GOOGLE RULES

An Analysis of Google's Influence on Copyright Law and Practice

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Submitted in total fulfilment of the requirements of the degree of

Doctorate of Philosophy (PhD)

Faculty of Law and Business

Thomas More Law School

Australian Catholic University

February 2018

Declaration of Authorship and Sources

This thesis contains no material published elsewhere or extracted in whole or in part from a thesis by which I have qualified for or been awarded another degree or diploma.

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All research procedures reported in the thesis received the approval of the relevant Ethics/Safety Committees (where required).

Joanne Gray

DEDICATION

This thesis is dedicated to my late father

James Robert McCormack

1955 — 2016

ACKNOWLEDGEMENTS

In completing this thesis, I owe sincere appreciation to Professor Brian Fitzgerald who provided constant and reassuring intellectual, professional and personal support; to Doctor John Gilchrist for his time, commitment and thoroughness; and to Suzanne McCormack for her intellectual, personal and genetic contributions. I am thankful to Professor Pamela Samuelson for facilitating my time at UC Berkeley. Finally, to my patient, kind and extraordinarily supportive family, the lovely Ben and Victor Hassell — thank you.

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ABSTRACT

This thesis explores Google's copyright agenda and the political, legal and private processes through which Google has sought its implementation. This is the first comprehensive documentation of Google's influence on copyright, drawing together evidence from multiple jurisdictions and spanning several years. This thesis is also significant for its insights into the current dynamics of digital copyright rule-making and enforcement and the distribution of power in the digital environment. Indeed, this thesis is a contribution to a larger conversation about a new generation of monopolistic companies, born from the technological developments of the digital age, and the social, political and economic influence they have acquired in contemporary society. The thesis concludes by enumerating strategies for addressing critical problems produced by concentrated private power in the digital environment; in particular, strategies aimed at ensuring digital copyright functions in the interest of a broad range of stakeholders.

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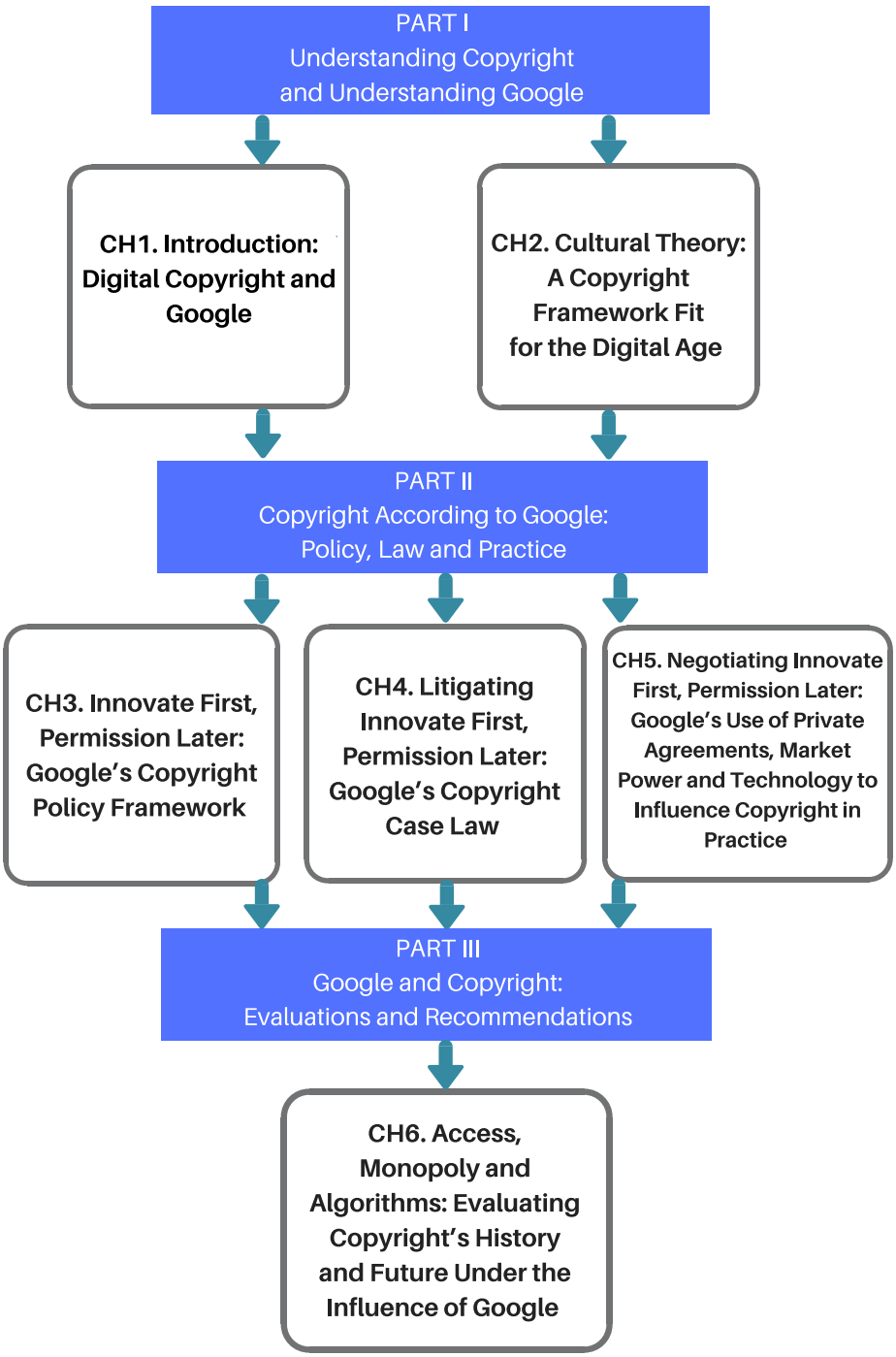

PART I

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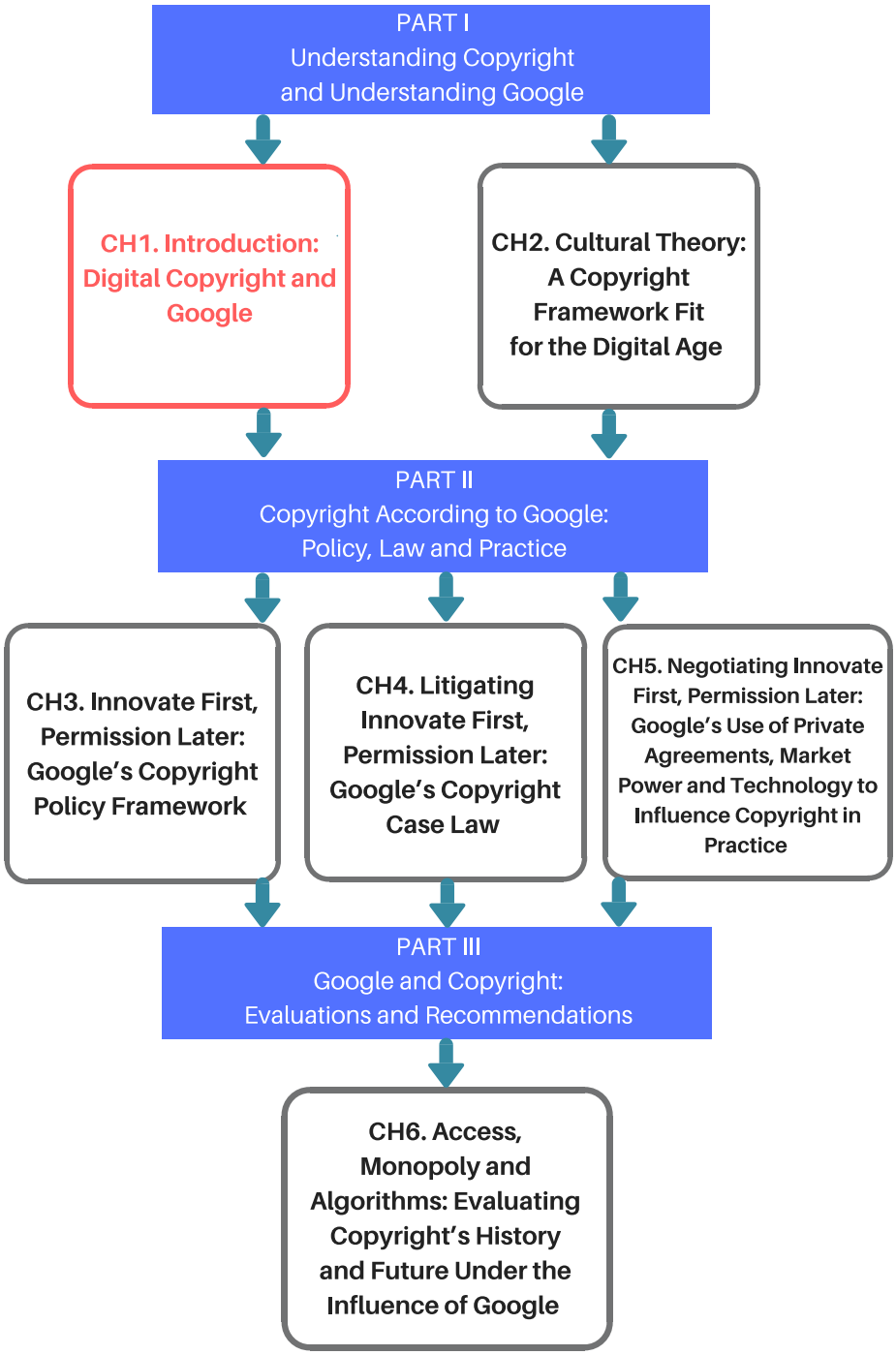
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CHAPTER 1

Introduction:
Digital Copyright and Google

This chapter outlines the purpose and significance of this thesis, its scope and structure, and its research methodology. This chapter also provides important contextual information. It introduces the central objectives that define copyright law and provides a brief history of digital copyright politics, including the dominant interests and ideologies. Finally, this chapter outlines Google's origins and core business activities, as well as the reasons why Google is a unique force in the history of copyright.

1. Introduction

The advent of Google was an affront to copyright.[1] Google engages in mass digital copying — famously of websites, images and books — and has made free access to information and content online ubiquitous. Since the 1990s, governments around the world have sought to devise copyright regimes for the digital environment that secure the media and entertainment industries the same level of control and remuneration they enjoy in the physical environment. Google's open access business model casts doubt on the inevitability of that approach. Rather than controlling access to content and information, Google has profited from the open structure of the internet and the free flow of information and content online. Seeking to sustain its profitable business model, Google has pushed back against the political agenda of the media and entertainment industries, pursuing a copyright framework that prioritises public rights to

[1] Google incorporated in 1998. In 2015, Google restructured and currently operates as a wholly owned subsidiary of parent company Alphabet. Google is Alphabet's largest subsidiary. The businesses unrelated to Google's internet activities, for example, in the areas of health sciences, drones and self-driving cars, now operate as separate subsidiaries of Alphabet. Google's key internet related businesses, including Search, YouTube and Android, remain within Google. Given Google's continued dominance within the broader corporate entity, as well as its continued focus upon activities that relate most directly to copyright law, in this thesis, rather than adopting 'Alphabet' to describe the political and economic activities of the restructured entity, I continue to use 'Google'. For information regarding Google's restructure see Larry Page, *G is for Google* Alphabet <https://abc.xyz/>.

access and use content and information. In doing so, Google has emerged as an exceptionally powerful actor influencing digital copyright law and practice.

