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**Author(s):** Cynthia M. Gayton

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## Alexandria Burned – Securing Knowledge Access in the Age of Google

By Cynthia M. Gayton

“We are all worried about the new librarian.  
The man must be worthy, and mature, and wise. ...  
That is all there is to it.”

*The Name of the Rose*, Umberto Eco

### Abstract

This article expands upon my previous VINE article entitled ‘Legal Issues facing the Knowledge Economy in the 21<sup>st</sup> Century’ by concentrating on one main topic, that of knowledge access specifically to works available currently in analog form. Most libraries face the daunting task of preserving their hard copy collections in a way not contemplated by Johan Gutenberg. How to preserve library collections in a manner permitted under copyright law is the primary legal issue, but the legal analysis does not end there. Contract, licensing, and vendor-driven solutions may leave the ultimate user without access to vital resources heretofore only available within the physical library environment. I will address not only copyright issues and related fair use and first sale doctrines, but antitrust issues, and the relationship between fair use and the 5<sup>th</sup> amendment. The recently initiated Google Library Project offers a useful test scenario as the debate continues between traditional hardcopy volumes and their digital counterparts. By way of analogy, I will compare the ancient Alexandrian libraries with that proposed by Google.

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Perhaps by the time you read this article the dilemma presented here will be resolved. Such is the nature of the Internet. In the event that the dilemma is not resolved, this article will expand upon some ideas discussed in my last article on legal issues in the knowledge-based economy for the 21<sup>st</sup> century. My focus will be almost entirely on knowledge access. Specifically, I will review the legal issues facing an entity that is attempting to create a library containing the world’s books and making that library available for search purposes online.

Initially, I will show that the issues being faced by the above-identified communities are not unique to this century, or even the past thousand years. I have chosen as an analogy the lost libraries of ancient Alexandria in Egypt as the starting point. Next, I will outline contemporary legal issues that face an organization attempting to emulate the intent of the Ptolemies, most of which were not considered by the founders of the original “world library.” I will compare the methods used by the knowledge acquirers in the time of the pharaohs with those used by mere mortals. Finally, I will identify the legal hurdles facing a commercial online digital library which will be laws relating to copyright, private property, and antitrust.

#### I. The Libraries at Alexandria

The Libraries at Alexandria were comprised of at least two libraries, the Mouseion and smaller library in the temple of Serapis, in Alexandria’s royal precinct, Brucheion. Over the centuries, the documents stored there were subject to the usual decay experienced by all organic matter as well as a number of fires rendering the library extinct between 300 and 400 A.D. (Battles, 22-32.)

##### a. Acquisition methods

During the time of the Greek Ptolomies, the rulers who began the collection process for the Libraries at Alexandria, it was decreed that all knowledge relating to the Greeks should be collected. To do so, all visitors to Alexandria had to relinquish possession of their books, which were then copied, and sometimes kept by library officials. These methods not only ensured the creation of a monumental library, it encouraged the second reason for amassing such riches, attracting great minds.<sup>1</sup>

#### b. Copying methods

The librarians then, as now, were faced with difficult decisions about which material was important enough to be copied. Scores of scribes were employed to make copies and ultimately, only those works considered major were transcribed.

#### c. Retention methods

How the copies were retained and preserved is a matter of speculation. There is some evidence that the libraries used a rudimentary shelving system which was difficult to maintain due to the nature of papyrus scrolls. It is not known exactly how many scrolls were held at the libraries, but may have been upwards of 700,000 scrolls.

#### d. Protection methods

The Libraries at Alexandria were not spared from competition. Both the libraries at Rhodes and Pergamum were worthy adversaries in the collection of Greek books. But the rulers at Alexandria devised a way to limit the competition by banning the export of papyrus to prohibit competition in neighboring kingdoms.<sup>2</sup>

#### e. The Libraries' Demise

There are numerous reasons for the ultimate demise of Libraries at Alexandria, notwithstanding the persistent rumor that Caliph Omar ordered them destroyed. Ultimately several conspirators were at work rendering the famous resource obsolete, not least of which was the fact that the Greek language was little used or spoken by the fourth century A.D., so fewer people could read the available texts. In addition, the storage methods were impossible to maintain. Moreover, after several centuries of neglect, recovery and preservation methods were becoming unknown or unused. Finally, because the rulers often kept the only versions of some of the text, there were no others available.<sup>3</sup>

## II. Google Library Project

In the present day, Google, one of the largest Internet search engines in the world, is aspiring to replicate, in a virtual space, the ambitious undertaking of the Alexandrian librarians. To do so, it will have to attain access to several million volumes of analog texts, many of which are in the public domain, but most of which are not. Google has partnered with five of the largest and most prestigious libraries in the world in order to make this aspiration a reality.<sup>4</sup>

Those guiding the Google Library Project intend to "digitize" these libraries' books for its project.<sup>5</sup> It is presumed that the contracts between Google and the various libraries are similar, however, only one contract is available to the public for review, that between Google and the University of Michigan ("Michigan") (Google-University of Michigan Cooperative Agreement.) That agreement, fortuitously or not, is the focus of the remainder of this article and how the dilemma faced by Google's ancient equivalents may be repeated, if not addressed soon.

