.berkeley.edu/institutes/bclt/ipsc/
papers2/Reis.pdf.

\(^{14}\) See Litman, supra note 8, at 61-63. See generally William Patry, *Moral Panics and
the Copyright Wars* (2010).
focus of Congress has been on private rights, pirates, infringers, and enabling technologies. One consequence of this focus results in the enactment of regulations to protect the wealth of private right holders with minimal observable concern for collateral damage to the public purpose of copyright, all under the myth of coincidence and mark of property.

B: The Great Divide: When Coincidence Becomes Consumptive and Rivalrous

Intellectual property rights as currently constituted are both rivalrous and consumptive. The combined consequence of the above often means that they are often “mutually exclusive” of one another. The exclusionary character and duration of these rights inhibit, rather than enhance, innovation and progress. These rights diminish the foundation for progress by restraining competition, a proven precondition for progress. To date, the legislature and the courts have given little attention to the public benefits that result from the use of privatized intellectual content, instead choosing to focus on the protection of the vast riches in the treasure chests of intellectual property right holders. For some, Google represents the shadowed figure of a fabled knight who champions public rights because of its use of open technologies, ubiquitous and expanding adventures in information management. The Google Book project has the potential, by

---

15 When one hears the term DRM (Digital Rights Management), one thinks of protection of intellectual content in digital form belonging to the copyright holder. Interesting, but how about changing that to DCMPBU (Digital Content Management to Maximize Public Beneficial Use)? In a blow to a leading copyright protection organization, a Barcelona court ruled on March 9, 2009, that peer-to-peer download networks are legal under Spanish intellectual property law. See generally, Mark Hefflinger, Spanish Court Declares P2P Link Sites, Filesharing Legal, DIGITAL MEDIA WIRE, March 15, 2010, http://www.dmwmedia.com/news/2010/03/15/spanish-court-declares-p2p-link-sites-filesharing-legal.


scanning all the books in the library, to archive all works for posterity. It has the potential of constitutional purpose: to publish, distribute, and permit identification and retrieval of intellectual content on a scale unimaginable (except by fiction writers) less than a decade ago. To digitalize, to “copy” literally every word, every “.” and every “I,” and then permit the world access through search engines and artificial intelligence, and, in an instant, to find a source or phrase of every work that is either in the public domain or copyrighted, is beyond dazzling. These benefits are not simply fair use or transformative use, but rather, the root right of public beneficial use that raises immutable public policy issues that are inherent in the intent of the constitutional delegation of power given to Congress. Perhaps there is a twist of fate in the Court’s decision to reject the settlement agreement on procedural grounds rather than note that the terms and provisions of the settlement agreement must be construed in light of settled authority. The court’s reasoning is the catalyst for speculation on a complex of matters that help clarify the fundamental disconnect in public right representation.

Despite repetitive judicial deference to the Congress, the focus of the court should have been on public benefit as the intended purpose of copyright. From this perspective the court could have simply approved the ASA noting that all provisions must be construed in light of settled authority, treaties, and statutes. There is little indication, however, that anything was done to identify, measure, or otherwise affirmatively attempt to secure the public benefit. Search though one might, there is no validation, empirical or otherwise, of how copyright functions to achieve the requisite public benefits or progress. Copyrights are “presumed” to serve these purposes by the creation of private rights in the publication and the distribution of expression original to the author without supporting focus on rights of use in the public. Copy “rights” were once defined by functions necessary to ensure publication and the spread of knowledge. In

---

18 “The benefits of Google's book project are many. Books will become more accessible. Libraries, schools, researchers, and disadvantaged populations will gain access to far more books. Digitization will facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities. Authors and publishers will benefit as well, as new audiences will be generated and new sources of income created. Older books—particularly out-of-print books, many of which are falling apart buried in library stacks—will be preserved and given new life.” The Authors Guild v. Google Inc., 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011).

19 Id. at *679, 686.


21 See generally Pollack, surpa note 1, at 760, 769-71. It should be noted that Professor Pollack also filed an amicus brief in Eldred.

22 17 U.S.C. § 107 (2006) (allowing for the fair use of copyrighted works) is more a limitation on the right of use than an enablement.

23 Fong, supra note 1, at 1167-84; Pollack, supra note 1, at 755-56.
the abstract for Professor Pollack’s article, one finds the following: “the 1789 meaning of progress is spread.” Where does one find any focus on the rights necessary to achieve these ends? Or, what about questioning the need for limitations on private rights to ensure purpose or prevent collateral harms? If learning and progress represent furthering the ends of copyright for the public good, then why the fixation on limiting widespread use of new technologies for publication, distribution and use of those elements of creativity “bound” within the copyrighted materials? Secondary liability is a limiting factor for the protection of public use interests often to the detriment of the constitutional purpose of copyright by losing sight of the ultimate purpose. Lest we think of this unique to this country, recall the new UK Digital Economy Act.

Considerable deference is accorded to the most minimal “original” expression in the granting of a copyright. It is ironic that despite this minimal threshold, there is no prerequisite of proof to validate either the claim of authorship or the source of the alleged author’s inspiration. The lack of authentication creates both private and public problems in the use of intellectual content since, once registered, the copyrighted work is entitled to a presumption of validity. The absence of public representation on this issue may be a misplaced elitist notion that the classes of creators who have been rewarded by copyright have more to offer than the infinitely greater creative potential of the many who may be denied access or use by the privatization of elements necessary for further creative activity. Evidence of collective creativity from the end of the second Ice Age, coupled with the incredible genius of far-flung cultures spanning times to the advent of

---


26 Id.

27 Even the new administration follows the new worn path by appointing an IP czar to protect intellectual property rights urged by the content industry. Michael Mesnick, Obama Finally Appoints IP Czar, Puts it in the Wrong Department, TECHDIRT, Sept. 25, 2009, http://www.techdirt.com/articles/20090925/1549476326.shtml.