1.1 The Purpose and Significance of this Thesis

The purpose of this thesis is to investigate and evaluate the influence of Google on copyright law and practice through two principal questions. First, I seek to know whether Google has influenced copyright in significant ways. And, if it has, how has Google done so? In this respect, how has Google managed its legal, commercial and political conflicts? Second, I seek to evaluate Google's position in digital copyright governance and the implications for the public interest. Specifically, what role does Google play in copyright rule-making and enforcement and what are the consequences for the public interest?

RESEARCH QUESTIONS

Has Google influenced copyright in significant ways?	If so, how has it done this? How has Google managed its legal, commercial and political conflicts?
What is Google's position in digital copyright governance?	What role does Google play in copyright rule-making and enforcement? What are the consequences for the public interest?

This thesis is the first comprehensive documentation of Google's copyright agenda, litigation and practices, drawing together evidence from multiple jurisdictions and spanning several years.[2] It is also significant for its exploration of Google's copyright rule-making and

[2] I acknowledge that a corporation does not think or seek anything for itself. A corporation is directed by owners and management — by real people working collectively and as individuals. Yet, when the decision and activities of the people working for an organisation are viewed in the aggregate, and in the context of an economic purpose, one may attribute to a corporation an overarching strategy, principles and agenda. In Google's case, key individuals lead a company with a clear economic purpose, and through empirical research it is possible to identify an overarching strategy and a policy agenda underpinned by political and economic principles. See generally Mary Douglas, *How Institutions Think* (Syracuse University Press, 1986).

enforcement, and the distribution of power in digital copyright governance.[3] Furthermore, this thesis provides strategies for addressing the consequences of Google's position and influence. Google is a powerful and motivated multinational corporation, one likely to continue to influence copyright law for the foreseeable future. Copyright lawmakers and other stakeholders should benefit from a detailed analysis and evaluation of Google's influence and the strategies developed precisely to address the consequences of Google's influence.

While the parameters may be narrowly set — upon one firm and one area of intellectual property law — ultimately, this thesis raises critical questions regarding private power in the digital environment. It is a contribution to a much broader conversation about a new generation of monopolistic companies, born from the technological developments of the digital age, and the social, political and economic influence they have acquired in contemporary society.[4]

2. Background

2.1 Copyright's Foundational Tension: In Service of Both Public and Private Interests

A fundamental policy tension underpins modern copyright law. On the one hand, the purpose of copyright is to protect and advance the private interests of authors of expressive works, such as books, films, music or paintings.[5] Copyright is a quasi-monopoly right, providing authors exclusive rights over a work, chiefly the exclusive right to copy and communicate the work to the public. In practice, copyright regimes also include an assortment of other rights that facilitate the control and commodification of a work by a rightsholder,[6] along with laws crafted to enforce those rights. Copyright assists rightsholders to control and receive remuneration for access to and use of a work.

[3] For, as Professor Peter Drahos et al conclude, '[u]nderstanding how power is distributed and wielded is a precondition for promoting just and efficient governance.' Peter Drahos, Clifford D Shearing and Scott Burris, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30, 31.

[4] To borrow Professor Tim Wu's phrase, this thesis is one part of the story of 'the industrial and ideological leaders of our times'. Tim Wu, *The Master Switch* (Vintage, 2010) 273.

[5] Here, as is conventional in copyright law, I use 'authors' to describe the creators of works subject to copyright protection. These works typically include musical, literary, artistic, audio visual works and software. In some jurisdictions and treaties, works are divided into authorial works and entrepreneurial works. For example, a painting may be an authorial work and rights accrue to the painter, whereas a film may be an entrepreneurial work and rights accrue to those who invested in the film's production.

[6] Throughout this thesis, I use 'rightsholder' to describe a person or entity that holds rights to a copyrighted work; this may be an author or a person or entity that has obtained rights through an assignment or licence.

At the same time, copyright has a public interest objective: ensuring social progress through public access to the ideas and information contained in expressive works.[7] To achieve this objective, copyright is limited. It is limited in duration so that after a period of protection works fall into the public domain and it is limited in scope so that some uses of works are not exclusive to authors. These uses are typically termed 'exceptions' to copyright, providing public rights to access and use works, such as for news coverage or educational purposes.[8] In theory, lawmakers design and adjust the scope and application of copyright regimes, in order to promote or balance the private and public interests in copyright law.[9] Accordingly, while copyright provides authors private property rights, copyright is not a pure property right, it also provides rights to the public, functioning as a tool for regulating public access to and use of information and content.[10]

For most, the private interests associated with copyright are the most intuitive: authors and rightsholders *should* be enabled to control and profit from the works they create and own. Yet, the public interest objective is not ancillary, it is in fact a foundational justification for the authors' exclusive rights. The *Statute of Anne* — a statute enacted in the United Kingdom in 1710 that laid the foundations for modern copyright law by granting book authors, rather than book publishers, exclusive rights to reproduce their works[11] — specified its fundamental

[7] Here I use 'information' to describe informative content broadly. That is, content that communicates knowledge or meaning. This can include traditional art forms such as music, literature and other copyright subject matter.

[8] For example, the Australian fair dealings provision specifies exceptions for research or study, criticism or review, parody or satire, reporting news or professional advice. *Copyright Act 1968* (Cth) ss 40-43, ss40-43, 103A-103C. Alternatively, the United States fair use exception is flexible, the provision providing only an illustrative list of uses. 17 USC § 107.

[9] See, eg, Timothy J Brennan, 'Copyright, Property, and the Right to Deny' (1993) 68(2) *Chicago-Kent Law Review* 675.

[10] Professor Zechariah Chafee describes, 'copyright law involves an adjustment between the interests of the author and his family on one side of the fence and the interests of the consuming public on the other side.' Zechariah Chafee, 'Reflections on the Law of Copyright: I' (1945) 45(4) *Columbia Law Review* 503, 516.

[11] *The Statute of Anne* stipulates:

> Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books…the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years

purpose to be 'the Encouragement of Learning'.[12] To encourage learning, the Statute of Anne required authors to register their works and to provide copies for inclusion in libraries.[13] The Statute granted authors private rights to their works, but also ensured public access to those works.

The principle that copyright regimes should ensure public access to works is based on an understanding that human knowledge and creativity is cumulative. United States' Circuit Judge Alex Kozinski elucidates: '[n]othing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each creator building on the works of those who came before.'[14] All knowledge and creativity, to varying degrees, is cumulative, drawing upon existing resources — technological, historical, social, creative and so on — and, therefore, ensuring some public access to these resources ensures knowledge and creativity continues to advance.[15] Professor Molly Shaffer Van Houweling summarises, the 'crude logic of copyright'[16] is that 'creativity is good for society'[17] and should be encouraged by providing exclusive rights to authors, but those rights should be limited because 'draconian copyright protection could stunt creativity'.[18]

While copyright regimes have increased in both scope and complexity since the Statute of Anne, the dual foundational objectives of copyright endure. For example, the preamble to the

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Statute of Anne 1710, 8 Ann. c. 19 ss I-II. See generally Benedict A C Atkinson and Brian F Fitzgerald, *A Short History of Copyright: The Genie of Information* (Springer, 2014) 23.

[12] The long title of the *Statute of Anne* is 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchase of such Copies, during the Times therein mentioned.'

[13] *Statute of Anne 1710*, 8 Ann. c. 19 s V.

[14] Dissenting in *White v Samsung Electronics America Inc* 989 F 2d 1512, 1513 (9th Cir, 1993).

[15] Professor Neil Netanel describes:

> All authors draw upon existing works in creating new ones. For that reason, a democratic copyright must provide considerable leeway for creative transformations of protected expression. At least to some extent, authors must be free to adapt, reformulate, quote, refer to, and abstract from existing expression without having to obtain copyright owner permission. Absent that breathing space, authors would be severely fettered in their ability to participate in public discourse, whether by building upon literary or artistic traditions, laying bare the contradictions in venerable cultural icons, or challenging prevailing modes of thought.

Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena' (1998) 51(2) *Vanderbilt Law Review* 218, 229. See also Chafee, who describes, '[t]he world goes ahead because each of us builds on the work of our predecessors.' Chafee, above n 10, 511. The cumulative nature of creative practice is discussed further in Chapter 2.

[16] Molly Shaffer Van Houweling, 'Distributive Values in Copyright' (2005) 83(6) *Texas Law Review* 1535, 1539.

[17] Ibid.

[18] Ibid. See again Circuit Judge Alex Kozinski in *White v Samsung Electronics America, Inc*, '[o]verprotecting intellectual property is as harmful as under-protecting it. Creativity is impossible without a rich public domain.' *White v Samsung Electronics America Inc* 989 F 2d 1512, 1513 (9th Cir, 1993).

World Intellectual Property Organisation (WIPO) Copyright Treaty recognises 'the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information'.[19] In recent decades, however, with the advance of digital technology, the tension between the public and private objectives of copyright law has heightened.

2.2 Copyright's Foundational Tension in the Digital Age

With the development of digital technologies, the scope of copyright has expanded. Contemporary copyright regimes have produced, for example, anti-circumvention laws that regulate car repairs,[20] liability for operators of public Wi-Fi networks,[21] restrictions on access and use of knowledge in developing countries,[22] and a decade long legal dispute over a

[19] The preamble of the *WIPO Performances and Phonograms Treaty* (WPPT) similarly states 'Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information'. *WIPO Copyright Treaty* and *WIPO Performances and Phonograms Treaty,* signed 20 December 1996 (entered into force 20 May 2002). See also *IceTV Pty Limited v Nine Network Australia Pty Limited* in which the High Court of Australia discussed 'the longstanding theoretical underpinnings of copyright legislation' noting:

> Copyright legislation strikes a balance of competing interests and competing policy consideration. Relevantly, it is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public…The "social contract" envisaged by the Statute of Anne, and still underlying the present Act, was that an author could obtain a monopoly, limited in time, in return for making a work available to the reading public.

IceTV Pty Limited v Nine Network Australia Pty Limited [2009] HCA 14 (22 April 2009), [24] – [25].
In the United States, the Constitution frames copyright as a tool for promoting '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 I, Section 8, Clause 8 of the United States Constitution. In *Feist Publications, Inc v Rural Telephone Service Co* the United States Supreme Court explained:

> It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." *Harper & Row,* 471 US, at 589 (dissenting opinion). It is, rather, "the essence of copyright," *ibid.,* and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8...To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.