#### a. Acquisition and Copying Methods

As stated above, several million books are scheduled to be scanned, digitized, and indexed to populate Google's Search service database supporting the Google Library Project. The full text of books in the public domain, meaning those books that are no longer subject to copyright protection, will be available in its entirety to the searching public via Google's

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<sup>1</sup> "By bringing scholars to Alexandria and inviting them to live and work, at royal expense, among an enormous store of books, the Ptolemies made the library into a think tank under the control of the royal house. The strategic implications of a monopoly on knowledge – especially in medicine, engineering, and theology, all among Alexandria's strengths – were not lost on the Ptolemies." (Battles, 29.)

<sup>2</sup> This temporary solution was short lived. Pergamenes, of Pergamum, invented parchment.

<sup>3</sup> "The loss of libraries is often the product of the fear, ignorance, and greed of their supposed benefactors and protectors. The willful ineptitude of bureaucracies throughout history plays its role as well. Threatening images of invading barbarians may be a salve in such instances; only catastrophe can provide the drama that acts as a drug against the existential horror of decadence and decline." (Battles, 32.)

<sup>4</sup> Harvard, Stanford, the University of Michigan and the New York Public Library are the number 2, 12, 13, and 20 largest libraries, respectively, in the United States as of August 2005 according to the American Library Association Fact Sheet Number 22. The University of Oxford's Bodleian Library is the fifth library from which Google is obtaining material.

<sup>5</sup> Both Yahoo! and Microsoft have announced digitization projects. However, these entities are seeking permission from the rights holders before making content available via an Internet on their search engines. (Band, 3.)

proprietary search mechanism. Those volumes still subject to copyright protection are being scanned without Google's securing permission from either publishers or authors at this time. However, the full text of those volumes can be searched. Only "snippets," up to two or three context sensitive sentences of copyright protected volumes, and bibliographic information (unless agreed to otherwise by publishers) can be viewed by the searcher who will also see where the full-text version is available.<sup>6</sup> Google asserts that although this second set of materials is still under copyright protection, Google is entitled to make copies of these books and display portions of them for search purposes under the "fair use" exemption, discussed below.<sup>7</sup>

Google is developing or has developed a proprietary software product that will index these scanned images in order to make these volumes available via its search engine and the Internet at no cost to the public. The value of Google's digitization service is estimated to be about \$10 per book. (Hanratty, 1.) While many libraries are undertaking preservation and digitization projects on their own, such digitization efforts are cost prohibitive for most, since library funds are used to provide not only preservation services, but to acquire, circulate, and lend books, in addition to providing research services.<sup>8</sup>

According to the Michigan frequently asked questions ("FAQ") page on their website dated August 2005, its library's mission is to "capture and preserve the sum of human knowledge, and to make that knowledge widely available for the purposes of teaching, learning and scholarship." (UM Library/Google Digitization Partnership FAQ.) Under the Google-Michigan contract, Google selects which books in Michigan's collection or "Available Content" it will digitize.<sup>9</sup> In addition, once the selected content is digitized, those items will become available through the Google site. Although the FAQ says nearly seven million volumes will be scanned, Google is not obligated to scan even one volume under the contract or use any portion of Google's own copy as part of its Google Search Services. (Cooperative Agreement ("CA"), Section 12.1.)

Michigan will receive the digitized version of the selected content in .TIF format and in some instances, such as illustrations, they will receive .JPG<sup>10</sup>, in addition to an optical character recognition ("OCR") text format file. These digital files, Michigan claims, involve "no significant constraints on our ability to use them in ways that are consistent with copyright law."

However, the contract does restrain Michigan's use in several ways. For example, if within three years of Google's transferring the digitized content to Michigan, Google decides not to use that content due to a dispute with a third-party copyright holder, Michigan would be required to destroy that content.<sup>11</sup> (CA, Section 2.5.2.) Moreover, Michigan can only use its own copy as part of services offered in cooperation with partner research libraries and has to expressly name Google as a third party beneficiary of any agreement with the partner research library. (CA, Section 4.4.2.) Finally, Michigan has to make reasonable efforts to prevent third parties from obtaining any portion of its digital copy for commercial purposes, which may restrain Michigan's ability not only to compete with Google to provide its library content using a third party vendor to create a separate database populated with Michigan materials,<sup>12</sup> but to provide access to this obviously important knowledge to its own patrons.<sup>13</sup> (CA, Section 4.4.1.) Finally, the interlibrary loan of those materials still under copyright protection will be prohibited.

## b. Retention and Protection of Digital Copies

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<sup>6</sup> Indeed, "Part of the consternation on the part of the publishing and author community is that [Google did] the initial [program for publishers] in the correct way, by going to the rights holder and saying, 'Let's work out a deal for a license,' quoting Allan Adler, VP of Legal and Gov't Affairs for the Association of American Publishers. (Rigdon, 23.)