28 UK Digital Economy Act, supra note 3; But see, Perfect 10, Inc. v. Google, Inc., 416 F. Supp. 2d 828, 831 (C.D. Cal. 2006), rev’d sub nom. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (“The principal two-part issue in this case arises out of the increasingly recurring conflict between intellectual property rights on the one hand and the dazzling capacity of internet technology to assemble, organize, store, access, and display intellectual property “content” on the other hand.”); see also, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Kelly v Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003). For an example of one of the better discussions, see PATRY, supra note 14.


copyright, raises questions of empirical coincidence in intellectual property assessment.\textsuperscript{31}

The foundation of current scholarship is the past. The field of Ontogeny refers to origin or genesis, usually taught in biology as “Ontogeny recapitulate Phylogeny,” in terms of human physical development. But is that not also the case with creative processes of living organisms and human development? Learning and “progress” are certainly subject to these wonders as well as limitations. Perhaps this is simply a variant of Newton’s reference to standing on the shoulders of giants metaphor that acknowledges “[o]ne who develops future intellectual pursuits [does so] by understanding the research and works created by notable thinkers of the past.”\textsuperscript{32} While found in a writing of Sir Isaac Newton, other sources attribute it to Bernard of Chartres in the twelfth century.\textsuperscript{33} Fact can be found in simple proof of the statement itself.\textsuperscript{34}

Validation of contemporary copyright rests on the anecdotal equation of economic growth and value in the private sector to “progress.” This is a weak foundation for restrictive copyrights in the current technological age. The equation of economic value with intellectual purpose is a classic example of syllogistic, fallacious logic designed to perpetuate the belief that private rights are coincidental with public beneficial use and the intent of copyright. It avoids fundamental questions about the absence of measure and the proof of public benefit. It does all this without consideration of what progress might be or identification of the growing litany of collateral harms and externalized costs.\textsuperscript{35} The majority opinion in \textit{Eldred}\textsuperscript{36} exemplifies the practice of avoiding empirical confirmation of the tension between copyright and public benefit by citing the myth of coincidence with constitutional purpose to justify its finding. It subsumes the question of why private rights and public beneficial use aren’t recognized as “rivalrous.” It treats public goods as non-rivalrous, but misses the exclusionary characteristic of copyright and other privatized intellectual goods.\textsuperscript{37}

\textsuperscript{31} For an interestingly authoritative source, see Jesse Bryant Wilder, \textit{Art History For Dummies} (2007).


\textsuperscript{33} \textit{Id.}

\textsuperscript{34} See \textit{DAN BROWN, THE LOST SYMBOL} (Doubleday 2009) (containing the following on the inside cover "What is lost will be found.").

\textsuperscript{35} See \textit{WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS} (Oxford Univ. Press, Inc. 2009) (characterizes exclusive rights as a tool to thwart competition and stifle innovation.).


The negative impact of exclusionary private rights is embarrassingly at the heart of any number of high profile controversies. A few high profile cases illustrate the problem of ambiguity in the intersection of private rights and public usage. The most egregious of outcomes dealing with exclusionary rights associated with intellectual property is a patent case that clearly indicates the harm to the public at the extreme. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, although clearly an extreme situation, allows one to ask what is not "rivalrous" and consumptive about a private right when the holder doesn’t use it, but prevents anyone else from using the subject matter of the patent right. The inclusion of, duration of, and protection of "intellectual property" increasingly nibbles away at and minimizes its use by the public for the intended constitutional purpose. The Copyright Act of 1976 may become, in time, recognized as the penultimate example of a statutory minimization of the public right of use without significant public representation or benefit. In one swoop, a large portion of the remaining public right was diminished under the guise of codifying judicial decisions. This cover of codification mischaracterizes and minimizes changes that may forever alter the paradigm of using otherwise public goods. From narrow literal copy protection to broader derivative rights, from public right to affirmative defense, proves once again for every action there is a reaction. Every change has a significant consequence, and that is clearly the impact of these changes under the Copyright Act of 1976. Copyright and public purpose, whether "progress," or "spread" or simply public right of use, are increasingly mutually exclusive, rivalrous, and consumptive. While it may be true that many intellectual activities are neither rivalrous nor consumptive and can be used simultaneously by many, that proposition is not necessarily true of the subject matter of either copyright or patents. The right to exclude is by definition rivalrous and, to the extent it affects the ability not only to use but to exclude over time, it is

---

38 See e.g., Warner Bros. Entm't Inc. v. RDR Books (The Lexicon Case), 575 F. Supp. 2d 513 (S.D.N.Y. 2008); Baigent v. The Random House Group (The Da Vinci Code Case), [2006] EWHC 719 (U.K.); Danny Eccleston, *Coldplay vs. Satriani: The Verdict!*, MOJO, Dec. 12, 2008, http://www.mojo4music.com/blog/2008/12/coldplay_vs_joe_satriani_the_v_1.html (Last visited June 23, 2011) (discussing Joe Satriani’s lawsuit against Coldplay for alleged infringement of his music). The lawsuit ended in settlement, but not until the world knew that Satriani’s score was maybe not all that original and where Coldplay got their version was certainly open to question. Depending on how one views it, the result of the lawsuit was a win-win or lose-lose situation; regardless, it clearly involved underlying public interest issues. Report On The Determination Of An Action, Satriani v. Martin, No. 08-07987 (C.D. Ca. 2009).

