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By Ryan Eddings*

Tentative Agreement in EU-US “Open Skies” Talks

After years of intense negotiations, the United States and European Union reached a tentative “open skies” agreement on November 18, 2005.¹ The agreement will replace the current system consisting of twenty-five bilateral deals between the US and individual EU member nations.² It will also lift many of the restrictions placed on carriers flying between US and EU cities.³ As a result, transatlantic carriers will be subjected to increased competition.⁴ This increased competition should lead to lower ticket prices and greater service options for consumers, as well as a more efficient transatlantic cargo distribution network.⁵

Transatlantic air carriers currently operate under a number of bilateral agreements between the US and individual members of the

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¹ *EU-US Land “Open Skies” Agreement*, BBC NEWS, Nov. 18, 2005, available at <http://news.bbc.co.uk/1/hi/business/4451440.stm> (last visited Nov. 26, 2005).

² Kevin Done, *EU-US Aviation Talks Appear Ready for Take-Off at Last*, FIN. TIMES, Oct. 20, 2005, at 6, available at 2005 WLNR 16948703.

³ John Crawley, *US-EU Reach Tentative Deal on “Open Skies” Pact*, REUTERS, Nov. 18, 2005, available at <http://go.reuters.com/newsArticle.jhtml?type=topNews&storyID=10337842&src=rss/topNews> (last visited Nov. 26, 2005).

⁴ *Id.*

⁵ *US, EU Agree to Throw Open Transatlantic Air Routes*, EU BUSINESS, Nov. 18, 2005, available at <http://www.eubusiness.com/Transport/051118213333.ymx7xa29/view> (last visited Nov. 26, 2005).

EU.⁶ These bilateral agreements grant reciprocal rights of access at specific cities to the signatories.⁷ In addition, some of the agreements regulate such matters as fares, flight frequency, and flight capacity.⁸ The first such agreement, the “Bermuda I,” was signed in 1946 between the US and the United Kingdom.⁹ The Bermuda I agreement became the template for thousands of other agreements signed among European nations and the US over the following thirty years.¹⁰ The resulting patchwork of agreements created the transatlantic network that exists today.¹¹

Under the contemporary transatlantic network, many European carriers can fly from European cities to destinations in the US.¹² However, under most current agreements, these flights cannot continue onto other cities in the US once they land. For example, while a British Airways plane can fly from London’s Heathrow Airport to New York’s JFK, that flight cannot pick up additional passengers and provide domestic service to other American cities like Chicago or Dallas.¹³ Similarly, American carriers can fly from American cities to European destinations, but some cannot continue onto third cities on the continent or fly to Asian cities.¹⁴ Moreover, while United Airlines may offer service from Chicago to London, Paris, and Frankfurt, each route is subject to a different bilateral agreement.

In November 2002, the European Court of Justice struck

⁶ *Open Skies Should Not be the Limit in Air Talks*, FIN. TIMES, Oct. 18, 2005, at 16, available at 2005 WLNR 16825277.

⁷ Jacob A. Warden, “*Open Skies*” at a Crossroads: How the United States and European Union Should Use the ECJ Transport Cases to Reconstruct the Transatlantic Aviation Regime, 24 NW. J. INT’L L. & BUS 227, at 230.

⁸ Thomas Firey, *Nothing to Fear From Open Skies with European Union*, CATO INST., Sept. 24, 2003, available at <http://www.cato.org/research/articles/firey-030924.html> (last visited Nov. 26, 2005).

⁹ Warden, *supra* note 7, at 230.

¹⁰ *Id.*

¹¹ *Id.*

¹² EU Business, *supra* note 5.

¹³ *Id.*

¹⁴ *Id.* The right for a foreign airline to fly domestic routes within another country is known as “full cabotage.” A few US airlines had achieved some degree of full cabotage within European nations, and this fact helped convince the European Commission to bring suit against the US in the Transportation Cases.