<sup>7</sup> "Because Google believes this copying is protected by fair use, it isn't asking for the copyright holders' permission. Instead it says it is extending a courtesy by giving [the publishers] an opportunity to opt out." (Rigdon, 23.)

<sup>8</sup> Google may spend "\$750 million to scan the 30 million volumes contained in the collections of the five participating libraries." (Band, 10.) It is worth noting that at least one publisher, HarperCollins, is paying someone to digitize its titles. In addition, it will allow any search engine to search them, but it will not allow users to make or keep copies, thereby assuring that HarperCollins controls its titles. (Rigdon, 27.)

<sup>9</sup> Michigan has excluded voluntarily some material from the digitization program, including special collections and large materials. All of the scanning will be conducted by Google and it will pay for all costs relating to conversion, transmission of data, pulling and reshelving materials. Michigan's staff will manage the scanning done by Google staff. (Michigan FAQ.)

<sup>10</sup> Both .TIF and .JPG are graphic file formats.

<sup>11</sup> "Suggestions that government or commercial interests might control what we can read imply that they might also control what we know and what we can think in a way that control over music could never achieve. ... Restrictions on the sharing of books are tantamount to restrictions on the sharing of ideas. This is why libraries are so important to our society; it is one of the reasons we fund and honor them. The preservation of our books and other texts forms the core of the preservation of our intellectual record." (Lynch, 27.)

<sup>12</sup> Whether or not this clause is anticompetitive and subject to federal antitrust laws is discussed below, e.g., in response to a FAQ asking why Michigan would provide access to its digitized collection when Google is also providing access, Michigan replied "we believe that our community of researchers will have specialized needs that are not met by the Google version. In any case, we do not believe that this parallel version of the materials will be in competition with Google; rather, it should complement the sort of implementation Google builds." (Emphasis added.)

<sup>13</sup> "Public access, and the social benefits that arise from it, may be an undervalued aspect of our current social processes and mechanisms." (*Digital Dilemma*, 202.)

The Google-Michigan Cooperative Agreement states that both Google and Michigan have “ownership and use” of its own copy. There are no provisions to retain back-up copies. Indeed, as discussed below, whether either can make an archive copy is up for debate considering the method by which the copy was obtained. Nevertheless, there are no specific provisions requiring retention, other than a tenuous connection between retention and assignment, where neither Google nor Michigan can assign the agreement without consent. (CA, Section 12.2.) In addition, Google makes no promises as to the continued availability of digitized content on the Internet. It only agrees that as long as it makes the content searchable via the Internet, it will provide an interface for searching and display. (CA, Section 4.3.)

With regard to protection, Google is obligated only to protect the original volume. Michigan has a duty to implement technological measures on its website to restrict automated access to its copy and make reasonable efforts to prevent third parties from downloading Michigan’s files for commercial purposes (as mentioned above), redistributing portions, or automatic and systematic downloading of its files. Michigan is obligated to restrict access only to those persons with a need to access such materials and shall “cooperate in good faith with Google to mutually develop methods and systems for ensuring that the substantial portions of the [Michigan] copy are not downloaded from the services offered on [Michigan’s] website.” (CA, Section 4.4.1.)<sup>14</sup>

Digital preservation is becoming increasingly important. What is available on the Internet today, may not be available, even in a search engine’s “cache,” tomorrow. Whether society can use information contained on today’s cutting edge electronic media ten years into the future is questionable. Such is the nature of technological advances, as well as vendor-driven product obsolescence to boost sales.<sup>15</sup>

While the technology issues are interesting, it is important to address the underlying content questions relating to authors, or knowledge holders, who create the material contained in virtual and analog libraries for public use, and discuss the knowledge holders’ rights to their intellectual capital.

### III. Private Property

According to O’Driscoll and Hoskins, “[t]he two essential elements of property rights are (1) the exclusive rights of individuals to use their resources as they see fit as long as they do not violate someone else’s rights and (2) the ability of individuals to transfer or exchange those rights on a voluntary basis. The extent to which those elements are honored and enforced will determine how effectively prices in an economy will allocate goods and services.” (O’Driscoll and Hoskins, 8.)

In the United States, it is presumed that an author has rights to the output generated by his or her personal creative endeavors. In order to ensure that those rights are protected, the United States Constitution says that Congress shall have the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. Article 1, Section 8, Clause 8. Indeed, it is clear that preserving such rights improves economic growth and development especially with regard to knowledge-based goods. Specifically, strong private property protection is “the only effective means for societies to make use of what they own, in the most efficient way, to promote both economic growth and prosperity.” (O’Driscoll, 9.)