39 210 U.S. 405 (1908).

40 See LITMAN, supra note 8, at 49-51.
consumptive. Consider the plight of News: if protection of news were extended under copyright to include facts that would be rivalrous and potentially consumptive.\textsuperscript{41}

If copyright subject matter were withheld from use by others for life plus 70 years, that certainly would be consumptive for those intervening generations who are denied use.\textsuperscript{42}

In the ‘information age’, the volume of human knowledge and its dissemination are greater than ever before and this is surely a cause for celebration. At the same time, however, our public sphere continues to shrink. More and more areas are carved out of the public sphere and enclosed behind digital locks, contracts and property rights; more speech is commoditized and commercialized, excluding those who cannot afford access. The masters of the enclosed domain might exercise control over cash flow, but they also control others’ cultural opportunities to express themselves and participate in the public discourse. If the masters do not like someone’s use of their property, they have an arsenal of technological and legal means to prevent that use. One of the main legal tools of enclosure is copyright law. Hence, there is a conflict between copyright and speech.\textsuperscript{43}

In the order of things, this is not simply a set of property right issues. It wasn’t until the later part of the 19th Century that intellectual rights were called “intellectual property.”\textsuperscript{44} This categorization forebodes of fundamental human rights issues, such as ensuring humanity access to and the benefit of collective genius. Lest this be considered idle utterance, consider: in England, the House of Lords found the UK Digital Economy Act (a far reaching Act that protects intellectual property content) to not be in violation of EU standards of human rights.\textsuperscript{45} The finding is significant, but the real question is why would you ask whether the proposal was in violation of human rights standards if you did not believe there is a human rights issue to be considered? Is the claim of human rights enough to move away from the value of private rights as the focus of and justification for

\textsuperscript{41} See Press Release, Federal Trade Commission, FTC Announces Second Workshop on the Future of Journalism (March 9, 2009), available at http://www.ftc.gov/opa/2010/03/news2010.shtm (announcing that panelists will discuss possible changes to copyright law that would “require news aggregators to pay fees to news gathering operations”).


\textsuperscript{43} Id. at 37.


copyright.\textsuperscript{46}

It is no easy task to right the way. It will be difficult to manage strong quartering winds, created by claims of entitlement by copyright holders, for further legislative action to expand and protect their “rights.” It is the huff and puff and storm of content right holders that is forecast for the present course. Those charged with piratical appropriation have rebelled and contend the real pirates may be the current holders of copyrights. They contend that their acts of use are of right and not infringement and that they are but privateers recapturing ill-gotten gains.\textsuperscript{47} The contention is that some of the paper laws granting such rights are “ultra vires”\textsuperscript{48} and, therefore, in derogation of inalienable rights of use for the public benefit anticipated by the Constitution.

\textit{Eldred} and subsequently \textit{Golan I} and \textit{Golan II} framed tensions that have surfaced as a result of any number of Google’s adventures in technology.\textsuperscript{49} The CTEA required the Court to explicate two critical issues regarding limitations on Congress under the constitutional delegation of the copyright power. The first issue the Court had to resolve was the meaning of progress (purpose), and the second issue was the meaning of “limited times.” \textit{Golan} addresses the question of whether and to what extent restoration of works which passed into the public domain conflict with fundamental rights and constitutional intent.\textsuperscript{50}

Both of these issues arise from the specific language of the constitutional power in question. Both are subject to limitations in powers delegated to the federal government itself, a sense of which reverberates in recitation of the source of all federal power, the inherent sovereign of the new nation: “We the people.”\textsuperscript{51} The Constitution derives legitimacy from the people. The citizens of the several states, again the people, empower the states, which in turn were able to create a great nation of delegated and limited powers. The delegation of powers to the Federal Government was


\textsuperscript{47} See MICHAEL CRICHTON, PIRATE LATITUDES (Harper Collins 2009).


\textsuperscript{49} Much of the discussion in this section details further matters already noted. Hopefully, additional detail and context will facilitate an appreciation of the role \textit{Eldred} may play in the resolution of issues created by new technologies such as the Google Book Project. See \textit{Eldred} v. Ashcroft, 537 U.S. 186 (2003).

\textsuperscript{50} See Golan, 501 F.3d 1179; \textit{but cf.} Golan, 310 F. Supp. 2d 1215.

\textsuperscript{51} US CONST. pmbl.
thus limited, as were the powers delegated to Congress under the
Constitution. This appears to be recognized by the dissenting opinions of
Justice Breyer\(^5\) and Justice Stevens,\(^5\) in stark contrast to the position of
the majority that had a running commentary on the errors of the dissenting
Justices thinking throughout the opinion.\(^5\)