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down many of these bilateral agreements after hearing multiple suits brought by the European Commission.¹⁵ This decision was the catalyst for the current round of open skies talks.¹⁶ The Commission sought the exclusive authority to negotiate aviation agreements on behalf of the entire EU. While the ECJ did not explicitly grant the Commission's request, it did declare that some provisions of the current bilateral agreements run afoul of European Law.¹⁷ In particular, the ECJ took issue with the so-called "nationality clauses."¹⁸ The nationality clauses incorporated in the bilateral agreements allowed the US to deny access to European carriers whose home nation had not signed an agreement.¹⁹ Such clauses had the potential to grant preferential rights of access over other carriers.²⁰ As a result, the ECJ voided the agreements and suggested that the new agreements could be efficiently negotiated between the US and the entire EU, rather than individual member states.²¹ After the ECJ's announcement, the Commission made it clear to the US that if a new agreement were not reached by the end of 2005, it would force the termination of all existing bilateral aviation agreements between EU members and the US.²²

In late 2003, trade representatives from the EU and US began

¹⁵ Case C-466/98, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, 2002 ECR I-9427; Case C-467/98, *Commission of the European Communities v. Denmark*, 2002 ECR I-9519; Case C-468/98, *Commission of the European Communities v. Kingdom of Sweden*, 2002 ECR I-9575; Case C-469/98, *Commission of the European Communities v. Republic of Finland*, 2002 ECR I-9627; Case C-471/98, *Commission of the European Communities v. Kingdom of Belgium*, 2002 ECR I-9681; Case C-472/98, *Commission of the European Communities v. Grand Duchy of Luxembourg*, 2002 ECR I-9741; Case C-475/98, *Commission of the European Communities v. Republic of Austria*, 2002 ECR I-9797; Case C-476/98, *Commission of the European Communities v. Federal Republic of Germany*, 2002 ECR I-9855.

¹⁶ FIN. TIMES, *supra* note 6.

¹⁷ John R. Byerly, *Liberalizing Transatlantic Aviation: The Case for Stability, Expansion, and Vision*, Address to the USA-BIAS Conference, Oct. 14, 2005, available at <http://www.state.gov/e/eb/rls/rm/2005/55129.htm> (last visited Nov. 26, 2005).

¹⁸ *Id.*

¹⁹ Warden, *supra* note 7, at 243.

²⁰ *Id.*

²¹ *Id.*

²² Byerly, *supra* note 17.

negotiations to reach a new agreement.²³ In June 2004, the EU ministers rejected a deal proposed by the US.²⁴ After that setback, the talks went into a stalemate.²⁵ By late summer of 2005, there was renewed optimism on both sides of the Atlantic that a deal could be reached.²⁶

The tentative deal reached on November 18, 2005 is designed to replace the patchwork of bilateral agreements with a single streamlined agreement.²⁷ The new agreement will remove the restrictions on foreign airlines offering domestic routes within another nation.²⁸ Under the agreement there will no longer be regulations concerning the type of aircraft that can be used, the frequency of service, or the routes serviced by the airlines.²⁹ Furthermore, fares will no longer be set by the International Air Transport Association,³⁰ but would rather be determined by the carriers themselves.³¹ As a result, the EU estimates that transatlantic travel could increase between four and eleven million passengers.³² Further estimates predict an additional thirty five million passengers in intra-European travel alone.³³

Though the plan appears to open the gates for the “vigorous competition” that the US delegation hoped to achieve, the agreement must first be accepted by both the EU and US.³⁴ In the US, the deal does not require approval from Congress, but it is not without

²³ *Id.*

²⁴ Raphael Minder and Sarah Laitner, *US and EU Hopeful on Deal on Liberalising Air Travel*, FIN. TIMES, Oct. 22, 2005, at 3, available at 2005 WLNR 17092327.

²⁵ Byerly, *supra* note 17.

²⁶ Doug Cameron, et al., *Hopes Fade for “Open Skies” Agreement This Year*, FIN. TIMES, Nov. 14, 2005, at 5, available at 2005 WLNR 18432261.

²⁷ BBC, *supra* note 1.