Feist Publications, Inc v Rural Telephone Service Co 499 US 340, 349-350 (1991).
Although not a copyright dispute, see also *Associated Press v United States*, in which Justice Black expressed that the United States First Amendment regarding religion and expression 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' *Associated Press v United States* 326 US 1, 20 (1945).
[20] Library of Congress U.S. Copyright Office 37 CFR Part 201 [Docket No. 2014-07] *Exemptions to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.*
[21] *Tobias McFadden v Sony Music Entertainment Germany GmbH* (C-484/14) [2016] ECLI-EU, 170.
[22] For example, art 18.63 of the *Trans-Pacific Partnership Agreement* would require Vietnam, Malaysia and Brunei to increase the length of copyright term to the life of the author plus seventy years. *Trans-Pacific Partnership Agreement,* signed 4 February 2015 (not yet in force).

mother's YouTube video of her child dancing to a Prince song.[23] Today, copyright regimes regulate markets for media and entertainment content, the development and administration of new technologies, access to and use of information and social communications.

Why would a broad range of activities such as these implicate copyright law? There are many reasons — political, legal and historical — but I will offer one important practical reason. Characteristically, digital technologies copy information (including software code, content and data) in order to function.[24] This means shifting daily activities online — working, shopping, emailing, blogging, banking, gaming, watching television, reading, remixing, chatting, Tweeting, sharing photos and all the different technologies that makes these activities possible — all implicate copyright because they usually involve a reproduction and/or a communication to the public of copyright subject matter. Consequently, today the regulatory effect and social consequences of copyright are far reaching. A complex regime of ownership, control and liability enmeshes the digital environment and therefore impacts upon an increasingly large portion of contemporary society. Questions of how copyright should function and how to properly balance public and private interests are relevant to more people and in more places than ever before.

The conditions of the digital age have intensified concerns for the private interests of authors of expressive works. The traditional business model of the content industries[25] centres upon controlling access to and the use of works.[26] They rely on an ability to authorise and seek remuneration for any use of a work; be it the sale of a CD, movie ticket or book, or a subscription cable TV service, a video rental or a software licence. Digital technologies, however, diminished the efficacy of this business model. Eliminating the need for physical resources, digital technologies enable near costless and limitless copying and distribution of expressive works. Additionally, the structure of the internet supports models of uncontrolled access and use of works. At its core, the internet is an open system where users can access and use information whenever and however they want.[27] The result is that rightsholders are less

[23] *Lenz v Universal Music Corp*, 815 3d 1145 (9th Cir, 2015).
[24] Invariably, copyright law treats software code as a literary work.
[25] From this point on, in this thesis, I will use 'content industries' to describe the dominant entertainment and media industries such as the industries for film, television, book publishing, news publishing, music and software.
[26] William Patry, *Moral Panics and the Copyright Wars* (Oxford University Press, 2009) 26.
[27] Here I have paraphrased Patry who describes:

> In the world of Internet-based companies, a completely different approach to consumers is taken…Open systems are not only consistent with the architecture of the Internet, but – and this is the key dividing line between the copyright and Internet companies – open systems

able to control and receive remuneration for access to and use of their works. For the content industries, this lack of control (or more precisely access without permission and without remuneration) is the central copyright problem of the digital age. And, despite the broadened social consequences of copyright in the digital environment, this 'problem' and concern for the private rights of authors has heavily influenced digital copyright politics.

2.3 Digital Copyright Politics: The Search for a New Model of Control

On critical occasions in the history of digital copyright politics, the content industries successfully framed the policy debate in favour of rightsholders. Indeed, their agenda found a firm foothold in digital copyright politics early on. As internet usage increased throughout the world in the 1990s, the question of an appropriate digital copyright regime came into focus for policy-makers and affected industries. In the United States, a White Paper produced for the Clinton Administration in 1995 put forward a policy framework that would have delivered rightsholders comprehensive control within the digital environment.[28] It effectively proposed that every use of a work, in all digital forms, would require permission from and remuneration to rightsholders.[29] The White Paper delivered this control through three key proposals. First, it proposed that a digital transmission of a work be categorised as the distribution of a copy. Second, it took the position that temporary reproductions made in the random-access memory (RAM) of a computer were reproductions subject to copyright. Third, it recommended making illegal any product or technology capable of circumventing a technical protection measure placed on a work in order to limit its use (known generally as anti-circumvention laws). As Professor James Boyle assessed, if the proposals of the White Paper were adopted the information superhighway would have become 'an information toll road.'[30]

At the time, the White Paper was recognised as heavily biased in favour of the content industries. Indeed, it was produced by Clinton Administration staff with professional ties to the United States' content industries who reportedly 'maintained extensive informal

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are consistent with the experience users want from the Internet: the ability to access and use information when and how you want. Ibid 27.

[28] Working Group on Intellectual Property, 'Intellectual Property and the National Information Infrastructure ' (September 1995) <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

[29] Jessica Litman, *Digital Copyright* (Prometheus Books, 2001) 74-75.

[30] James Boyle, *Shamans, Software, and Spleens Law and The Construction of the Information Society* (Harvard University Press, 1997) 135. See also Patry who contends the content industries' 'business model for the Internet is one even more vertically controlled than it was in the world of physical distribution of copies'. Patry, above n 26, 26.

communications with private-sector copyright lobbyists'.[31] Effectively, the White Paper laid bare the content industries' digital copyright policy agenda: they sought maximum control in the digital environment and laws to preserve and expand their private property interests. The justification offered for their framework was that it was necessary to ensure works were made available digitally and to encourage investment in digital infrastructure.[32] A justification that would prove unconvincing. Various library, education, public interest and consumer organisations, along with industries such as telecommunications, manufacturing and internet service providers, worked with law professors to successfully oppose the White Paper and its accompanying legislation.[33] Nonetheless, the White Paper proposals became the United States' policy position at the subsequent WIPO treaty negotiations.[34]

The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (the Internet Treaties) mark an important moment in the history of digital copyright as they formally imported analogue copyright doctrine into the digital era.[35] In the treaty negotiation process, the Clinton Administration's White Paper policies were embodied in the draft treaties that 'served as the basis for negotiations'.[36] Professor Pamela Samuelson describes:

> the U.S. digital agenda at WIPO aimed to write the rules of the road for the emerging global information superhighway. Under these rules, copyright owners would have considerably stronger rights than ever before, and the

[31] Litman, above n 29, 90. See also, Professor Pamela Samuelson:

> Why would the Clinton administration want to transform the emerging information superhighway into a publisher-dominated toll road? The most plausible explanation is a simple one: campaign contributions. The administration wants to please the copyright industry, especially members of the Hollywood community, who are vital to the president's reelection bid. And what this copyright industry wants in return is more legal control than ever before over the products they distribute.

Pamela Samuelson, 'The Copyright Grab', *Wired* (online) 1 January 1996 <http://www.wired.com/1996/01/white-paper/>.

[32] Information Infrastructure Task Force, 'National Information Infrastructure: Progress Report' (September 1993-1994) <https://babel.hathitrust.org/cgi/pt?id=umn.31951d00269995v;view=1up;seq=13>. For a more detailed discussion see Pamela Samuelson, 'The US Digital Agenda at WIPO' (1996) 37 *Virginia Journal of International Law* 369.

[33] Litman, above n 29, 122.

[34] Samuelson, 'The US Digital Agenda at WIPO', above n 32, 373.

[35] Samuelson describes the negotiations as 'a battle about the future of copyright in the global information society'. Ibid 372.

[36] Blayne Haggart, *Copyfight: The Global Politics of Digital Copyright Reform* (University of Toronto Press, 2014) 118.

> rights of users of protected works would largely be confined to those for which they had specifically contracted and paid.[37]

WIPO describes the purpose of the treaties as 'address[ing] the challenges posed by today's digital technologies, in particular the dissemination of protected material over digital networks'.[38] This language is revealing: the challenge identified was not *how best to take advantage of the economic and social benefits of digital technology and new forms of social dissemination of knowledge* (for example) but rather the challenge for policy-makers was how best to preserve private property rights.

While the final treaties did not fully adopt the United States' agenda, they did set a path for expanded rights for rightsholders.[39] In particular, the Internet Treaties clarified that digital transmissions would be considered communications to the public under copyright law.[40] They also included an anti-circumvention requirement for member states,[41] prohibiting the removal of or interference with any technical protection measure, regardless of the reason for doing so.[42] Professor Jessica Litman concludes the anti-circumvention requirement evolved copyright from a copy-control right to an access-control right by granting 'copyright owners control over looking at, listening to, learning from, or using copyrighted works.'[43]

A second significant moment in digital copyright politics proceeded from the successful negotiation of the Internet Treaties: the enactment of the Digital Millennium Copyright Act

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[37] Samuelson, 'The US Digital Agenda at WIPO', above n 32, 372.
[38] WIPO, *WIPO Internet Treaties* <http://www.wipo.int/copyright/en/activities/internet_treaties.html>.
[39] Samuelson, 'The US Digital Agenda at WIPO', above n 32, 435.
[40] *WIPO Copyright Treaty* art 8. *WIPO Performances and Phonograms Treaty* art 15.
[41] *WIPO Copyright Treaty* art 11. *WIPO Performances and Phonograms Treaty* art 18.
[42] Art 11 of the *WIPO Copyright Treaty* stipulates:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights…that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Art 18 of the *WIPO Performances and Phonograms Treaty* stipulates:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

[43] Litman, above n 29, 176.

(DMCA).[44] This statute implemented the Internet Treaties domestically in the United States and was the subject of extensive industry negotiations. Primarily, negotiations occurred between representatives of the content industries and technology industries, including telecommunications and consumer electronics, as well as certain public interest organisations who were concerned copyright laws crafted to give content owners expanded rights may inhibit the development of the internet and digital technologies.[45] Professor Timothy Wu reflects, '[i]n retrospect, the publication of the White Paper was the opening shot in what became a grand legislative battle between traditional copyright disseminators and their internet challengers.'[46]

In the DMCA negotiations, '[t]elephone companies, commercial Internet service providers, libraries, and schools insisted that an agreement setting up a safe harbor for online service providers was a precondition to the enactment of implementing legislation.'[47] Safe harbours would ensure, if certain conditions were met, online service providers would be shielded from copyright liability. Professor Kimberlee Weatherall summarises, 'internet intermediaries not involved in choosing or modifying content communicated by their users would avoid liability, provided they responded once they became aware of copyright-infringing activities by taking down or disabling access to the infringing material.'[48] Intermediary safe harbours were justified on the grounds that most intermediaries are open to unlawful uses and given the scale of their operations without safe harbours many intermediaries would be rendered operationally and financially unviable if they were presumptively liable for every act of infringement by a user.[49] The DMCA ultimately specified four provisions providing safe harbour for transitory digital network communications,[50] caching,[51] storage of information at the direction of users[52]