In the appreciation of both progress as a substantive limitation on the
powers of Congress and the meaning of “limited times” as a limitation on
the means of achieving the goal of progress, bear in mind there were just
twenty powers that were requested for the new federal government.\(^5\) The
copyright power and patent power were two of the twenty powers requested
for delegation from the states. A third requested power, ostensibly tied with
the first two noted above, was the power to create a national university.
The latter is said to shed light on the purpose of the copyright and patent
powers and the meaning of progress as a core purpose and thereby
limitation on these grants. There is a common sense relationship among the
three as one finds educational aspects in requisite patent requirements of
disclosure, claims, description, enablement, best practices and other patent
inclusions. The design of these disclosures educates in the ways of using
and manufacturing the subject of the patent right. There is no degree of
specificity present for copyrights beyond disclosure (publication),
referencing use and purpose, except that of progress. Progress has meaning,
it means “moving forward towards a goal, advancement in general, implicit
of a good; specific delegated powers from the states to the federal
government limited and delegated.”\(^5\) Some might suspect that the U.S.
Supreme Court granted certiorari of Golan to review Eldred’s
categorization of “progress” as “prefatory” as “preamble” and thereby not a
limitation on the grant to Congress of the copyright power.\(^5\)

Repeated Supreme Court dicta characterize the Intellectual Property
Clause of the United States Constitution as containing both grants of power
and limitations. The Court, however, has yet to explicate the limit imposed
by the Clause’s opening words, “to promote the progress of Science and the
useful Arts.” Scholars and jurists have assumed without investigation that
“progress” bears the meaning most potent in Nineteenth Century American

\(^5\) See Eldred, 537 U.S. at 266-67.
\(^5\) See id. at 223.
\(^5\) See id. at 192-222. Although rejected in at least one copyright case, these basic
principles of sovereignty that limit the power of legislative bodies in other appropriations
from the public domain should rightfully apply to appropriation and privatization of
intellectual "rights." See Reis, supra note 13.
\(^5\) Oliar, supra note 1, at 446.
\(^5\) RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1546 (2001).
\(^5\) Eldred, 537 U.S. at 211; But see Pollack, supra note 1 (Note: Professor Pollack filed
an amicus brief in Eldred); see also Fong, supra note 1.
civilization: a continuous qualitative improvement of knowledge inevitably leading to consensus and human happiness. This article presents empirical evidence that the 1789 meaning of “progress” is “spread.” The original meaning of Article I, section 8, clause 8 of the Constitution is that Congress has power to pass only such time-limited copyright and patent statutes as increase the dissemination of knowledge and technology to the public. Congress’ modern focus on providing maximum control and economic benefit to copyright holders is constitutionally illegitimate.58

The inclusion of progress as a goal was neither accidental, nor incidental to the requested copyright power from the states. In a rather detailed review of the notes of Madison and others during and after the constitutional convention, the copyright power with the patent power and education have been linked together reflecting the concern of the convention.59 The conclusion supported by the inclusion of progress in each of the draft proposals confirms the significance it played in the view of the convention. By the substance of this presentation, progress was not prefatory, but mandatory and intended a limitation on the power of the Congress. Progress is the primary substantive reference in the clause without which, what is the public purpose?60 Despite the common sense of this question, this issue suffered the fate of a divided Court, clearly divided focus and philosophy. Protectionists of the private right have again scored to the determent of the beneficial user. As noted above, one must certainly question why certiorari has been granted so soon after the decision in Eldred. Perhaps the Court will use the opportunity to clarify their prior decision and revisit those elements which may be perceived to work to the determent of the public beneficial interest.61

From a beneficial use standpoint, Eldred removed “limited times” as a functional limitation on the delegation to Congress.62 It is inapposite to take the meaning of limited, as used in the phrase, out of context. The Court now has an opportunity to review the use of a dictionary phrase, albeit mathematically correct, that neither captures the concern, nor the justification for appropriation from the public domain of rights of use.

58 See Pollack, supra note 21 (“The Court, therefore, should hold the Copyright Term Extension Act to be unconstitutional when it decides Eldred v. Ashcroft next Term... Article I, section 8, clause 8 is most properly referred to as the "Progress Clause.").
60 Oliar, supra note 1. See also Pollack, supra note 1; Fong, supra note 1.
61 See generally Reis, supra note 13 (particularly the notation of the resurrection of discretion in discretionary remedies and the clear difference of focus in the two concurring opinions.) This may be the necessary clarification to achieve balance as the review of Sony in Grokster citations.
62 Eldred, 537 U.S. at 209-10.
otherwise available to all. Focus should be on the beneficial purposes that require a limited term and reversion to the public domain. The proposed user is isolated as a public domain publisher, reframing the case and issues as that of private right, rather than public benefit. The issue was cast as a windfall to the public domain publishers, detriment to foreign authors, and potential reciprocal protection of domestic rights overseas. The proposed user is isolated as a public domain publisher, reframing the case and issues as that of private right, rather than public benefit. The issue was cast as a windfall to the public domain publishers, detriment to foreign authors, and potential reciprocal protection of domestic rights overseas. Any profits they realize from their publications are tainted as belonging to the efforts of foreign authors and publishers wronged by registration defects. The wrong perspective and thus the wrong questions were implicated by the use of the word windfall. The focus should be on the expected benefit to the public. This beneficial use is not only theoretical; it is also an actual benefit as shown in Golan. They, the public, are parties to benefit by increased access through publication at a reasonable cost. Is that premise not inherent in the patent system as well? Is this not the basis of the reward in the first place? Not compensation, but reward? How much is too much private right? How much is enough control and gain? Limits should be based on the ability of the public to progress through the use of advances in technology and related ennoblements.