²⁸ *Id.*

²⁹ Crawley, *supra* note 3.

³⁰ Warden, *supra* note 7, at 231.

³¹ Crawley, *supra* note 3.

³² Minder and Laitner, *supra* note 24.

³³ *Id.*

³⁴ Byerly, *supra* note 17.

opposition.³⁵ From the European perspective, the deal does not open up US airlines for total foreign ownership, a central goal of the European delegation.³⁶ Nevertheless, there is a good chance that EU transport ministers will approve the agreement if the US shows a willingness to accept foreign ownership of US airlines.³⁷ Currently, the US limits the voting rights of foreign entities in domestic airlines to 25%, which is less than the 49% allowed by the EU.³⁸ In early November, the Bush administration proposed to ease restrictions on foreign ownership in US airlines, but seventy-five members of the House of Representatives have come out against the proposal.³⁹ Another potential problem is that the UK is reluctant to grant more access to London's Heathrow Airport to foreign airlines, which is currently serviced by only two US carriers – United Airlines and American Airlines.⁴⁰ Increased access to Heathrow is a major goal of the US delegation, and in turn is a major bargaining chip of the EU.⁴¹

The new open skies agreement, if finalized, will be a significant step forward for consumers. Not only will transatlantic routes be opened to “vigorous competition,” but domestic routes could potentially see the entrance of new foreign carriers. At the same time, the increased competition will indirectly benefit consumers in the form of lower cargo rates that could produce retail and other savings. The fact the Bush administration is apparently willing to grant the necessary concessions to the Europeans is a sign that an agreement is a real possibility. And that possibility should give optimism to consumers.

Seventh Circuit Splits From Sister Circuits Over Telephone Consumer Protection Act

In an opinion by Judge Easterbrook,⁴² the Seventh Circuit

³⁵ Crawley, *supra* note 3.

³⁶ BBC, *supra* note 1.

³⁷ Crawley, *supra* note 3.

³⁸ EU BUSINESS, *supra* note 5.

³⁹ Crawley, *supra* note 3.

⁴⁰ Cameron, et al, *supra* note 26.

⁴¹ Done, *supra* note 2.

⁴² Brill v. Countrywide Home Loans, Inc., 2005 U.S. App. LEXIS 22514, 1,

Court of Appeals recently ruled that federal courts have jurisdiction to hear suits alleging violations of the Telephone Consumer Protection Act (TCPA)⁴³ brought under the Class Action Fairness Act (CAFA).⁴⁴ The TCPA is the Congressional response to consumer outrage over the intrusions of telemarketers and attempts to save consumers' time and money by prohibiting unsolicited faxes.⁴⁵ Illinois state courts have presided over many TCPA cases and the state is becoming a hotbed of TCPA litigation.⁴⁶ That might change as the Seventh Circuit's decision in *Brill v. Countrywide Home Loans, Inc.* places the Seventh Circuit, within which Illinois is located, at odds with at least six other federal appellate circuits. Additionally, the decision will have significant ramifications for individuals suing under the TCPA.

In the case, *Brill* brought a class action suit in Illinois state court under the private right of action provision created by the TCPA.⁴⁷ *Brill* alleged that he received one of 3,800 unsolicited faxed advertisements distributed by Countrywide Home Loans.⁴⁸ Countrywide admitted that an employee had sent at least 3,800 such faxes.⁴⁹ Under the TCPA, each fax constitutes a violation, and each violation can be fined by \$500.⁵⁰ Moreover, if *Brill* could prove that

427 F.3d 446 (7th Cir. 2005).

⁴³ 47 U.S.C. § 227 (2004).

⁴⁴ Pub. L. 109-2, 119 Stat. 4 (2005).

⁴⁵ For a discussion on the TCPA, see Brook M. Carey, *Fax Blasting at the OK Corral: Is the FCC Shooting From the Hip*, 18 LOY. CONSUMER L. REV. 1 (2005).

⁴⁶ Carey, *supra* note 45, at 4.