[44] The long title of the DMCA is To Amend Title 17, United States Code, to Implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for Other Purposes.
[45] Professor Lev-Aretz Yafit explains, the technology industry entered copyright politics when the Internet 'redefined the target of copyright legislation, adding technology providers and end-users to the circle of affected parties.' Lev-Aretz Yafit, 'Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering' (2013) 27 *Harvard Journal of Law & Technology* 203, 206. See generally Litman, above n 29.
[46] Timothy Wu, 'Copyright's Communications Policy' (2004) 103(2) *Michigan Law Review* 278, 350.
[47] Litman, above n 29, 134-135.
[48] Kimberlee Weatherall, 'The New (Old) War on Copyright Infringement, and How Context is Opening New Regulatory Possibilities' (2012) 143(1) *Media International Australia* 110, 111.
[49] See, eg, the United States Senate on the purpose and legislative history of the safe harbours: 'Title II will provide certainty for copyright owners and Internet service providers with respect to copyright infringement liability online...In short, Title II ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand'. United States Senate, 'Senate Report 105-190 *The Digital Millennium Copyright Act of 1998'* (1998), 2 <https://www.congress.gov/105/crpt/srpt190/CRPT-105srpt190.pdf>.
[50] 17 USC § 512 (a).
[51] 17 USC § 512 (b).
[52] 17 USC § 512 (c).

and information location tools including directories, indexes, references, pointers or hyperlinks.[53] Since the enactment of the DMCA in 1998, similar safe harbour provisions have been implemented in jurisdictions throughout the world.[54]

The inclusion of intermediary safe harbours within the DCMA brought a measure of balance to the legislation, balancing the interests of rightsholders against the interests of technology companies and internet users. However, as a product of extensive industry-led negotiations, rather than evidence-based policy-making, the DMCA lacked an 'overarching vision of the public interest'[55] and, as Litman explains, '[i]nstead, what we have is what a variety of different private parties were able to extract from each other in the course of an incredibly complicated four-year multiparty negotiation.'[56] Indeed, as Litman notes, the full DMCA legislation is almost thirty thousand words in length but effectively contains only two influential provisions: anti-circumvention protections in line with the requirements of the Internet Treaties and safe harbours for online intermediaries: two provisions to satisfy two powerful industries.[57]

Since the negotiation of the Internet Treaties and the enactment of the DMCA, in domestic and international fora, the content industries have continued to lobby for stronger copyright laws and expanded rights in order to maximise control online. In the United States in 2011, the *Stop Online Piracy Act* (SOPA) and the *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act* (PIPA) proposed measures to expand the liability of and obligations for intermediaries to enforce copyright. For example, they required internet service providers, search engines, digital advertising networks and online payment systems to block or

[53] 17 USC § 512 (d).
[54] See, eg, the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce). Australia's safe harbours are contained in *Copyright Act 1968* (Cth) pt V div 2AA. However, Australia's safe harbours apply only to Carriage Service Providers as defined in the Telecommunications Act 1997 (Cth) s 87.
[55] Litman, above n 29, 144.
[56] Ibid 145. Litman argues '[c]opyright legislation written by multiparty negotiation is…kind to the status quo, and hostile to potential new competitors. It is also overwhelmingly likely to appropriate value for the benefit of major stakeholders at the expense of the public'. At 144. See also Fisher who describes the 1976 United States copyright law reform negotiations: 'the negotiations privileged groups with interests sufficiently strong and concentrated to have formal representatives. Very rarely was the public – the consumers of intellectual property – represented in any way.' William W Fisher, 'The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States' (1999) *Eigentum im Internationalen Vergleich* 265, 19-20 <https://cyber.harvard.edu/people/tfisher/iphistory.pdf>.
[57] Litman, above n 29, 143.

cease servicing websites associated, even indirectly, with copyright infringement.[58] The Anti-Counterfeiting Trade Agreement (ACTA) of 2011, a multilateral intellectual property treaty, proposed increasing criminal penalties for copyright infringement.[59] Even the spectre of the 1995 Clinton Administration White Paper continues to haunt copyright policy-making. For example, an early draft of the United States' proposals for the Trans Pacific Partnership (TPP) agreement included a provision categorising transitory copies as reproductions[60] and since 2013 the European Union has been considering reforms to copyright directives that would make transitory copies and hyperlinks subject to the authorisation of rightsholders.[61] As Cory Doctorow suggests, '[t]hough SOPA, PIPA, ACTA, the TPP, the [Internet Treaties] and their ilk differ in their specifics, they share certain broad themes that represent the legislative agenda for the entertainment lobby.'[62] To summarise, in response to digital technologies eroding barriers to accessing information and content, the content industries have consistently offered policies for controlling and moderating access.

At the individual policy level, the content industries have experienced varying success in accomplishing their digital copyright agenda.[63] But they have had overwhelming success in framing the debate. From the White Paper, to the Internet Treaties, to the TPP, copyright is primarily debated in terms of private property rights. Digital copyright issues are understood in terms of private property rights and infringement: file sharing, downloading, streaming and so on are all strongly associated with piracy and illegality.[64] Boyle observes, 'the dominant voice in intellectual property policy-making is still that of rights-holders. The dominant

[58] *Stop Online Piracy Act* HR 3261, 112th Cong (2011) and *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act*, S 968, 112th Cong (2011). See generally Mark Lemley, David S Levine and David G Post, 'Don't Break the Internet ' (2011) 64 *Stanford Law Review Online* 34.
[59] *Anti-Counterfeiting Trade Agreement*, signed 1 October 2011 (not yet in force).
[60] *Trans-Pacific Partnership Intellectual Property Rights Chapter Draft* (February 10, 2011) art 4.1 <http://keepthewebopen.com/assets/pdfs/TPP%20IP%20Chapter%20Proposal.pdf>.
[61] In a 2013 review of European Union copyright laws, the European Commission sought public comments on whether transitory copies and hyperlinks should be subject to the authorisation of rightsholders. See, eg, Google, 'Public Consultation on the Review of the EU Copyright Rules' (2013) <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm>.
[62] Cory Doctorow, *Information Doesn't Want to be Free: Laws for the Internet Age* (McSweeney's, 2014) 107.
[63] Significantly SOPA, PIPA, ACTA and the TPP have not been successfully legislated. Yet, one could speculate that the number and frequency of these instruments tell us something about the level of political influence of the content industries.
[64] See generally Patricia Loughlan, 'Pirates, Parasites, Reapers, Sowers, Fruits, Foxes. The Metaphors of Intellectual Property' (2006) 28(2) *Sydney Law Review* 211; Litman, above n 29; Patricia L Loughlan, '"You Wouldn't Steal a Car...": Intellectual Property and the Language of Theft' (2007) 29(10) *European Intellectual Property Review* 401.

philosophy is that of maximalism…where exceptions are viewed with a grudging hostility'. [65] While internet intermediaries like Google have challenged this view (as I show in this thesis), by successfully framing the debate in their interest, the content industries tipped the rhetorical and conceptual balance in their favour. Consequently, '[c]ontemporary copyright discourse increasingly prefers a much more simplistic form of property-based reasoning, within which limitations are relegated to the margins.'[66] In digital copyright politics, more is said of the role of exclusive rights and less is said of the role of exceptions and limitations to copyright. More is said of the private interests of rightsholders and less is said of the public interest in accessing information and creative works.

2.4 An Ideological Setting

Another factor important to the history of digital copyright law and politics is an ideological one. Neoliberalism, a political ideology that has dominated Western democracies since, approximately, the 1980s,[67] is a 'theory of political economic practices that proposes human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.'[68] While there are varying assessments of neoliberalism in theory and practice, '[i]n all its modes, neo-liberalism is built on a single, fundamental principle: the superiority of individualized, market-based competition over other modes of organization.'[69]

Individual freedom is the normative proposal validating the neoliberal framework.[70] Neoliberalism holds 'ideals of individual liberty and freedom as sacrosanct–as the central

[65] James Boyle, '(When) Is Copyright Reform Possible?' in Ruth Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press, 2017) 206, 211.
[66] Julie Cohen, 'Between Truth and Power' (2014) in Mireille Hilderbrandt and Bibi van den Berg (eds), *Freedom and Property of Information: The Philosophy of Law Meets the Philosophy of Technology*, 13 <Available at SSRN: https://ssrn.com/abstract=2346459>.
[67] I acknowledge that the concept and experience of neoliberalism is widely contested. In this thesis, I do not attempt a thorough critique of neoliberalism. Rather, I accept neoliberalism as a dominant political philosophy in recent decades and identify its influence on copyright theory, rhetoric, law and policy. I follow Professor David Levi-Faur in his assessment that '[m]uch debate has taken place over the causes and impact of neoliberalism, but few doubt that neoliberalism has become an important part of our world'. David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *The Annals of the American Academy of Political and Social Science* 12, 13. For a historical and empirical analysis of neoliberalism see, eg, David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2007); John Campbell and Ove Pedersen, *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press, 2001).
[68] Harvey, above n 67, 2.
[69] Stephanie Lee Mudge, 'What is Neo-Liberalism?' (2008) 6(4) *Socio-Economic Review* 703, 706-707.
[70] Harvey, above n 67, 5.

values of civilization.'[71] Importantly, neoliberalism assumes individual liberty and freedom are best realised through free markets.[72] For the neoliberalist, the freedom of individuals, businesses and corporations 'to operate within this institutional framework of free markets and free trade is regarded as a fundamental good.'[73] The role of the state should be limited to supporting free markets, which includes the 'structures and functions required to secure private property rights'.[74] Protected and exchangeable private property rights are necessary for efficient market transactions.[75] The state's role is to secure private property rights and support a legal regime of 'freely negotiated contractual obligations between juridical individuals in the market-place.'[76]

Within the neoliberal framework, the market is held as superior to the legislative process on the assumption that 'the state cannot possibly possess enough information to second-guess market signals (prices) and…interest groups will distort and bias state interventions.'[77] Distrust of government regulation (and faith in market transactions) is also strongly associated with neoliberalism's moral proposal. For example, in 1980, Professors Milton and Rose Freidman wrote:

> Our society is what we make it. We can shape our institutions. Physical and human characteristics limit the alternatives available to us. But none prevents us, if we will, from building a society that relies primarily upon voluntary cooperation to organize both economic and other activity, a society that preserves and expands human freedom, that keeps government in its place, keeping it our servant and not letting it become our master.[78]

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[71] David Harvey, 'Neoliberalism as Creative Destruction' (2007) 610 *Annals of the American Academy of Political and Social Science* 22, 24.
[72] Harvey, *A Brief History of Neoliberalism*, above n 67, 5.
[73] Ibid 64.
[74] Ibid 2.
[75] Maureen Ryan, 'Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World' (2000) 79(3) *Oregon Law Review* 647, 657.
[76] Harvey, *A Brief History of Neoliberalism*, above n 67, 64.
[77] Ibid 2. See also Julie E Cohen, 'Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"' (1998) 97(2) *Michigan Law Review* 462, 481-482. See also Professors William Landes and Richard Posner: '[t]oday it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.' William Landes and Richard Posner, *Economic Structure of Intellectual Property Law* (Harvard University Press, 2002) 4.
[78] Milton Friedman and Rose Friedman, *Free to Choose* (Penguin, 1980) 58.