There are many facets of these issues further informed by Feist Publications, Inc. v. Rural Telephone Service Co. The purpose of the copyright clause is not protection of sweat equity, but the benefit that accrues to the public. The question before the Court should lie in the justification of term extension on the merits with due consideration to purpose and rights of the public. The apparent disconnects illustrated here are crystallized by justification in judicial opinions, as well as the congressional Record, which focuses on private gain and not public user benefits. The role of CTEA in providing economic incentives to ensure

---

63 See 609 F.3d at 1086, 1087 (The Court reasons that restoring public domain works for foreign authors will lead to reciprocal behavior of foreign nations including China and Russia.).
64 See Stephen Breyer, The Uneasy Case For Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281, 313-321 (1970). This article has generated commentary and rejoinder in several articles that followed.
65 See 609 F.3d at 1081, 1082 (Businesses, performers, and public resources relying upon the available of public domain works including "orchestra conductors, educators, performers, publishers, film archivists, and motion picture distributors who have relied on artistic works in the public domain for their livelihoods. They perform, distribute, and sell public domain works. The late plaintiff Kapp created a derivative work--a sound recording based on several compositions by Dmitri Shostakovich.").
67 Eldred at 206 n.14 ("Members of Congress expressed the view that, as a result of increases in human longevity and in parents' average age when their children are born, the pre-CTEA term did not adequately secure 'the right to profit from licensing one's work during one's lifetime and to take pride and comfort in knowing that one's children -- and perhaps their children -- might also benefit from one's posthumous popularity.' 141 CONG.
progress was related to providing authors income to finance new works and
support themselves while creating. The URAA is designed to protect
authors and publishers who failed to perfect or enforce exclusive rights the
first time around – at the expense of those who have made public beneficial
use of long forgotten works.68 These are “sweat of the brow” and
“monetary reward” notions, distinct from earlier notion of the “reward” for
progress.69 It is reflective of the times that these arguments and reasoning
attempt to justify increasing the economic reward given private right
holders based on anecdotal beliefs that compensation plays a role in
ensuring progress – even where that compensation is theoretical.70

Finally, the Court has taken a limited role in reviewing or construing
congressional exercises of the power granted by the constitution.71 This is a
strange and somewhat strained distancing from the obligations of the Court
in a government of separate but equal and checks and balances. If it is a
limitation on the function of the Court, then it may be judged by some as an

68 See 609 F.3d at 1076 (“Section 514 of the Uruguay Round Agreements Act
amended at 17 U.S.C. §§ 104A, 109), which granted copyright protection to various foreign
works that were previously in the public domain in the United States.

69 Eldred, 537 U.S. at 208 n.15 (“Congress also heard testimony from Register of
Copyrights Marybeth Peters and others regarding the economic incentives created by the
CTEA. According to the Register, extending the copyright for existing works ‘could . . .
provide additional income that would finance the production and distribution of new works.’
[Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989,
Comm. on the Judiciary, 104th Cong. 165 (1998)]. . . . ‘Authors would not be able to
continue to create,’ the Register explained, ‘unless they earned income on their finished
works. The public benefits not only from an author's original work but also from his or her
further creations. Although this truism may be illustrated in many ways, one of the best
examples is Noah Webster[,] who supported his entire family from the earnings on his
speller and grammar during the twenty years he took to complete his dictionary. Id. at
165’”

70 See supra note 65.

71 See 770 F. Supp. 2d at 677(The Court states that it defers in "questions of who should
be entrusted with guardianship over orphan books, under what terms, and with what
safeguards are matters more appropriately decided by Congress than through an agreement
among private, self-interested parties. Indeed, the Supreme Court has held that "it is
generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's
objectives." Eldred v. Ashcroft, 537 U.S. 186, 212, 123 S. Ct. 769, 154 L.Ed.2d 683 (2003);
accord Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429, 104 S. Ct. 774,
78 L.Ed.2d 574 (1984) (“[I]t 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.”).
abdication of a fundamental requirement of governance. Reliance on precedent of Congress' incremental increase in duration does not mean the interpretation and exercise was historically correct. Nor does it mean that it justifies forgoing review when there are extraordinary changes in technologic capacity to achieve goals of widespread public education and benefit. A positive aspect of Eldred, subsequently accepting Certiorari of Golan, may well be that these decisions help solidify the focus on the future of copyright in the 21st Century. It accentuates the need to recognize and protect changes in creative endeavors, publication and distribution of intellectual resources fundamental to constitutional purpose since the mid 19th Century.

Entering the second decade of the new millennium, Google represents innovation that fuels a growing global sense of deprivation, measured by the missed potential for enrichment. It constitutes the realization that private rights are as thin as the paper on which they are written and that rules sometimes have little bearing on either progress or the general well being. It is this that provides segues to Google "adventures."

II. GOOGLE: FUELING THE PARADOX: THE WINDS OF CHANGE

The rise of the "Google" adventurist has created a paradox affecting the relationship of copyright and constitutional purpose. Google "slipped in" as a small venture beneath the radar of major players in content rights. Google achieved a mark of dominance in search technologies. Through innovation and acquisition they quietly added related applications to their core function. The result of Google's incessant innovative activity in

---

72 Id. at 223, 235-236 (Stevens, J., dissenting); Id. at 242 (Breyer, J., dissenting).

73 Nowhere was this divide more clearly evident than in the two concurring opinions in eBay v. MercExchange, L.L.C., 547 U.S. 388, 395-97 (2006). In this six-page opinion one finds a similar divide in alignment as in Eldred on similar issues affecting the focus and function of the courts. Justice Ginsburg joined in the first concurring opinion, which did not want to move away from 150 years of precedent. Justices Stevens and Breyer were in the second concurring opinion and noted that what might have been right in its time, may no longer serve the purpose for which the rights were created. They noted the need for continuing review of rules governing the issuance of injunctions and their application in current contexts. See Reis, supra note 13.