There are some limits on private property rights. Under copyright law, those limits include “fair use,” “first sale,” and the library exemptions. The United States Constitution presumes that private ownership is necessary for a prosperous country. Under the 5<sup>th</sup> amendment, there is a prohibition against transferring private property for public use unless the private property owner is given “just compensation.”<sup>16</sup>

#### a. Copyright

In the United States, once an author has created a work with a modicum of creativity and which is embodied in a tangible medium of expression, the work is protected under the copyright laws. If a work is filed with the Copyright Office, it is afforded some added statutory remedies unavailable to those who have not registered their work with the Copyright Office. A copyright holder has 6 enumerated rights of which only the first 5 are relevant and briefly outlined here, e.g., the

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<sup>14</sup> This is not to say that neither Google, which is making a substantial investment in this project, nor the University of Michigan, which has a constituency to which it has to report, will not preserve their digital copies. Nevertheless, there is no contractual obligation to preserve.

<sup>15</sup> “Forced obsolescence of content – the need to repurchase it over and over again for changing technologies, to hope that the content will be made available in the new format and that money can be found to acquire it again – is only one threat to the cultural and intellectual record. ... In the digital world, with its much-enhanced capabilities to track the disposition of copies of works and where access so often substitutes for possession, it is all too easy to envision legal demands for post-publication withdrawal, editing, or censorship of works that would be able to reach every copy of that work in existence, utterly undermining assumptions about the integrity of our cultural and intellectual record and providing the courts and the government with unprecedented and dangerous capabilities to re-write that record at will.” (Lynch, 42.)

<sup>16</sup> “[N]or shall private property be taken for public use, without just compensation.” U.S. Constitution, Amendment 5, made applicable to the States by the 14<sup>th</sup> Amendment. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

right to: (1) reproduce the work; (2) prepare derivative works; (3) distribute copies to the public by sale or other transfer of ownership; (4) publicly perform the work; (5) publicly display the work. The copyright laws have identified three situations of consequence to this article where the copyright holder cannot sue an otherwise unlawful user for infringement: (1) when the use is “fair” (section 107); (2) when the user is a public library (Section 108); or (3) when a user has purchased an object embodying the copyrighted work (Section 202 “first sale”). These exemptions allow an otherwise unlawful user to make use of a work subject to copyright in a way that may be contrary to the copyright holder’s rights. In no situation is the user, under color of an exemption, allowed to make a copy of the original work in its entirety and sell it, which is the subject of at least two pending lawsuits discussed below.

Google is being sued in separate lawsuits by the Author’s Guild (as representative for a class of authors) and several American publishers (the “Author’s Guild” and “Publishers” cases respectively).<sup>17</sup> In both cases, Google is being accused of infringing on the copyrights in the works being copied by Google from the University of Michigan Library. Both sets of plaintiffs allege that Google is infringing copyrights and are seeking injunctions against Google to prevent it from making copies of the protected works.<sup>18</sup> In both cases, Google is asserting, as an affirmative defense against copyright infringement, fair use.

#### i. Fair Use

The fair use exemption under the Copyright Law is probably the one with which the public is most familiar. Under Section 107, an author cannot make a claim for infringement if the alleged infringer uses the work for the following reasons: (1) criticism; (2) comment; (3) news reporting; (4) teaching; (5) scholarship; or (6) research and are considered “fair use” of the copyrighted material. In order to determine whether the use is fair, courts will apply a four-part test: (1) purpose and character of the use (including whether use is for commercial or non-profit educational purposes); (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the entire work; (4) the effect of this use on the potential market for or value of the work.

#### ii. First Sale

It is important to distinguish the physical embodiment of a copyrighted work and the rights attached to it. Once a copyright holder sells a copy of the work, the rights to it are not relinquished absent any agreement to the contrary.<sup>19</sup> The importance of the first sale rule cannot be overemphasized, specifically, “while the first-sale rule enables access that may result in loss of revenue for publishers... the larger social benefits – an informed citizenry and democratization of information and knowledge – can be substantial. ... Public access may suffer, however, as the evolution of the information infrastructure compels a reexamination of the first-sale rule and other mechanisms for achieving access. As one example of the difficulties digital information brings, a single online copy of a work available from a digital library could diminish the market for the work much more than the distribution of hard copies to traditional libraries.” (*Digital Dilemma*, 202.)

#### iii. Library Exemption

Under Section 108, otherwise known as the library exemption, a library has not infringed a copyrighted work if (1) it reproduced no more than one copy of a work when such copy is made without any purpose of direct or indirect commercial advantage; (2) its collections are open to the public; and (3) the copy includes a copyright notice.<sup>20</sup> Specifically, under subparagraph (f) “Nothing in this section (2) excuses a person who ... requests a copy ... from liability for copyright infringement for any such act, or for any later use of such copy ... if it exceeds fair use as provided by section 107.” Moreover, there is some evidence that it was not Congress’ intent to allow a commercial enterprise to establish a collection of copyrighted works without the permission of the rights holder.<sup>21</sup>

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<sup>17</sup> The named publishers are McGraw-Hill Companies, Inc., Pearson Education, Inc., Penguin Group, Inc., Simon & Schuster, Inc., and John Wiley & Sons, Inc.