The neoliberal claim is that government regulation is inefficient and impinges upon individual liberty and, therefore, governments should where possible refrain from regulating and instead allow the market to organise society. Furthermore, and in line with this proposal, governments should remove existing interventions and implement policies of deregulation and privatisation.[79] Deregulation and privatisation polices are thought to 'eliminate bureaucratic red tape, increase efficiency and productivity, improve quality, and reduce costs'.[80] Professor Stephanie Mudge describes, the intellectual face of neoliberalism is an 'unadulterated emphasis on the…market as the source and arbiter of human freedoms'[81] and the 'bureaucratic face'[82] of neoliberalism is deregulation and privatisation policies designed to limit the activities of the state.[83]

In reality, while governments and industries have often embraced neoliberal language and concepts, the neoliberal era has not achieved the neoliberal ideal of pure free markets. To varying degrees, markets remain regulated and Western democracies remain comprised of complex regulatory systems.[84] Nonetheless, despite not diminishing the number and scope of regulatory institutions, neoliberal polices have had the effect of shifting certain regulatory responsibility from public to private actors, through models of self-regulation.[85] Farrand explains, espousing neoliberal ideology 'governments devolve the power to regulate to private

[79] Harvey, *A Brief History of Neoliberalism*, above n 67, 65. Deregulation typically refers to the removal of laws regulating the operation of businesses domestically and internationally. See generally Damien Cahill, "Actually Existing Neoliberalism' and the Global Economic Crisis' (2010) 20(3) *Labour & Industry: A Journal of the Social and Economic Relations of Work* 298, 298. Privatisation typically refers to the transfer of public property to private property (for example the sale of government assets), but it also includes 'outsourcing traditionally public regulatory functions to private entities'. Benjamin Farrand, 'Regulatory Capitalism, Decentered Enforcement, and its Legal Consequences for Digital Expression: The Use of Copyright Law to Restrict Freedom of Speech Online' (2013) 10(4) *Journal of Information Technology & Politics* 404, 407.
[80] Harvey, *A Brief History of Neoliberalism*, above n 67, 65.
[81] Mudge, above n 69, 704.
[82] Ibid.
[83] Ibid.
[84] For an example from copyright law see, eg, Joseph P Liu, 'Regulatory Copyright' (2004) 83(1) *North Carolina Law Review* 87. Professor Joseph Liu examines what he describes as the increasing willingness of the United States Congress to 'intervene in the structure of copyright markets': at 91.
[85] Farrand, above n 79, 407. Farrand argues there have been 'twin effects' of neoliberal theories on copyright: 'the primacy of property protection as a regulatory goal' and 'the proliferation of self and intermediary-based regulation'. At 405. See also Levi-Faur who posits that 'at the ideological level neoliberalism promotes deregulation, at the practical level it promotes, or at least is accompanied by, regulation.' Levi-Faur, above n 67, 14.

bodies in a form of "self-regulation," predominantly on the neoliberal principle that the private entities are more effectively able to regulate than the government itself.'[86]

It is within this political and ideological setting that policies for managing the development of the internet and digital technologies have evolved. For example, in 1995, the United States government specified private investment would 'define and guide the development of the Global Internet Infrastructure'.[87] Similarly, the 1997 Framework for Global Electronic Commerce expressed that the position of the United States government was that 'the infrastructure of the information society should be built by the private sector',[88] that the private sector should drive the creation of a global framework for electronic commerce, and the 'government's role was to encourage private-sector investment'.[89] In the United Kingdom, the *Information Society Agenda* commissioned in 1995 '[l]ike its US equivalent… emphasised self-regulation'.[90] Essentially, early in the digital age, policy-makers opted for private actors and private regulation to manage the development of the digital environment.

Since the 1990s, in the United States in particular, an appeal to free markets and the benefits of technological development have continued to justify an anti-interventionist approach to the regulation of the technology sector. Policy-makers have sought to permit the technology sector to grow unencumbered by government regulation.[91] As Professor Anupam Chandler documents, '[t]he story of Silicon Valley is not only a story of brilliant programmers in their garages, but also a legal environment specifically shaped to accommodate their creations.'[92]

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[86] Farrand, above n 79, 413. See also Des Freedman, 'The Internet of Rules: Critical Approaches to Online Regulation and Governance' in James Curran, Natalie Fenton, Des Freedman (eds), *Misunderstanding the Internet* (Routledge, 2016) 117, 122. ('The preferred mechanisms of contemporary governance regimes are increasingly self-regulation, where industry modifies its behaviour in response to a set of agreed codes, and co-regulation, where industry works in partnership with the state to design and enforce adherence to rules').

[87] See Lucas D Introna and Helen Nissenbaum, 'Shaping the Web: Why the Politics of Search Engines Matters' (2000) 16(3) *The Information Society* 169, 170.

[88] See Weatherall, above n 48, 115.

[89] Ibid.

[90] Ibid.

[91] See, eg, Professor Robin Mansell who argues '[c]hampions of an open Internet, not subject to regulation, have so far managed to convince policy makers that direct intervention under conventional telecommunication or broadcasting regulatory mechanisms is not needed and would suppress innovative activity.' Robin Mansell, 'New Visions, Old Practices: Policy and Regulation in the Internet Era' (2011) 25(1) Continuum 19, 22. See also Professor Des Freedman who explains, '[t]he anti-statist ideas that dominated the thinking of many internet advocates in the 1990s have morphed into a new consensus that the internet is best governed, wherever possible, by users and experts rather than by politicians and governments.' Freedman, above n 86, 120. See also Anupam Chander, 'How Law Made Silicon Valley' (2013) Vol 63 *Emory Law Journal* 639, 648.

[92] Chander, above n 91, 645. Professor Chander submits:

> Silicon Valley's success in the Internet era has been due to key substantive reforms to American copyright and tort law that dramatically reduced the risks faced by Silicon

Where economic and political conflicts have emerged, for example stemming from disruptive technological developments, governments have largely continued to encourage industry-led solutions, such as private agreements and self-regulation.[93] Even the DMCA safe harbours were developed with industry cooperation and self-regulation in mind; the United States Senate specifying: 'Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.'[94]

In this political and ideological setting, while there has yet to be another widely significant copyright legislative or treaty development since the Internet Treaties and the DMCA, through processes of self-regulation and private agreement, industries have continued to negotiate the scope and application of copyright in the digital environment.[95] As a result, today, copyright regimes are comprised of a complex assemblage of laws and private agreements, administered by both public and private actors.

2.5 The Advent of Google

Google entered copyright politics several years after the conclusion of the Internet Treaty and DMCA negotiations.[96] Today, however, Google stands centre stage in global copyright politics, as a powerful private actor, and a party to some of the most significant digital copyright disputes to date. Google views copyright from its position as a technology company, one that has developed technologies and services that exploit, harness and advance digital information

> Valley's new breed of global traders. Specifically, legal innovations in the 1990s that reduced liability concerns for Internet intermediaries, coupled with low privacy protections, created a legal ecosystem that proved fertile for the new enterprises. At 642.

[93] For an examination of self-regulation models in the digital setting see, eg, Christopher T Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge University Press, 2011); D Tambini, D Leonardi and C Marsden, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence* (Routledge, 2007). In Chapter 5, I review examples of Google's self-regulation in copyright governance.

[94] United States Senate, above n 49, 20.

[95] While none as broadly significant, there have been other multilateral intellectual property treaty undertakings since the signing of the Internet Treaties (and enactment of the DMCA); for example, the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, signed 28 June 2013 (entered into force 30 September 2016).

[96] Developed from a research project at Stanford University, Google founders Larry Page and Sergey Brin incorporated Google in 1998 and Google became a publicly listed company in 2004. Google, *Company Overview* <https://www.google.com/about/company>.

and communication networks. Since its founding, Google has maintained that its mission is to 'organize the world's information and make it universally accessible and useful'.[97]

In essence, Google's algorithms order and facilitate global access to a vast network of diffuse information.[98] Today, the Google Search index contains over 130 trillion webpages.[99] The Google Books database allows the public to search and view snippets of millions of books. Google reports YouTube has over 1 billion users,[100] that each day 1 billion hours of YouTube videos are watched[101] and over 100 hours of video are uploaded to YouTube every minute.[102] Through these services, Google has driven a spectacular increase in the creation and circulation of information and content in contemporary society.

Google founders Larry Page and Sergey Brin claim they began Google with the question: '[w]hat if we could download and index the entire web?'[103] Their identification and conceptualisation of the issue of internet search and their anticipation of its future importance was singular. Brin explains:

> Before Google, I don't think people put much effort into the ordering of results. You might get a couple thousand results for a query. We saw that a thousand results weren't necessarily as useful as 10 good ones. We developed

[97] Ibid.

[98] Broadly defined, an algorithm is a method or procedure for computing a function. Hartley Rogers and H Rogers explain, '[r]oughly speaking, an algorithm is a…procedure which can be applied to any of a certain class of symbolic *inputs* and which will eventually yield, for each such input, a corresponding symbolic *output*.' Hartley Rogers Jr, *Theory of Recursive Functions and Effective Computability* (The MIT Press, 1987) 1. In the context of the digital environment, broadly defined, 'an algorithm is an instruction that we give to a computer in the form of some kind of program to ensure that it gives us a specific outcome.' K Turvey, *Algorithm* (n.d. Sage Video Shorts) <http://sk.sagepub.com/video/algorithm>. In 2016, Search Engine Land reported Google's search algorithm now processes at least 2 trillion searches per year. Google last confirmed its search statistics in 2012, claiming to process 1.2 trillion per year. Danny Sullivan, 'Google Now Handles at Least 2 Trillion Searches Per Year', *Search Engine Land* (online), 24 May 2016 <http://searchengineland.com/google-now-handles-2-999-trillion-searches-per-year-250247>.

[99] Google announced this figure in 2016 and at time of writing there has been no further update by Google. Barry Schwartz, 'Google Knows of 130 Trillion Pages On The Web - 100 Trillion More in 4 Years', *Search Engine Roundtable* (online), 14 November 2016 <https://www.seroundtable.com/google-130-trillion-pages-22985.html>. See also Barry Schwartz, 'Google's Search Knows About Over 130 Trillion Pages', *Search Engine Land* (online), 14 November 2016 <http://searchengineland.com/googles-search-indexes-hits-130-trillion-pages-documents-263378>.

[100] YouTube, *YouTube for Press* <https://www.youtube.com/yt/press/statistics.html >.

[101] YouTube, 'You Know What's Cool? A Billion Hours' on YouTube Official Blog (27 February 2017) <https://youtube.googleblog.com/2017/02/you-know-whats-cool-billion-hours.html>.

[102] YouTube, 'Here's to Eight Great Years' on YouTube Official Blog (19 May 2013) <https://youtube.googleblog.com/2013/05/heres-to-eight-great-years.html >.

[103] Google Inc, Annual Report 2014, 2.