⁴⁷ 47 U.S.C. § 227(b)(3) (2004).

⁴⁸ *Brill*, 2005 U.S. App. LEXIS 22514 at 1.

⁴⁹ *Id.*

⁵⁰ 47 U.S.C. § 227(b)(3) Private right of action.

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this

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Countrywide “willfully or knowingly violated” the TCPA, Countrywide would be subject to treble damages of \$1,500 per violation.⁵¹ Thus, the damages claimed against Countrywide could range from \$1.9 million to \$5.7 million, or higher if more violations were found. In response to Brill’s complaint, Countrywide filed notice to remove the case to federal court under the CAFA.⁵² In doing so, Countrywide alleged that the damages exceeded the \$5 million minimum threshold articulated in the CAFA.⁵³ The district court remanded the case to state court after finding that Countrywide had failed to show that the damages at stake exceeded \$5 million and that, in any event, the federal courts could never hear case brought under the TCPA because the states have exclusive jurisdiction over such claims.⁵⁴

In reversing the district court, the Seventh Circuit first clarifies the burden placed on the removing party.⁵⁵ The Court states that Countrywide did not have to prove or present evidence that Brill would in fact recover more than \$5 million.⁵⁶ Such a burden would be difficult to fulfill during the pleading stage of litigation, when evidence has not yet been obtained.⁵⁷ In its place, the Court notes that the removing party need only demonstrate that the “amount in controversy” exceed the threshold amount.⁵⁸ Once this amount has been established, federal jurisdiction can be foreclosed only where it is a “legal certainty” that the final judgment will fall short of the threshold amount.⁵⁹ Countrywide’s admission that an employee had

subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

⁵¹ 47 U.S.C. § 227(b)(3).

⁵² *Brill*, 2005 U.S. App. LEXIS 22514 at 2.

⁵³ Pub. L. 109-2, 119 Stat. 4, Sec. 4 (a)(6) - In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$ 5,000,000, exclusive of interest and costs.

⁵⁴ *Brill*, 2005 U.S. App. LEXIS 22514 at 2.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 6.

⁵⁷ *Id.*

⁵⁸ *Id.* at 7.

⁵⁹ *Brill*, 2005 U.S. App. LEXIS 22514 at 7.

sent the 3,800 unsolicited faxes was sufficient to satisfy its burden of showing that the amount in controversy exceeded \$5 million.⁶⁰

The Court next addresses the district court's ruling that the states possessed exclusive jurisdiction to resolve private suits brought under the TCPA. Subsection (b)(3) of §227 specifically creates a private right of action, and in so doing expressly states that "[a] person or entity may, if otherwise permitted by the laws or rules of a court of a State, bring in an appropriate court of that State" an action based on the regulations of the TCPA.⁶¹ The Court states that the TCPA's failure to authorize federal jurisdiction at the same time has led some courts to infer that state jurisdiction is exclusive.⁶² However, the TCPA does not expressly proclaim that jurisdiction over TCPA claims is given exclusively to the State courts.⁶³ The Court reasons that Congress left out any mention of federal jurisdiction to avoid the argument that federal courts hold exclusive jurisdiction over TCPA claims.⁶⁴ Furthermore, the language may be an attempt by Congress to free states from the rule that they may not discriminate against federal claims.⁶⁵ Finally, the Court notes that while §227(b)(3) does not mention exclusive jurisdiction, §227(f)(2) does.⁶⁶ Section 227(f)(1) allows States to bring claims under the TCPA and §227(f)(2) grants that the federal courts shall have exclusive jurisdictions of claims brought under §227(f).⁶⁷ The Court

⁶⁰ *Id.*

⁶¹ 47 U.S.C. § 227(b)(3).

⁶² *Brill*, 2005 U.S. App. LEXIS at 10.

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 13.

⁶⁵ *Id.* at 14. "Section 227(b)(3) may serve the further function of freeing states from *Testa's* rule [*Testa v. Katt*, 330 U.S. 386 (1947)] that they may not discriminate against federal claims; the clause in §227(b)(3) that the action is proper 'if otherwise permitted by the laws or rules of court of a State' implies that each state may decide for itself whether to entertain claims under the Telephone Consumer Protection Act."