<sup>18</sup> See *Author’s Guild v. Google, Inc.*, Class Action Complaint, USDC SDNY Case No. 05-CV-8136, filed October 19, 2005 and *The McGraw-Hill Companies, Inc., et al. v. Google*, Complaint, USDC SDNY, Case No. 05-CV-8881 filed September 20, 2005. In neither case is an individual author suing for copyright infringement.

<sup>19</sup> Title 17, Chapter 2, Section 202: “Transfer of ownership of any material object ... does not of itself convey any rights in the copyrighted work embodied in the object...”

<sup>20</sup> There are additional circumstances under which a library is exempt from infringement if it makes up to three copies of an unpublished work or if the copy serves as a replacement for a lost, stolen, or deteriorated volume, which are not at issue here.

<sup>21</sup> “Under this provision, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies. Similarly, it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.” H.R. Rep. No. 1476.

Section 404 of the Digital Millennium Copyright Act (DMCA), which modifies section 108, allows libraries to make a digital copy of a work. However, access to that work is limited to the libraries' physical boundaries.<sup>22</sup>

#### iv. Exemptions for Google

Having briefly outlined the rights held by a copyright holder and the copyright exemptions as well as the limitations relating to the possession of private property, characterizing Google's use, in contract terms, will be addressed next. As any first year law student knows, an enforceable contract is comprised of an offer, an acceptance, some consideration (money, exchange of goods, etc.), and must be for a legal purpose.<sup>23</sup> There are two scenarios in which one can observe the possible contractual relationship between Google and the University of Michigan.

##### Scenario 1 – Google Looking for Content

In this scenario, Google is looking for content for its Google Library project. It solicits a number of libraries to make available their collections for this new service. Google offers to give the Libraries, as consideration for access to the works in their libraries, a digital copy of Google selected volumes for archival and preservation purposes.<sup>24</sup> In this case, Google as offeror, can determine the terms of the contract, select which volumes it wants copied, and control how additional copies are used.

##### Scenario 2 – Library Looking for Vendor

In scenario two, a library seeks a vendor who will make a digital copy of its collection for archival and preservation purposes. The cost is extremely prohibitive, and the budget only allows for a finite number of digital copies to be made a year and criteria are devised in a "triage" fashion. In this scenario, the Library as offeror, should be able to determine the terms of the contract by instructing the vendor (or offeree) which volumes it should copy, the format in which it should be delivered, and determine all uses for its copy.

#### 1. Analysis

Upon review of the contract between Google and the University of Michigan, scenario one is the closest description of the services rendered. Whether or not Google's use of Michigan's collection falls under the fair use exemption requires a rudimentary analysis of the fair use factors.<sup>25</sup> According to Hanratty, Google's use of the copyright protected work falls outside of the first factor of fair use analysis, because Google's use is ultimately for commercial purposes.<sup>26</sup> The second factor, the nature of the copyrighted work, is clearly in favor of infringement because Google copies the works in their entirety. Because Google is copying these works in their entirety, it will likely be found infringing under the third factor, considering the amount and substantiality of the portion used. Finally, because Google's use may supplant the market for the original work, it fails the fourth factor.<sup>27</sup> Under this analysis, what right does Google have to make a copy of a library's

<sup>22</sup> See Executive Summary, University of Maryland University College where UMUC encouraged the Copyright Office to provide an exemption for libraries serving students studying at a distance to permit them to make a single digital copy of a work to be used by students in a course. UMUC states that "[c]opyright owners, typically the publishers, often refuse to work with the [Copyright Clearance Center] and require UMUC to go directly to the publisher for permission to reproduce a work in digital form for reserves." UMUC, 4. Also, some owners refused to allow their work to be reproduced in digital form. Specifically, "the Harvard Business School being one notable example ... [refuses] to allow any of their works to be made available in digitally delivered distance education courses." UMUC, 5 <http://www.copyright.gov/disted/comments/init028.pdf>.

<sup>23</sup> The CA states that the Agreement "shall be binding upon the Parties despite any lack of consideration" (emphasis added) which may lead one to think, if either party sought to enforce this contract, would the contract fail and be rendered unenforceable for "lack of consideration"? For my purposes, it will be assumed that the parties exchanged a copy for service in lieu of any monetary compensation as consideration.

<sup>24</sup> Publisher's Complaint, p. 2: "In consideration for receiving books from Michigan for scanning, Google proposes to make a digital copy of each book it scans and then provide that copy to Michigan for Michigan's own use." Paragraph 4. In Author's Guild Complaint "As part of the consideration for creating digital copies of these collections, the agreement entitles Google to reproduce and retain for its own commercial use a digital copy of the libraries' archives." Paragraph 2, p. 2. In its answer to the Author's Guild Complaint, Google admitted that it contracted to digitally scan and create a searchable index of the words in many books in several books in the libraries' collection and that it will retain a "digital scan" of such books.

<sup>25</sup> For a more thorough analysis of fair use and Google, see Hanratty.

<sup>26</sup> Whether or not Google's digital copy is actually a "transformative use" of the work, thereby not superseding the original, but is in fact a new work which may entitle it to separate copyright protection, is the discussed below under Return to Access.