> a system that determines the best and most useful websites. We also understood that the problem of finding useful information was expanding as the web expanded. In 1993 and 1994, when Mosaic, the predecessor of Netscape, was launched, a "What's New" page listed new websites for the month and then, when more began appearing, for the week. At the time, search engineers had to deal with a relative handful of sites, first thousands and then tens of thousands. By the time we deployed our initial commercial version of Google in late 1998, we had 25 million or 30 million pages in our index…That volume requires a different approach to search technology.[104]

Google's PageRank algorithm was key to the search engine's original utility. Not only did Google find and provide access to websites, PageRank also determined their relevance. Put simply, PageRank operates so that the more hyperlinks there are to a website, the higher in the search results that website will be.[105] According to Google, PageRank is an ever-improving democratic process: 'sites have been "voted" to be the best sources of information by other pages across the web. As the web gets bigger, this approach actually improves, as each new site is another point of information and another vote to be counted.'[106]

In Google's current search algorithm, PageRank is one of hundreds of variables used to assess the relevance of a website to a search query.[107] While Google does not disclose the specifics of its current search algorithm — it is protected as a trade secret — the sophistication of the search algorithm is apparent to any user. Of particular significance is the ability for Google's algorithm to understand user intent. For example, the search query 'how many people live in NY' will return results related to the terms 'population' 'demographics' 'New York City' and 'New York State'. Google Search takes into account synonyms and spelling variations, purposeful or erroneous. It is able to understand that the prefix 'bio' means 'biography' when it is typed with a person's name and 'biology' when it is typed with 'warfare'.[108] Google Search

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[104] Sergey Brin 'Playboy Interview: Google Guys' *Playboy Magazine September 2007* in *Google IPO Prospectus 2004*, 259.
[105] Google Inc, Google Annual Report 2005, 13.
[106] Google, *What We Believe* <http://www.google.com/about/company/philosophy/>.
[107] According to some reports, Google updates its search algorithm between 500-600 times per year. See Moz, *Google Algorithm Change History* <https://moz.com/google-algorithm-change>.
[108] Steven Levy, 'Interview with Amit Singhal', *Wired* (online), 22 February 2010 <http://www.wired.com/2010/02/ff_google_algorithm>. The speed of service is enhanced by the auto-complete function, which predicts a search query as a user types, and by the instant results feature, which provides search results as the query is typed.

also incorporates user context, providing results relevant to the user's geographical location and previous search history. Overall, the search results Google returns to a user are heavily curated, according to a complex regime of variables devised by Google in the pursuit of relevance.[109]

In many ways, Google's advertising service is as impressive as its search technology. AdWords and AdSense are the company's two key advertising programs that facilitate advertising across Google's platforms and third party websites. The majority of Google's advertisers pay on a 'cost-per-click' basis, which means Google only generates revenue when a user engages with an advertisement.[110] As such Google is motivated to identify user interests and target advertising accordingly. Google uses two methods to target advertising: contextual targeting and interest-based targeting. Contextual targeting involves scanning and analysing websites, in order to place advertisements relevant to that website's visitors.[111] Interest-based targeting is achieved by collecting information about individual Google users. Google collects personal information provided when individuals use a Google product or service. For example, Google retains users' individual search history and YouTube viewing history.[112] Google also collects information on user devices and locations.[113] Google describes, 'interest-based advertising enables advertisers to reach users based on their interests and demographics (e.g. 'sports enthusiasts'), and allows them to show ads based on a user's previous interactions with them, such as visits to advertiser websites.' [114]

Targeted advertising has driven the success of Google's advertising business, success measured by both reach and profitability. Indicatively, despite an extensive range of products and services, advertising revenue has consistently accounted for approximately 90 per cent of Google's total revenue since 2004.[115] Indeed, Google's lucrative advertising business allows

[109] As we will see in this thesis, Google also curates its search results in response to other objectives, beyond relevance, including copyright enforcement.
[110] Google Inc, 'Google Annual Report 2014', 23.
[111] Google, *AdSense Help* <https://support.google.com/adsense/answer/9713?hl=en>.
[112] Ibid. Google, *Privacy Policy* <http://www.google.com/policies/privacy/#infocollect>. In 2017, Google announced it had stopped scanning emails sent through Gmail. Diane Greene, 'As G Suite Gains Traction in the Enterprise, G Suite's Gmail and Consumer Gmail to More Closely Align' on The Keyword: Google Blog (23 June 2017) <https://www.blog.google/products/gmail/g-suite-gains-traction-in-the-enterprise-g-suites-gmail-and-consumer-gmail-to-more-closely-align/>.
[113] Google, *Privacy Policy*, above n 112.
[114] Google, *AdSense Help*, above n 111.
[115] This figure is based on information reported in Google and Alphabet's United States Annual Reports on Form 10-K, available at Alphabet, *Alphabet Investor Relations* (n.d.) <https://abc.xyz/investor/>.

the company to provide the majority of its services to users free of charge. Google Search, News, Images, Books, Maps, Gmail, Calendar, Docs and Sheets and so forth, are all provided to users without a monetary charge. As described by Page, '[w]e maintain the world's largest online index of web sites and other content, and we make this information freely available to anyone with an Internet connection.'[116] Indeed, while Google has produced an imposing array of products and services — including Google Search, Images, News, Books, Maps, Earth, Translate, Scholar, Art, Glass, Fiber, Play and Drive; Gmail; AdWords and AdSense; Google for Work including Calendar, Docs and Sheets; Chrome; Google+; Android; and YouTube[117] — two facets of its business continue to dominate: search and advertising. Worldwide, Google has close to 85 per cent share of the search engine market[118] and it has the largest portion of global digital advertising revenues, at approximately 30 per cent.[119] Internet search and advertising technologies remain fundamental to Google's business model.

With this business model, Google profits from the open structure of the internet and the free flow of content and information online.[120] In other words, Google has a vested interest in the free flow of information online. The more information that is accessed and shared online, the larger the market is for Google's advertising system. Similarly, Google has a vested interest in a user-friendly internet. This is stated explicitly in Google's financial reports:

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[116] Google, *Initial Public Offering Prospectus 2004* <http://www.sec.gov/Archives/edgar/data/1288776/000119312504143377/d424b4.htm#toc>.

[117] This is by no means an exhaustive list of Google's products and services but a highlight of their most successful internet-based undertakings.

[118] Statista reports Google has maintained between 80 and 90 percent market share of the global search engine market since 2010. Statista, *Worldwide Desktop Market Share of Leading Search Engines From January 2010 to January 2017* <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/>. Google's market share varies across jurisdictions. For example, in April 2017, Google's market share for search in China was below 2%. China Internet Watch, *China Search Engine Market Share in Apr 2017* <https://www.chinainternetwatch.com/20538/search-engine-market-share-apr-2017/>. In December 2016, in the US Google held a 63.5% market share. Greg Sterling, 'Data: Google Monthly Search Volume Dwarfs Rivals Because of Mobile Advantage', *Search Engine Land* (online), 9 February 2017 <http://searchengineland.com/data-google-monthly-search-volume-dwarfs-rivals-mobile-advantage-269120>. In Europe, Google has maintained over 90 percent market share in search for several years. Matt Rosoff, 'Here's Where Google Dominates in Europe', *Business Insider Australia* (online), 21 April 2016 <https://www.businessinsider.com.au/google-europe-market-share-search-smartphones-browsers-2016-4?r=US&IR=T>.

[119] eMarketer, *Google Still Dominates the World Search Ad Market: The Search Giant Will Take in Nearly a Third of All Digital Ad Spending this Year* (26 July 2016) <https://www.emarketer.com/Article/Google-Still-Dominates-World-Search-Ad-Market/1014258>.

[120] As Doctor Benedict Atkinson and Professor Brian Fitzgerald note, Google's model challenges the presumption that 'unless carefully regulated or controlled, the supply of information will dwindle, since information is scarce, and its few producers unwilling to continue production unless protected by monopoly.' Atkinson and Fitzgerald, above n 11, 122.

> Google has a vested interest in understanding and catering to user needs. In their quest for revenue, many Internet companies have cluttered their web sites with intrusive or untargeted advertising that may distract or confuse users and may undermine users' ability to find the information they want…We believe these tactics can cause dissatisfaction with Internet advertising and reduce use of the Internet overall.[121]

Google openly attributes its user-centric approach as key to its success: '[w]e have found that offering a high-quality user experience leads to increased traffic and strong word-of-mouth promotion'.[122] Both access and the user are fundamental to Google's business model. Google's business model is based on providing highly desirable and useful information and technology to users, for free, and leveraging their closeness to users to build a highly profitable advertising network.

Given this business structure, it is unsurprising that Google has clashed with rightsholders. Google represents a structural challenge to the content industries. Google's business model stands in opposition to the models of control and remuneration common to media and entertainment businesses. The continued flow of content and information online is central to Google's business model but copyright is not. Professor Matteo Pasquinelli describes, 'Google itself is a clear example…of a technological empire that was built with no need of a strict copyright regime.'[123]

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[121] Google Inc, Annual Report 2005, 5.

[122] Google Inc, IPO Prospectus 2004, 73. Google has also stated: '[w]e believe that our user focus is the foundation of our success to date. We also believe that this focus is critical for the creation of long-term value. We do not intend to compromise our user focus for short-term economic gain.' Google Inc, *IPO Prospectus* 2004, 73.

[123] Pasquinelli goes on to say, 'Google is clearly a supporter of the *free* content produced by the *free* labour of the *free* multitudes of the internet'. Matteo Pasquinelli, 'Google's PageRank Algorithm: A Diagram of Cognitive Capitalism and the Rentier of the Common Intellect' in Konrad Becker and Felix Stalder (ed), *Deep Search: The Politics of Search Engines beyond Google* (Innsbruck, Wien, Bozen, 2009) 152, 161. For Pasquinelli, 'Google is a parasitic apparatus of capture of the value produced by the common intelligence' and 'can be described as a global rentier that is exploiting the new lands of the internet with no need for strict enclosures and no need to produce content too'. At 161. Other scholars have made similar criticism of Google's business model, for example, see Professor Christian Fuch who provides a neo-Marxist critical Internet theory that describes information networks as socialised means of production, in which users create value for free:

> The users who 'google' data, upload or watch videos on YouTube, upload or browse personal images on Flickr, or accumulate friends with whom they exchange content or communicate online on social networking platforms like MySpace or Facebook, constitute an audience commodity that is sold to advertisers. The difference between the audience commodity on traditional mass media and on the Internet is that in the latter the users are also content producers: there is user-generated content, the users engage in permanent creative activity, communication, community building and content production

Furthermore, Google profits from copying and providing access to copyrighted works, often done so without permission from rightsholders. Indeed, when Page and Brin first copied the internet to create their search index, the lawfulness of this action was uncertain at best.[124] Professor Timothy Wu explains that 'no one really knows whether that copying was legal — whether a massive copyright violation occurred at the birth of the firm…As a matter of law, copying generally requires permission, something that Google never asked for'.[125] Since then, Google has not asked for permission to use websites, images, books, news articles and other content — causing major disputes with rightsholders over Google Search, Google Images, Google Books, Google News, YouTube and its phone operating system Android. As this thesis explains, as it has developed its products and services, Google has challenged the laws and assumptions of copyright. Google advocates for the public interest in accessing information and pushes for copyright arrangements that limit the private rights granted by copyright in favour of public rights to access and engage with content.