⁶⁶ *Id.*

⁶⁷ 47 U.S.C. § 227 - (f) Actions by States.

(2) Exclusive jurisdiction of Federal courts. The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief,

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notes “[h]ow strange it would be to make federal courts the exclusive forum for suits by states, while making state courts the exclusive forum for suits by private plaintiffs.”⁶⁸ The Court resolves this conflict by holding that the state forum mentioned in §227(b)(3) is “optional rather than mandatory.”⁶⁹ Furthermore, the implication of condition in §227(b)(3) allowing state court jurisdiction “if otherwise permitted by the laws or rules of court of a State” is that both federal question and diversity jurisdiction remain available to litigants.⁷⁰ If the states chose not to allow TCPA claims, Judge Easterbrook rhetorically asks, then where else could litigants pursue their claims?⁷¹ Thus, at least in the Seventh Circuit, the only exclusive jurisdiction implicated in TCPA claims is that of the federal courts to hear claims brought by states. In suits brought by private parties, the federal courts have jurisdiction both under federal question and diversity. Moreover, Countrywide’s removal action pursuant to 28 U.S.C. § 1441 was proper and should not have been remanded by the district court.

The Court’s decision in *Brill* places the Seventh Circuit squarely at odds with Second,⁷² Third,⁷³ Fourth,⁷⁴ Fifth,⁷⁵ Ninth,⁷⁶ and Eleventh Circuits.⁷⁷ Those Courts have previously held that jurisdiction to hear private suits brought under the TCPA belongs

commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

⁶⁸ *Brill*, 2005 U.S. App. LEXIS 22514 at 15.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.*, 156 F.3d 432 (2nd Cir. 1998).

⁷³ *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3rd Cir. 1998).

⁷⁴ *International Sci. & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997).

⁷⁵ *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997).

⁷⁶ *Murphy v. Lanier*, 204 F.3d 911 (9th Cir. 2000).

⁷⁷ *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998).

exclusively to the states.⁷⁸ In the decisions finding exclusive state jurisdictions over TCPA private claims, the courts have placed emphasis on the fact that Congress expressly granted exclusive federal jurisdiction to TCPA claims brought by states under §227(f)(2).⁷⁹ This is the same section that the Seventh Circuit used to justify its interpretation that federal courts retained jurisdiction over private TCPA claims.

How this split plays out in the federal courts is important for consumers bringing TCPA claims. As it is right now, which forum – state or federal – a plaintiff can properly bring such a claim depends in which appellate district the parties reside. Differing venues bring in the possibility of different procedural requirements which could increase disunity in standards and decisions in implementing a nationwide law.

Publishers Fight to Stop Google's Library

Google, the internet search engine giant praised for its innovation, recently unveiled a new concept that is exciting consumers and drawing the ire of international publishers. Google's next big idea is the Google Print Project,⁸⁰ an ambitious attempt to scan and digitize millions of books from the libraries at Harvard, Michigan, Stanford, and Oxford Universities and the New York Public Library.⁸¹ Under the plan, Google intends to scan over 15 million books and other documents at a cost of about \$10 per item.⁸² The scanned documents will then be made available for public searches. Fearing copyright violations, both the Association of American Publishers⁸³ (AAP) and the Authors Guild⁸⁴ have filed

⁷⁸ See *Chair King*, 131 F.3d at 512 (“Congress’s failure to address any of these matters with regard to private actions provides support for the our conclusion that Congress intended only state courts to handle these private actions”).

⁷⁹ See *Murphy*, 204 F. 3d at 913.

⁸⁰ The Google Print Project, <http://print.google.com> (last visited Nov. 26, 2005).

⁸¹ Chris Nuttall, *Publishers Try to Halt Google Library Plan*, FIN. TIMES, Oct. 20, 2005, at 20, available at 2005 WLNR 16948658.