<sup>27</sup> One of the leading cases on fair use, where one company displayed "thumbnail" images on its website, and where the court found that it was fair use is *Kelly v. Arriba Soft Corp.*, 336 F. 3d 811 (9<sup>th</sup> cir. 2003). However, a court recently granted a preliminary injunction against Google, Amazon.com, and its subsidiary, A9.com to prevent them from displaying "thumbnail" images of nude women from the adult magazine "Perfect 10" website and from linking to third party websites that host infringing full-size images (*Perfect 10 v. Google, Inc., et al.*, Case No. 04-9484 AhM (SHx), U.S. Dist. Ct., CD CA, Order Granting in Part and Denying in Part Perfect 10's Motion for Preliminary Injunction Against Google, entered 2/21/06). The company invested several million dollars in developing the website, hiring models and photographers, and creating images for the site. Its copyright based market includes the individual sale of magazines, subscriptions (print and website), and has a licensing agreement for the sale and distribution of images for download on cell phones. It has no other outstanding licensing agreements with any other organizations. As part of its search service, Google displayed "thumbnail" images stored in Google's cache. These thumbnail images are reduced in size and are in a lower resolution than the original. When a user conducted an image search on Google, a split screen was generated revealing at the top Google's cache version of the image with a disclaimer that the image may be subject to copyright, and at the bottom the original image, if available, along with the corresponding URL. Perfect 10 filed a lawsuit against Google alleging several copyright and trademark infringement claims, including direct copyright and trademark infringement, vicarious copyright and trademark

contents? As indicated in the fair use discussion above, Google does not have a right, fair use or otherwise to make a copy of the library's contents.

In addition, Google has not purchased a single volume for it to fall under the first sale exemption so it is not entitled to make an archival copy for its own research or other permitted purposes.<sup>28</sup>

Even if the services characterization is more accurate under scenario 2, where the library may claim an exemption and have a copy made for archival purposes, and where Google, acting as vendor, offers its services to provide a digital copy of selected volumes in the library's collection and as compensation, receives its own copy, the library is not permitted under the library exemption to barter a copy of its collection (digital or analog) for digitization services.

Looking at specific clauses of the contract, the portion of Available Content available online will be those that Google desires to digitize or incorporate into its services. The University of Michigan can request that work be stopped if there are problems with the digital copies, but the Michigan is only permitted to review samples. (CA 2.4.) As discussed previously, Michigan can use its copy on its website, but must implement measures to restrict automated access and prevent third parties from obtaining any portion of Michigan's copy for commercial purposes (CA 4.4.1.) Under CA 4.5.3, Google has the right to make copies, license, or sell portions of its copy that are now in the public domain, or where Google has obtained authorization. Michigan is not granted such rights. Finally, Michigan cannot demand that Google provide any digitization services under Section 12.1.

In Google's answer to Publisher's complaint, p. 2, paragraph 6, Google admits that: "it is a for-profit business, but avers that the Google Library Project provides substantial benefits to the public and copyright holders alike." Charles D. Ossola, an attorney representing Kelly in the *Kelly v. Arriba* case, where the court found that a company's thumbnail image display was not in violation of copyright and was a fair use, doesn't think the court in the Publisher's case will find that the public benefit outweighs the potential loss to the rights holders. "The argument that all infringers make is 'What I'm doing is going to be good for you ....' The Second Circuit, of all places, is pretty good at cutting through the Gee-this-is-good-for-copyright-owners argument. Because the truth is, it generally isn't." (Rigdon, 27.)

#### b. 5<sup>th</sup> Amendment

The Fifth Amendment to the United States Constitution states "No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." While this clause is familiar to most as that in support of a governmental entity's assertion of "eminent domain" over land<sup>29</sup>, that interpretation is quite narrow, since it has been applied to intellectual property, including trade secrets, and does not necessarily have to involve only a governmental acquisition.<sup>30</sup> Private property includes intellectual assets. (Gayton – Vaughn, 204.)

Does Google's use of an author's work without permission and without compensation amount to a taking from authors and publishers without "just compensation" under color of law, where the legal exemption of "fair use" is being asserted to legitimize Google's copy so long as it is for "public use"?<sup>31</sup>

Consider Supreme Court Justice Sandra Day O'Connor's prescient opinion in her dissent from the *Kelo* case: "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private

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infringement, and unfair competition. Google asserted the "fair use" defense. The court said: "Google argues that the 'value of facilitating and improving access to information on the Internet ... counsels against an injunction here.' This point has some merit. However, the public is also served when the rights of copyright holders are protected against acts likely constituting infringement." (Order, 46.) According to Charles D. Ossola, a partner at Arnold & Porter LLP who represented Kelly on appeal in the *Kelley v. Arriba Soft Corp.* case, there is a problem analogizing snippets to thumbnails. "In order to form an index of a book that serves up snippets, Google doesn't need to scan the whole book, Ossola argues." (Rigdon, 25.) To make a thumbnail, a user has to have available the entire image.