74 For an excellent perspective on rights, rights of use, of ordinary and extraordinary expansion of author rights, and thoughtful consideration of public use in light of new enabling technologies See Jessica Litman, Billowing White Goo, 31 COLUM. J.L. & ARTS 587 (2008) (Referring to the Google Book Search: "[i]t seems clear that today's fair use test privileges uses that yesterday's test would not, and vice versa. It seems equally clear that uses that were fair under earlier tests are fair no longer. We haven't stretched fair use, or shrunk it; we've simply moved it around. . . . It's not obvious how the test should apply to the [case] authors and publishers have brought against Google Book Search - (however you want those cases to come out) . . . ") (footnotes omitted). See also Reis, supra note 13 at 590.
expanding their business model is clear; Google has surpassed all but a few in revenues, net worth, and most in functional viability. How does this translate to Google as a difference factor affecting the future of copyright? Quite simply: Google is global; Google is ubiquitous; Google is non-stop innovation; Google is value added to any number of processes, applications, and “enablements.” Google has earned the “trust” of the public and elevated the public sense of entitlement. If the legal system removes these services from public reach there will be deep sense of loss and deprivation. This may be the fuel for political action, congressional attention, and further the normative disconnect. It has been characterized as a bargain between the public user and Google, the tradeoff being the benefit of the technologies for the gathering of information about the user by Google.75 The gift of enablement, having already become indispensible to the many, means that public opinion will not likely wilt in the face of denial, but rather be energized. This represents an interesting quandary for representative governance and the rule of law.76 The beneficial uses of Google are not likely in this political climate to be denied, nor humbled by a single decision.

The above has significance in the balance between copyright claimants and Google. Unlike prior technological innovations, such as Peer-to-Peer (P2P) file sharing or Bit Torrent applications, Google has an established public purpose and list of non-infringing uses prior to legal action charging them with infringement. Their innovation and core functionality has already been challenged and protected.77 The use of inference absent evidence of intent in secondary liability cases based on a snapshot in time when the heaviest first users were infringers without a portfolio of lawful used to render the technology a “staple article of commerce” is not an Achilles heel for Google. Google may well be empirical proof that nascent technologies given the opportunity to mature make significant fundamental contribution to copyright and constitutional purpose. It certainly makes one wonder what marvels would be present


76 One only has to look at the proliferation of "Pirate Parties" running candidates for political office in Europe to understand the will of governance. The Swedish Pirate Party has already placed at least one member in the legislature. There are at least four other EU nations that have formed Pirate Parties and there is reputed to be one in England as well. See, e.g., Results page from a Google search for “Swedish piracy party” http://www.google.com/#hl=en&source=hp&q=swedish+piracy+party&oq=Swedish+piracy+party&aq=2&aqi=g5g-m3&eq=Swedish+pir&fp=64df356c6a3f8304 (last visited June 7, 2010).

77 See Perfect 10 v. Amazon.com, Inc., 508 F.3d 1146, 1169-1172 (9th Cir. 2007) (characterization by Judge Mantz of Google's technology).
today had the court focused on constitutional purpose rather than protecting
the status quo ante of copyright.78

Perhaps an aside, but likely relevant based on the history of public
interest representation in commons or public domain litigation, is the fact
Google has an undeniable ordinal wealth value in conventional monetary
terms. This makes it ever more difficult to minimize Google’s activities in
the balance of “commons rights” with private right regimes alleging
harm.s 79 Google is a catalyst for change consistent with constitutional
purpose in this digital age. This is true Digital Rights Management as noted
earlier, only the rights being protected are those of the public beneficiaries.
Under it’s corporate overview of 2007, “Google’s stated goal is: “to
organize the world’s information and make it universally accessible and
useful.”80

There is little denial that Google functions are increasingly at the outer
boundaries permissible under current legal regimes. They bump into private
rights in intellectual matters, privacy (EU, Italy and the US), and
contemporary business models. They render obsolete historic models of
creation, production, distribution and consumption of intellectual content.
They cast a bright light to a future that overcomes historic theological and
practical limitations by offering change fundamental to the purpose and
functionality of copyright. They represent the emerging global sense of
enablement, as well that of deprivation, not enrichment.81 At no time in the
history of humanity has the ability to use and create been so widely
distributed. The distributive abilities take into account literacy, curiosity
and technology. What response do we find from copyright holders and
institutions of law? These institutions treat the enabled public and emergent
technologies as the enemy. They increasingly limit the rights of user to
protect the status quo.82 One of the more illuminating presentations on
private rights, market structures and completion is a presentation on CNBC
in “Visions,” focusing on innovation as the means of competing, not
exclusive rights.83 Progress based on value added in a structure where all

79 See Eldred v. Ashcroft, 537 U.S. 186 (2003) (recall how public domain rights were minimized in Eldred).
80 Excerpt from Google’s Corporate Values and Goals and How They Motivate Their Employees, http://www.megaessays.com/viewpaper/202934.html (last visited June 7, 2010).
82 See Patry, supra note 12.
83 See Building a Global Leadership Brand, Technology, CNBC http://classic.cnbc.com/id/15840232?video=1296806145&play=1 (last visited June 23,
goods are otherwise free. It is this that constitutes the realization that private rights "may" have little bearing on progress or the general well being.