⁸² John Markoff and Edward Wyatt, *Google is Adding Major Libraries to its Database*, NEW YORK TIMES, Dec. 14, 2004, at A1, available at 2004 WLNR 15523341.

⁸³ Press Release, Association of American Publishers, *Publishers Sue Google*

lawsuits against Google, seeking both damages and injunctive relief.

The Google Print Project is divided into two components. The first is the Google Print Publisher Project,⁸⁵ under which a publisher of a copyrighted book authorizes Google to scan the full text of a published work into the Google searchable database.⁸⁶ In response to a user search, Google returns results with information on specific publications and relevant text triggered by the search.⁸⁷ The user is also given a link, through which the user can purchase the publication.⁸⁸ There are no copyright issues implicated by the Google Print Publisher Project because it operates under an agreement between the publisher and Google.⁸⁹

It is the other component, the Google Print Library Project,⁹⁰ which has drawn the criticisms of the publication industry. What Google retrieves after running a user's search in the Print Library Project depends on whether the material retrieved is copyrighted. If the material is not protected by copyright, the full text will be available for the user to view.⁹¹ If the material is protected by copyright, the user will see what Google terms the "Snippet View" – a page containing basic card catalogue information, plus a few

over Plans to Digitize Books, (Oct. 18, 2005) available at <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=292> (last visited Nov. 26, 2005). The lawsuit brought by the AAP was filed in the United States District Court for the Southern District of New York, case number 05 CV 8881.

⁸⁴ Press Release, Authors Guild, *Authors Sue Google, Citing "Massive Copyright Infringement,"* (Sept. 20, 2005) available at http://www.authorsguild.org/news/sues_google_citing.htm (last visited Nov. 26, 2005). The lawsuit brought by the Authors Guild was filed in the United States District Court for the Southern District of New York, case number 05 CV 8136.

⁸⁵ The Google Print Publisher Project, available at <http://books.google.com/googlebooks/publisher.html> (last visited Nov. 26, 2005).

⁸⁶ Jonathan Band, "*The Google Print Library Project: A Copyright Analysis*," at 1, available at <http://www.policybandwidth.com/doc/googleprint.pdf> (last visited Nov. 26, 2005).

⁸⁷ Band, *supra* note 86, p. 1.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Google Publisher Project, *supra* note 85.

⁹¹ Google Library Project, <http://books.google.com/googlebooks/library.html> (last visited Nov. 26, 2005).

sentences of the search terms in context.⁹² Google maintains that the full text of copyrighted material will not be available for public viewing,⁹³ although the full text of the copyrighted information will reside in Google's database.⁹⁴ As with the Print Publisher Project, Print Library Project users interested in a publication after reading the Snippet View will be directed to retailers' websites where the publication can be purchased.⁹⁵

The Google Print Project promises to give consumers unprecedented access via their own personal computers to information previously found only in the world's great libraries and accessible by only a privileged few. Librarians and educators see the Google Print Project as a way of promoting literacy.⁹⁶ Consumers see the project as a way of broadening and facilitating their information choices, while others predict the Print Project will turn into a windfall for publishers, providing consumers free referrals to a publisher's products and thereby actually increasing demand for the copyrighted material.⁹⁷ But publishers and authors fear what they call the "Napsterising" of books.⁹⁸

In response to Google's decision to press ahead with the Print Project, both the AAP and the Authors Guild have brought suit to stop the project, claiming copyright infringement. After filing suit against Google, Authors Guild President Nick Taylor labeled Google's plan a "brazen violation of copyright law."⁹⁹ Both the AAP and the Authors Guild claim that only the authors themselves can

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Needless Fight Threatens Google's Online Library*, USA TODAY, Nov. 8, 2005, at 12A, available at 2005 WLNR 18058884.

⁹⁵ Patti Waldmeir, *Google's Digital Page-Turner*, FIN. TIMES, Nov. 17, 2005, at 13, available at 2005 WLNR 18564938.

⁹⁶ USA TODAY, *supra* note 94.