By providing high quality technology that facilitates free access to information, and by doing it so successfully and ubiquitously, Google is a unique force in the history of digital copyright law and politics. Google is a powerful private actor with an unconventional copyright agenda, and, as we will see in this thesis, the capacity and will to see it implemented.

3. Methodology

The first stage of this research project involved the collection of primary sources including case law, policy documents and company information regarding Google's business structure and practices, as well as secondary sources such as government and industry reports, journal articles, books and other scholarly writings. Notably, for Chapter 3, I collected 39 submissions made by Google to government agencies in jurisdictions throughout the world as part of law reform public consultations undertaken between 2005 and 2016. To locate these submissions, I researched every one of the 189 countries in the WIPO member state database to determine which countries had conducted public consultations on copyright law amendments or reforms

Fuch contends the creation of content for free by users is unpaid labour – searching, emailing, posting videos or photos, chatting to friends on Google+ are all unpaid work activities. Christian Fuchs, 'Information and Communication Technologies and Society: A Contribution to the Critique of the Political Economy of the Internet' (2009) 24(1) *European Journal of Communication* 69, 81-82.

[124] Wu, *The Master Switch*, above n 4, 287.

[125] Ibid.

between 2005 and 2016.[126] To obtain a copy of Google's submission to a public consultation, if not publicly available, I made contact with copyright agencies (or other relevant agencies) in each jurisdiction. WIPO's member state database specifies which agency is responsible for the state's intellectual property administration. In many cases, Google had made its submission publicly available. In my analysis in Chapter 3, I also included submissions from two third party organisations; organisations in which Google was a founding member and the explicit purpose of the organisation is to undertake law and policy advocacy. From the submissions collected, I establish Google's vision for copyright, including Google's preferred policies, legislation and reforms. Policy submissions are reliable sources for this purpose, as they provide formal proposals and analysis made directly by Google.

During the second stage of my research, I spent a period at the University of California, Berkeley School of Law as a visiting researcher. This second stage predominantly involved a critical examination and evaluation of the primary sources I had previously collected including the submissions, case law and company information as well as secondary sources including government and industry reports, journal articles, books and other scholarly writings.

To evaluate and devise recommendations regarding the influence of Google on copyright law and practice, I employ cultural theory. Although traditionally cultural theory is not a commonly adopted theory of copyright, it is appropriate for evaluating the public interest in contemporary copyright law and policy issues because it provides a descriptive and normative framework that accounts for the economic, social and cultural dynamics relevant to digital copyright.[127] The reasons for this choice are discussed further in Chapter 2 of this thesis.

4. Scope and Limitations of this Thesis

This thesis is limited to the law and the practices and policies of Google up to 1 November 2017. Developments after this date are included where possible. I also acknowledge the

[126] I did not seek information prior to 2005, as prior to this Google was not significantly politically engaged, outside of the United States.

[127] As I discuss in Chapter 2, the labour, personality and economic incentive theories of copyright — the more dominant theories — as products of the liberal and neoliberal traditions, while pervasive and enduring, informing conventional understandings of the value and consequences of copyright, they obscure important social and cultural dynamics.

activities of Google span multiple policy contexts, however, this thesis is limited to the area of copyright law.

With regard to the submissions collected for Chapter 3, I note that I use these submissions to understand and analyse Google. I do not attempt to use them to quantify Google's political influence. Legislative copyright law-making is often a protracted process subject to multiple domestic and international variables. Attempting to quantify any direct influence of Google on the outcome of individual law reform undertakings is beyond the scope and objectives of this thesis. Relatedly, this thesis does not include an examination of Google's use of 'soft power' strategies to indirectly influence the law. I acknowledge that Google provides financial support to organisations such as think tanks, advocacy groups, trade associations and education institutions.[128] Google's activities in this regard are likely to have some influence on social and political conditions and, in my view, it is an issue worthy of future research. However, it is not within the scope of this research project.

With regard to my analysis of Google's litigation history, I acknowledge Google has been the subject of copious copyright infringement allegations in jurisdictions throughout the world. However, with some limited exceptions, in this thesis, my analysis is limited to the United States. I do this for several reasons. First, the cases I examine, and United States copyright laws more broadly, have been critical to Google's commercial development. Despite a global presence, Google maintains a significant portion of its activities within the United States, in order to remain within United States jurisdiction and to enjoy United States copyright laws, specifically the flexible fair use exception. Indeed, Google seeks to have United States copyright law apply in jurisdictions outside the United States. For example, Google argued United States' copyright law applied in its dispute over Google News with Belgium press publishing organisation *Copiepresse*. Google (unsuccessfully) argued United States law should apply 'on the grounds that it is in the United States that it inserted, on its servers, the pages

[128] Google publishes a list of 'politically-engaged trade associations and other tax-exempt groups that receive the most substantial contributions from Google's U.S. Public Policy and Government Affairs team'. Google US Public Policy, *Memberships* <https://www.google.com/publicpolicy/transparency.html>. The list includes over 200 organisations, which Google describe as

> representing the broad range of issues that we care about. We choose these memberships and sponsorships after carefully determining that each organization can help advance the open Internet, our issues, partner with us to shape meaningful policy discussions and help us engage with key constituencies and organizations.

published on the Belgian websites of the Belgian newspaper editors.'[129] Second, the cases examined in Chapter 4 have significant doctrinal implications; implications relevant to copyright policy-makers within and beyond the United States. Exploiting the flexibility of the United States copyright regime, Google's United States copyright cases have challenged and shaped copyright doctrine for the digital environment. As few jurisdictions have the same flexibility as is provided by the United States' fair use exception, these cases exhibit a novel model for managing digital copyright issues. Overall, this history is useful for understanding Google and for understanding how United States courts have applied copyright law to cutting-edge digital copyright issues.

Finally, on multiple occasions throughout this thesis, I discuss antitrust allegations made against Google. I note that a thorough assessment of the merits of each allegation to determine whether Google has breached a competition law applying in the jurisdiction in which the allegation is made is beyond the scope of this thesis.

5. Thesis Structure

PART I Understanding Copyright and Understanding Google

Chapter 2 provides a theoretical framework for evaluating Google's influence on copyright law. Copyright is a contested paradigm. Varying political and theoretical proposals have informed diverse claims as to what the role of copyright is and should be — different stakeholders frame copyright in different ways. Given its contested nature, a working theory of copyright is required in order to evaluate Google's influence. In this thesis, I adopt a cultural theory framework for my evaluation in Chapter 6. Cultural theory explains the origins of copyright, which rewards the production and dissemination of learned and other cultural works for the benefit of society. Cultural theory presents copyright as a tool for regulating access to information and cultural participation, and suggests lawmakers should craft copyright laws that facilitate and stimulate a cultural democracy.

[129] *Google Inc v Copiepresse* Vol JBC No 2176 (The Court of Appeal of Brussels, 9th Chamber, 2011). Similarly, in its dispute over Google Books with French publishing organisation, *Societe Editions du Seuil Sas,* Google argued United States law was the correct choice of law. *Societe Editions du Seuil Sas v Societe Google Inc* 2009, n09/00540 (Tribunal de Grande Instance de Paris).

PART II Copyright According to Google: Policy, Law and Practice

In Chapter 3, I present Google's copyright framework. Google approaches copyright law from the perspective of an innovator and appeals to the social and economic benefits of the internet and technological innovation. Google challenges the assumption that permission from a rightsholder is required in order to use a work, unless the law provides otherwise. According to Google, the social and economic benefits of the internet and technological innovation render the conventional account of copyright inappropriate. Google argues, in the digital environment, the exclusive rights provided to rightsholders must be limited.

In Chapter 4, I examine Google's United States copyright case law, covering disputes over Google's use, without permission, of copyrighted content in Google Search, Google Images, Google Books, YouTube and its phone operating system Android. I argue these cases show Google implementing its vision of copyright through judicial decisions that reject rightsholders' private property claims in favour of public interest arguments. In a majority of cases, the United States' fair use provision has enabled these decisions. Viewed in the aggregate, Google's litigation history shows Google influencing United States copyright law, particularly as it applies to digital technologies.

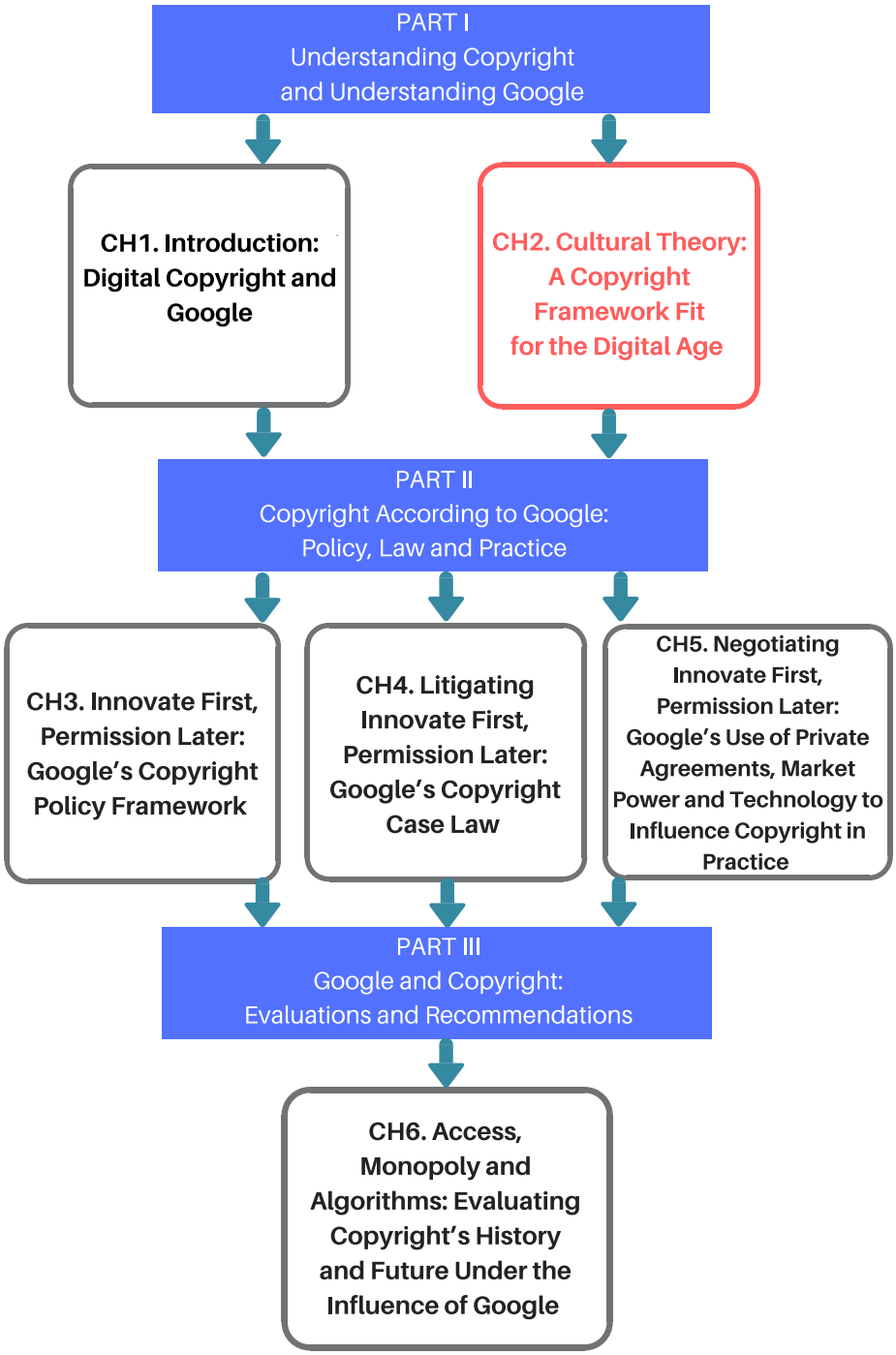
In Chapter 5, I examine Google's approach to copyright in practice. I survey the history of Google News in Europe. This multifaceted history shows, where legal challenges have failed, Google shifting to cooperation with rightsholders — including partnership and investment strategies — to ensure copyright functions in accordance with its interests. In this Chapter, I also examine Google's approach to copyright enforcement across its own platforms. I observe Google self-regulating and negotiating with rightsholders to devise copyright rules that extend beyond its obligations under law — Google undertakes private copyright rule-making. Furthermore, Google has developed and deployed algorithmic technologies to enforce copyright. I argue through private copyright rule-making and algorithmic enforcement Google plays an influential role in digital copyright governance.