The paradox lies in how the Congress and the courts will treat the onslaught of Google and like ventures as providers of progress and public benefit through innovation fundamental to the underlying constitutional purposes of intellectual progress. This is even more amazing since the current course and conflict of private rights and emerging technologies was anticipated by two prior congressional enactments: The National High-Performance Computing Technology Act of 1989 and the High Performance Computing Communication Act of 1991, neither of which to date appear to have been used in as a base for resolution of conflicts such as posed by Google. Many thought this challenge would be in the context of the Google Book Project. It was anticipated Google would proceed to defend the action, likely based on public purpose, benefit and "fair use." After all underlying technologies at the foundation of creative endeavors reflect evolutionary processes core to copyright. The processes of "fixing" for creation and distribution, such as printing press, photography, lithographing technologies and distribution have evolved over time. New technologies for these processes, such as telephone, radio, motion pictures, recordings, television and video recorders all had their impact recognized within the copyright acts both incorporating new formats of derivative rights and extending protections to copyright holders. While each of these advances and case law remain important, they are but the tip of accelerated "r"evolution during the period of the past four decades, including the first decade of this new millennium. The likelihood of "reconciliation" of vested copyrights in the face of innovation remains within the four comers set by statute and case law which are often backward looking and protectionist, albeit in the eyes of the beholder.

The Google Book Project, in its simplest form, proposed to do what many others had suggested before and after—to digitalize, achieve and permit search and retrieval of the great literary treasures of the world. Could there be any functional grouping that would better meet the constitutional purpose of publication, distribution, searching, sorting, and archival protection of the literary works of the nation and humanity? A fairest and most noble of uses of technology to further the dream of

---

progress includes such efforts as the digitization of libraries in Rome and Florence, Italy\(^{86}\), the Library of Congress\(^{6}\) grant of two million dollars to digitize all books and documents\(^{87}\), and other current and ongoing ventures.\(^{88}\)

It makes one wonder whether if this was initially proposed as a government sponsored grant or project, would they not have been likely to receive accolades and support? Google's scanning technologies are at the cutting edge in protecting rare and fragile manuscripts. The project is so steeped in public purpose that many thought the interface of this incredible project and technology would have been resolved in legal action by copyright holders against Google with either a finding of fair use, or at least a finding distinguishable by intent and purpose as a transformative use. There are those who relished the notion that there might be a basic sense of altruism behind Google's actions in fighting the good fight for fair use based on its obvious financial ability to wage battle in the courts. Google is no stranger to litigation, nor to the taste of vindication. That did not materialize and leaves open the question of why not?

Can you think of a "fair use" defense that will be accepted by the court in the context of the Google Book Project? Recall the purpose of the project, to create a digital database by scanning copy every book accessible in libraries cover to cover. To then store these works on their own servers and make these databases open and accessible to the world thus facilitating access to all of a work in the public domain and limited access to copyrighted works to enable the reader to determine whether to purchase the book, or borrow a library copy, or pursue any other viable legal alternative for further perusal or use of the copyrighted work.

The criteria detailed under section 17 U.S.C. §107 states:

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.89

How many of the statutory factors noted above does Google’s project pass or fail? Based on the extent of actual copying by the scanning project, the argument would likely contend that the project exceeds the quantity component of fair use criteria, thus making a finding of fair use most difficult. Perhaps the question should be refocused from the more difficult fair use issues to an alternative argument that regardless of the amount copied, the intent and purpose of the copies constitutes a “transformative” use serving a different purpose, such as in the case of Campbell v. Acuff-Rose Music90 and Perfect 10 v. Amazon.com, Inc.91 A third alternative might well posit that because the functionality of the Google book project is that of a global library and search similar to a “card catalog,” it might come under the exceptions of 17 U.S.C. §108 applicable to libraries. This proposition may arguably rest on the established underlying rational and principle behind the “card catalog” exception, not limited to then existent technologies.92 A fourth alternative may simply take the position that this was not considered by congress, nor provided for in the Copyright Act of 1976, and therefore a matter for the court to exercise its discretion absent specific indications by Congress as to how to resolve the conflict. This leads to questioning whether one thinks the court could have responded to reason and the argument that Google’s program lies at the core of copyright purpose, and absent specific direction from Congress, should be permissible. Are these inherently fundamental issues of copyright ownership and the public interest? Are these circumstances where the activities of Google and the alleged rights of the copyright holder are “mutually exclusive” of one another? The safe course was that which the court appears to have taken. Apparently, its decision was to await further congressional direction, which would provide standards for protecting, to the extent possible, and “reconciling” “conflicting” interests relative to appropriate private right, public purpose and policy.93 In this, thus, the court deferred on the matter and did not presume to set policy within the realm of the delegated powers to Congress.94

Discretion is often the better part of valor thus leading Google possibly to concede the fair use defense and split the pie in a “win-win”

91 508 F.3d 1146, 1164 (9th Cir. 2007).
93 See supra note 71.
94 Id.
paradigm for private rights and much of its innovation purpose. What of the public interest? Why did the Court list the wide range of public benefit then choose to discount it? A national response from the Attorney General indicated a clear concern with the antitrust implications of the settlement agreement. The European Economic Union response was at first questioning on competition grounds and the need to do further study on copyright reform, the settlement agreement and public interest. Industry representatives raised concerns about a de facto monopoly in Google — even where no exclusive rights exist or will exist.