⁹⁷ Google cites the example of the Penn State University Press who saw sales of Print On Demand titles jump from an average of nineteen sales per month to seventy-four after converting to the Google system. The Penn State case study is available at <https://print.google.com/publisher/pennstate> (last visited Nov. 26, 2005).

⁹⁸ Waldmeir, *supra* note 95. "Napsterising" is a reference to the now-legal music file sharing company, Napster, which in the late 1990s allowed consumers to share and download music files without forcing consumers to go through the trouble of purchasing the music.

⁹⁹ Authors Guild, *supra* note 84.

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determine whether the copyrighted publications can be copied.¹⁰⁰ The groups insist that Google must first get the permission of each author before a copyrighted publication can be scanned into the Google database.¹⁰¹ Google has refused, noting that finding the author of every copyrighted publication would not only be prohibitively expensive, but impossible as well.¹⁰² Moreover, these groups insist that only the copyright holder can determine which information can be released in the “Snippet View.”¹⁰³

Rather than acquiesce to the publishers’ demands, Google has sought protection under the “fair use” exemption under American Copyright law, arguing that its use of the copyrighted material is limited and that the Print Project serves important public interests. The fair use exemption is an affirmative defense that can be raised after a *prima facie* case for copyright infringement has been established.¹⁰⁴ A *prima facie* case for copyright infringement consists of two elements. First, there must be ownership of a valid copyright.¹⁰⁵ Second, original elements of the copyrighted work must be copied.¹⁰⁶ Both elements are likely satisfied in the case of the Google Print Project. The fair use exemption is codified in the Copyright Act,¹⁰⁷ providing four factors for courts to consider in

¹⁰⁰ *Id.*

¹⁰¹ Waldmeir, *supra* note 95.

¹⁰² *Id.*

¹⁰³ USA TODAY, *supra* note 94.

¹⁰⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

¹⁰⁵ *Feist Publ’ns, Inc. v. Rural Telephone Servs., Inc.*, 499 U.S. 340, 361 (1991).

¹⁰⁶ *Id.*

¹⁰⁷ 17 U.S.C. § 107 (2004). Limitations on Exclusive Rights; fair use

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

determining if unauthorized use of a copyrighted item is nevertheless fair.¹⁰⁸ The four factors are not exhaustive, and no single factor is determinative.¹⁰⁹ Rather, section 107 attempts to harmonize the two principles behind copyright law: providing incentives for creators without stifling other creators and the public good.¹¹⁰

The future of the Google Print Project will largely depend on how the courts presiding over the lawsuits interpret Google's actions. If the courts find that the Google Print Project use of copyrighted material is intended for commercial gain, then it is presumed that the infringement has, or will, harm the market for the copyrighted material.¹¹¹ On the other hand, if the courts find that Google's intent is not for commercial gain, then either AAP or the Authors Guild will have to show that Google's Print Project has, or will, harm the market for the copyrighted works in question to prevail.¹¹² If the Penn State University Press case study is to be believed, such a showing will be difficult to make.¹¹³

In the meantime, Google continues to digitize copyrighted works without permission. At the time of this publication, the first sources of the Google Print Library were accessible by users. The interests served by the Print Project are for the project to stall in litigation. The Print Project will likely benefit everyone involved – Google, consumers, authors, and publishers. The fact that Google is paying for the project should only sweeten the deal. However, unless a compromise is reached, it appears that Google will have to fight to make the world's great libraries available to the public, while at the

(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.

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

¹⁰⁸ See Elizabeth Hanratty, *Google Library: Beyond Fair Use*, 2005 DUKE L. & TECH. REV. 10, 14-16.

¹⁰⁹ *Sega Enters., Inc. v. Accolade, Inc.*, 977 F.2d 1510, 1521-22 (9th Cir. 1993).

¹¹⁰ Hanratty, *supra* note 108, at 16.

¹¹¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

¹¹² *Id.*

¹¹³ Google, *supra* note 97.

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same time testing the outer boundaries of American copyright law.