<sup>28</sup> Answer, Jury Demand, and Affirmative Defenses of Defendant Google, Inc. Publisher's case. In paragraph 25, p. 5: "Google admits that it announced the Google Library Project in December 2004, and that the Library Project will make available for searching online an index of words found in many books in several of the world's leading libraries. Google further admits that as part of the Library Project, it is provided print copies of books from participating libraries, digitally scans the print copies, returns the print copies to the libraries, and makes available to the libraries one scan of the books for their own use in compliance with copyright law. Google further admits that some of the books for which a searchable index is created currently may be protected by copyright." (Emphasis added.) Google argues in its defense that in some instances 1) copyrights may have been forfeited or abandoned, 2) portions of the works are not original, 3) portions may be in the public domain; 4) remedies sought are barred by the 1<sup>st</sup> amendment, subject to exceptions. In addition, Google argues that the Publishers have engaged in copyright misuse and have unclean hands.

<sup>29</sup> *Kelo v. City of New London*, Thomas dissent: "The Takings Clause is a prohibition, not a grant of power." At 6.

<sup>30</sup> "It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking." *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1004 (1984).

<sup>31</sup> "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . . A few instances will suffice to explain what I mean . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation and the general principles of law and reason forbid them." *Calder v. Bull*, 3 Dall. 386, 388 (1798)

owner, so long as it might be upgraded – i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public – in the process.” *Kelo*, O’Connor’s dissent, at 1. She continues, “Any property may now be taken for the benefit of another private property, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. ‘[T]hat alone is a *just* government,’ wrote James Madison, ‘which *impartially* secures to ever man, whatever is his *own*.’” O’Connor at 13, citing National Gazette, Property, (Mar. 29, 1792) reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983) (emphasis added).<sup>32</sup>

#### IV. Return to Access

So far the discussion has been about what legal remedies a copyright holder has against an alleged infringer. Let’s assume that a court finds Google’s use of the copyright protected items is fair, and that it has transformed the original work into something entitling it to copyright protection of the resulting product. Assume further that the CA grants Michigan a license to that now transformed work. This leads to the two remaining discussion points, licensing and antitrust.

##### a. Licensing

Copyright laws represent “a set of general regulations negotiated through statutory enactment.” Licenses, however, “represent a market-driven approach to this regulation, through deals struck between buyers and sellers.” Okerson, 3. The effect on access to knowledge under a licensing regime could be profound under the CA, where Google retains ownership rights to the digital versions of books currently in the public domain.<sup>33</sup> This provision differs significantly from the intent of the copyright laws which are to grant to the author for “limited Times” a monopoly to a work, and thereafter allow the public is free access to the work. In addition, an altered distribution model from sale to licensing changes the libraries’ role as a “permanent repository of material that constitutes a cultural heritage” rendering libraries a “transient, temporary [point] of access to collections of information that may be available today and gone tomorrow, when licenses expire.” *Digital*, 203

Intellectual property licensing raises another concern when a rights holder uses its market power in that intellectual property to gain a foothold in another industry.

##### b. Antitrust

According to the *Antitrust Guidelines*, the intellectual property laws and the antitrust laws share a common purpose of “promoting innovation and enhancing consumer welfare.”<sup>34</sup> The Sherman and Clayton acts regulate competitive activity. A party may be in violation of the Sherman Act if it monopolizes, or attempts to monopolize a particular market. Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies in restraint of trade whereas Section 2 prohibits monopolization, attempts to monopolize and conspiracies to monopolize.

An exclusive dealing arrangement, such as a license, may raise an antitrust issue under Section 1 if it prevents a licensee from licensing, using, or distributing competing technologies.<sup>35</sup> The Department of Justice may become involved when “a licensing arrangement harms competition among entities that would have been actual or likely potential competitors in a relevant market in the absence of the license. ... A restraint in a licensing arrangement may harm such competition ...

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<sup>32</sup> Taking intellectual property from a private owner for public use is not without precedent. In *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), Monsanto sought injunctive and declaratory relief from provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIRFA) and its data disclosure provisions. Under those sections, the EPA can use Monsanto’s data to evaluate other competing applications and discloses the data to “qualified members of the public.” Monsanto alleged that all of their identified disputed provisions effected a “taking” of property in violation of the Fifth Amendment. (*Monsanto*, 998.) The lower court found the disputed sections to be unconstitutional and enjoined the EPA from enforcing those sections. The Supreme Court found that the EPA’s use of the pesticide related data was a taking for a “public use” rather than a “private use.” “So long as a taking has a conceivable public character, the means by which it will be obtained is for Congress to determine. Congress believed that the data-consideration provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly. Such a procompetitive purpose is within Congress’ police power.” (*Monsanto*, 988) (emphasis added).

<sup>33</sup> “[T]he use of licensing also raises significant concerns about the consequences for public access and the maintenance of a healthy corpus of materials in the public domain, particularly where license restrictions differ from legal rules that would otherwise apply.” (*Digital*, 203.)

<sup>34</sup> “The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.” (*Antitrust Guidelines*, Section 1.0, 3)

<sup>35</sup> Stempel, 13.