The concerns of the public regarding the settlement itself raised serious issues affecting not only the rights of those who fit within the class action, but of the lack of representation of the public interest. Why should Google have been able to agree to a structured settlement based on private rights without due consideration of the implications for the public? What kind of precedent would this set for other book, artifact or other scanning project? Why is any agreement needed at all? At least one post argues that there are already better scan projects than Google


97 See 770 F. Supp. 2d at 672 (“Rightsholders can exclude their Books from some or all of the uses listed above, and they can remove their Books altogether from the database. At any time Rightsholders can ask Google not to digitize any Books not yet digitized, and Google will use “reasonable efforts” not to digitize any such Books. (ASA §§ 1.124, 3.5(a)(i)). A Rightsholder may also request removal from the Registry of a Book already digitized, and Google is obligated to remove the Book “as soon as reasonably practicable, but it any event no later than thirty (30) days.” (ASA § 3.5(a)(i))).

98 See Request To Participate of Sony Electronics Sony’s, Author’s Guild, Inc. v. Google, Inc., No. 05 Civ. 8136 (S.D.N.Y. Feb. 4, 2009) (Sony addressed ASA’s potential to enhance consumer ability to search and find copyrighted content, increased volume and variety of e-books available to the market place, and fulfilling the promise of increased competition and progress in the marketplace). See also LETTER addressed to Judge Denny Chin from Paul N. Courant, Author’s Guild, Inc. v. Google, Inc., No. 05 Civ. 8136 (S.D.N.Y. Sept. 10, 2009) (Mr. Courant writes on behalf University of Michigan’s advocating the "overwhelming benefits to libraries, the academy, the world... ").


101 Id.
under way.\textsuperscript{102} Based on the concerns brought to its attention, the court deferred final action on the proposed settlement agreement.\textsuperscript{103} This activity is indicative of the broad and deep implications inherent in the interests of the parties, the underlying technological issues and the rights of the public pose in the resolution of the controversy.

One has to wonder whether there isn’t a “Google effect” in the presence of Google itself. Suppose it was not Google involved in this project? Or, perhaps what if Google had applied for a grant to archive, preserve and protect the writings of the past and present for posterity? Are these two separate issues, or maybe not issues at all?

Beyond the ASA, the \textit{Viacom v. Youtube} decision contrasts with the reasoning and conclusion found in the Courts rejection of the ASA. At the core of each are beneficial uses of content. In Google Books the benefit lies in decades, even centuries of printed material covered by long settled law; in \textit{Viacom} it is digital video clips uploaded to the internet with inherent ambiguities about rights, fair uses, and onus on enforcing those rights. Yet, in Google books the Court defers to the Congress on an assumption that they have not yet spoken on these matters. Structurally both the DMCA and the Books registry provide opt-out provisions. Why didn’t the Court simply state that the ASA must comport with settled law including the DMCA takedown policy? Why did the Google book court deem Google’s speed to market and technological effectiveness as unfair in light of their ability to out-perform their competitors, yet rely on \textit{Perfect 10} for support of their decision in \textit{Viacom}? One can theorize that technological advances and the underlying copyright issues that are presented to the court for resolution tax the judicial process and ability of the court to manage and resolve evolving issues which require balancing private rights and public purpose. It may be simply that it is fear of the unknown that leads to a “protection of sweat equity” perspective when the real concern is, and always has been, the balance between limited exclusive rights, as an incentive for creation, so that the public can reap the benefits from “progress.”\textsuperscript{104}

\section*{III. CONCLUSION}

This little discourse ends with an awareness that foundations are

\footnotesize{\textsuperscript{102} Google Scan Competition, \textit{supra} note 88.\
\textsuperscript{103} See, \textit{e.g.}, Archive of Google Books Status Conference, http://copyright.columbia.edu/copyright/2009/10/07/google-books-status-conference/ (last visited June 8, 2010) (detailing a “status conference” held to meet objections noted by the U.S. Attorney General concerning revisions in the Google Books Agreement).\
\textsuperscript{104} See \textit{supra} note 8.}
important to review and bear in mind, with full appreciation that “change”
is not a value in itself, but rather the opportunity to right the ship, alter the
course and ensure purpose. But change we must and change we will
because every single premise and element of copyright, the public sense of
entitlement, the impact of exclusive rights under privatized copyright, the
complete “new world” represented by enablement, communication, file
transfers, digitalization of whole libraries and artifacts of the real world,
search engines, holographic representations and archiving for posterity are
here at the threshold. The public realizes this. Global populations demand
reform and in Europe have formed “pirate parities” seeking direct
representation in the EU legislative bodies for copyright reform. A pirate
party is reputedly being formed in England. And, likely after the tea (or
other soft drink) is served in this country, pirate parties may well be in play.
The goal is balance. The goal is to create a balance that changes as needed
with perspective on the value of private rights in a global economy and the
root of public right to the incidents necessary for “progress.” There is no
balance in the consideration of public rights and goals and private right that
is more than a moment in time. Professor Goldstein is correct; there is too
much focus on the four factors of statutory criteria for fair use. The original
intent was birthed as an equitable and discretionary balance between public
and private rights. Treating it as cast in the shadows of a world that no
longer exists is the problem which Google creates. The resolution of the
Google paradox lies in measuring balance, and re-measuring and re-
measuring as the wonders of technological progress are realized and
distributed along the course to “Progress” itself.¹⁰⁵

¹⁰⁵ As to be expected, the Google saga continues to raise fundamental questions of
balance regarding constitutional purpose, the interpretation of congressional legislation and
the role of the court in protecting “progress,” innovation and creative ventures. See e.g.,
Viacom Int’l, Inc. v. YouTube, Inc., --- F.3d --, 2012 WL 1130851 (2d Cir. 2012); and