[when] license restrictions with respect to one market may harm such competition in another market by anticompetitively foreclosing access to, or significantly raising the price of, an important input, or by facilitating coordination to increase price or reduce output.” (Antitrust Guidelines, Section 3.1.)<sup>36</sup>

Exclusive dealing in the intellectual property context “occurs when a license prevents the licensee from licensing, selling, distributing, or using competing technologies.” (*Id.*, 25-26.) To determine whether an exclusive dealing arrangement will reduce competition in a relevant market, “the Agencies will take into account the extent to which the arrangement (1) promotes the exploitation and development of the licensor’s technology and (2) anticompetitively forecloses the exploitation and development of, or otherwise constrains competition among, competing technologies.” (*Id.*, 26.)

A statutory monopoly, like a copyright, is subject to some additional scrutiny when the rights holder attempts to leverage that statutory monopoly into another market. Specifically, the antitrust prohibition “against leveraging means that a property right in information can be used to monopolize the products emanating from the direct use or duplication of that information but cannot be used to acquire a monopoly in some other product. ... The principle underpinning this prohibition is that the rewards to the creator of knowledge should be limited to the direct-use value of that knowledge, even though granting broader rights might well induce much more innovative effort in the quest to monopolize the entire economy.” (*Digital*, 278.)

#### i. The Cooperative Agreement and Exclusive Dealings

The CA states that the parties desire to enter into a nonexclusive agreement “whereby Google will digitize works from the U of M collection to include them in Google’s search services, and to make them available to the University of Michigan for preservation, archival or other purposes of its choosing.” Although this agreement asserts that it is nonexclusive, several clauses in the contract lead one to believe that the result will ensure that Michigan, and the public, will have to depend on Google’s online search services in order to access digitized versions of its collection, since it will be unable to secure the services of a third party, according to this agreement, to design a software program enabling Michigan to view the digital content provided by Google.

To determine whether an exclusive dealing arrangement is violative of the antitrust laws requires a determination about whether the license promotes the exploitation and development of the licensor’s technology and whether it prevents the exploitation and development of competing technologies. (Antitrust Guidelines, 4.1.2 and 5.4.)

There is little debate about Google’s Internet search engine market dominance.<sup>37</sup> Whether it intends to use this market control to leverage its newly acquired content into the library support services market remains to be seen.

#### V. Conclusion

Court cases are being filed, licenses are being entered into, and negotiations are taking place between entities capable of changing the knowledge access landscape that has been formed over the last several decades, if not since the United States’ conception. The balance between providing creative works for which an author can expect to be paid, in order to provide enjoyment to the public may not be maintained. Contract law and its relative, licensing, are playing an ever increasing role in the negotiation of intellectual property rights. The public are important stakeholders in the ultimate intellectual property regime that may usurp public access to copyright protected works as we know it. The parties who enter into these agreements should keep in mind not only exploitation for private gain, but the public’s interest in having reasonable access to the bounty of this country’s cultural heritage.

The factors leading to the demise of the Libraries at Alexandria need not be repeated. The failure to secure for the future a cultural heritage amassed over millennia is not a goal toward which any library or archive would aspire. Ravenous acquisition without adequate compensation to authors, poor preservation of digital copies, and lack of back-up versions are inexcusable in a knowledge-based economy. Google has an opportunity, although not a duty, to set precedents for

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<sup>36</sup> “The key competitive issue raised by the licensing arrangement is whether it harms competition among entities that would have been actual or likely potential competitors in the absence of the arrangement. Such harm could occur if, for example, the licenses anticompetitively foreclose access to competing technologies (in this case, most likely competing computer programs), prevent licensees from developing their own competing technologies (again, in this case, most likely computer programs), or facilitate market allocation or price-fixing for any product or service supplied by the licensees.” (Antitrust Guidelines, P. 6)

<sup>37</sup> “The more people who view [Google’s] pages and rely on its search capabilities, the more influence Google wields in the search engine market and (more broadly) in the web portal market. In turn, Google can attract more advertisers to its AdSense and AdWords programs.” (Order, at page 25.) “Google’s thumbnails lead users to sites that directly benefit Google’s bottom line.” (*Id.*, 26.) As of February 28, 2006, PRNewswire reports the following as it relates to online searches: In January 2006, there were 5.48 billion searches conducted, up 10.7 percent since January 2005. Of these, 41.4% were conducted via Google sites, followed by Yahoo! at 28.7, MSN-Microsoft at 13.7, Times-Warner Network at 7.9 and Ask Jeeves at 5.6 percent, reflecting their relative market share of online searches.

the future digital archives of not only an American cultural heritage, but one for the expanse of human history. A good faith effort to cooperate with the authors and publishers whose works populate their digital space by following the laws already forged by public debate should not be ignored in favor of technological expediency and perhaps ephemeral and temporary gain. What is at stake here is not just providing an Internet search service that also happens to link search results with commercial advertisements, but a tool assisting with knowledge accumulation and access for generations.

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