PART III Google and Copyright: Evaluation and Recommendations

In Chapter 6, I evaluate Google's influence on copyright law and identify the implications for the public interest. Employing cultural theory, I conclude Google has made both positive and

negative contributions to digital copyright law and practice. In this chapter, I raise questions regarding monopoly power, accountability, transparency and bias in digital copyright governance. I suggest Google's private copyright rule-making and algorithmic enforcement practices in particular, threaten the public interest. I propose policies for addressing these issues and suggest that a strategic approach — in the form of a negotiated agreement between Google and a public interest advocate — is a logical preliminary intervention.

Chapter 7 concludes the thesis by identifying and summarising its contribution to current and future copyright scholarship.


PART I
Understanding Copyright
and Understanding Google
CH1. Introduction: Digital Copyright and Google
CH2. Cultural Theory: A Copyright Framework Fit for the Digital Age
PART II
Copyright According to Google:
Policy, Law and Practice
CH3. Innovate First, Permission Later: Google's Copyright Policy Framework
CH4. Litigating Innovate First, Permission Later: Google's Copyright Case Law
CH5. Negotiating Innovate First, Permission Later: Google's Use of Private Agreements, Market Power and Technology to Influence Copyright in Practice
PART III
Google and Copyright:
Evaluations and Recommendations
CH6. Access, Monopoly and Algorithms: Evaluating Copyright's History and Future Under the Influence of Google

CHAPTER 2

Cultural Theory:
A Copyright Framework Fit for the Digital Age

This chapter provides a theoretical framework for understanding copyright and evaluating the influence of Google on copyright law and practice. Evaluating Google's influence requires a framework that goes beyond abstract concepts of authors' rights and market transactions. It requires consideration of the social, economic and political consequences of copyright. Accordingly, in this chapter, I adopt a cultural theory of copyright. I argue cultural theory provides a useful framework for understanding the function of copyright in current times. In this chapter, I also discuss the orthodox theoretical justifications for copyright. These theories have made significant contributions to the copyright tradition but they offer a narrow view of copyright.

1. Introduction

A rich political and economic history has shaped and continues to shape copyright law. In this chapter, I interrogate the copyright tradition and the leading theoretical justifications for copyright, which are the labour, personality and economic incentive theories.[130] Products of the liberal and neoliberal traditions, these theories have proven pervasive and enduring, informing conventional understandings of the value and consequences of copyright. Yet, they emphasise abstract concepts of authorship, originality and private property, while obscuring other important economic, social and political dynamics; dynamics increasingly (but not newly) relevant in the digital environment. In the current digital environment, where the social consequences of copyright are far reaching, copyright theorised simply as authors' rights is no

[130] See William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168.

longer appropriate. For these reasons, I turn to cultural theory for a theoretical framework for this thesis.

By broadening our view of copyright, cultural theory provides the theoretical and rhetorical tools necessary for managing both the private and public objectives of copyright and for ensuring copyright functions in the interest of a broad range of stakeholders. By broadening our view of the function and value of copyright, cultural theory also provides a framework for understanding and evaluating Google — an entity whose agenda and influence cannot be fully accounted for by authors' rights or economic incentive frameworks. Accordingly, the aims of this chapter are twofold. First, I aim to identify the descriptive and normative proposals of the dominant justifications for copyright.[131] Given their dominance, this provides context for the commercial, legal and policy debates discussed in this thesis. Second, I aim to establish cultural theory as the theoretical basis upon which to evaluate the issues raised in this thesis.

2. The Copyright Tradition

2.1 Conventional Wisdom of Copyright as a Private Right

In the conventional copyright narrative, the author of creative works is the primary character — for instance the painter, songwriter, playwright or novelist. An author fixes into a tangible format some original, creative expression: the painter paints a watercolour, the musician records a song, the novelist writes a novel.[132] Through copyright law, this work becomes the

[131] I use 'normative' to describe a value position or justification. Normative claims posit how a law *should* function and why. Normative claims are distinct from descriptive or instrumental claims, which describe the function and consequence of a law. See, eg, Anthony A D'Amato, *Jurisprudence: A Descriptive and Normative Analysis of Law* (Nijhoff, 1984).

[132] With some exceptions, for copyright to subsist in a work, that work must be fixed in a tangible format. See, eg, 17 USC § 102(a). The digital environment has complicated copyright's fixation requirement. Professor Ira Brandriss reflects:

> say, you are "talking" on-line in real time as part of a chat group, where there may not just be one, but many, many "listeners" to what you have to say. You may just stumble – as many of us do in conversation into saying something brilliant. But all the words are only in RAM, seemingly but a transitory form. Copyrightable?

author's private property. Joined to the author are the companies engaged to promote and disseminate their work — for example, a record label, publisher, distributor or merchandiser.[133] The personal and economic interests of the author, and associated industries, are positioned as the principal copyright stakeholders. In this conventional narrative, copyright is a property owners' right: the owner has the exclusive right to reproduce their work (to make copies); to distribute their work; to publish, perform or communicate their work to the public and to create and control derivative works. If a third party wishes to use the work, they must seek permission from and remunerate the copyright owner. The author has a rightful claim to own and control their works; private property is an undisputed, natural consequence of authorship.[134]

In this conventional narrative, the public is depicted as a collection of individual consumers of creative works, consuming for enjoyment, education or commentary, and existing in opposition to and isolated from the author.[135] The public has some limited rights to use copyrighted works such as those provided under a fair use or fair dealings exception, for example, for news reporting, parody or satire.[136] The public's rights are limited because, or so the conventional story goes, it is the author that copyright seeks to reward. Yet, the history of modern copyright tells a somewhat different story. As I outlined in Chapter 1, the interest the public has in

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Ira Brandriss, 'Writing in Frost on a Window Pane: E-Mail and Chatting on RAM and Copyright Fixation' (1996) 43(3) *Journal of the Copyright Society of the USA* 237, 238. Cf Professor Jane Ginsburg who posits, 'in principle, the rights copyright confers will be the same whatever the format of the work, whether originally created in hard copy or in digital format, including…works created in whole or in part on digital networks'. Jane C Ginsburg, 'Putting Cars on the "Information Superhighway': Authors, Exploiters, and Copyright in Cyberspace' (1995) 95(6) *Columbia Law Review* 1466, 1475. For discussions on the issue of fixation and reproduction rights in the context of the digital environment see, eg, David Nimmer, 'Brains and Other Paraphernalia of the Digital Age' (1996) 10(1) *Harvard Journal of Law & Technology* 1; Joseph P Liu, 'Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership' (2001) 42(4) *William and Mary Law Review* 1245; Aaron Perzanowski, 'Fixing Ram Copies' (2010) 104 *Northwestern University Law Review* 1067.

[133] For the purpose of this description, the list of intermediaries is limited to the more conventional, pre-digital, model of intermediary. More recently, Google and other technology companies have emerged as additional intermediaries, providing infrastructure and services that disseminate works. As their business models do not centre upon owning or controlling copyrights, these new intermediaries are substantially dissimilar to pre-digital intermediaries, conventionally defined. However, they do align with Professor Timothy Wu's modular copyright system analysis. Wu posits 21st Century copyright law comprises two regimes, authorship and communications, the latter regulating disseminators:

> The first regime is the familiar system, run by the courts, that grants exclusive rights to encourage creativity. The second is a messier regulatory regime comprised mainly of the sections of copyright that have always perplexed copyright theorists and have never fit the central theme of author-incentives. This *de facto* communications regime runs through the legislative process and the courts, and largely takes the form of industry specific liability rules, court created immunities, and special considerations.

Wu, 'Copyright's Communications Policy', above n 46, 279.

[134] See generally Mark A Lemley, 'Romantic Authorship and the Rhetoric of Property' (1997) 75 *Texas Law Review* 895.

[135] But see Madhavi Sunder, 'IP3' (2006) 59 *Stanford Law Review* 257.

[136] See, eg, the United States fair use exception 17 USC § 107.

accessing informative works is a foundational justification for modern copyright. The conceptual dominance of the author's private rights results from a specific political and economic history.

2.2 Politically Constructed Concepts of Authorship and Creativity

In Germany in the 18th century, a group of politically and economically motivated writers assisted in the formulation of the concept of authorship conventional to copyright law today. As documented by Professor Martha Woodmansee and others,[137] recognising an expanding market for book sales, writers sought to 'establish the economic viability of living by the pen'[138] and to do so they 'set about redefining the nature of writing.'[139] The work of a writer had been until then regarded that of a craftsman; a writer was a 'master of a body of rules, or techniques, preserved and handed down in rhetoric and poetics'.[140] Any contribution beyond the tradition of the craft was considered externally derived, from God or muse.[141] Working through external inspiration or craft, rather than personally responsible for his work, a writer was merely a 'vehicle of received ideas'[142] — ideas obtained from a public source — and so he did not acquire property rights to the finished work. The writer was considered just one of many responsible for the creation of a book; the writer's contribution commensurate with that of the printer, papermaker, binder, publisher and so on.[143]

As book dealers' profits expanded, writers became increasingly dissatisfied that they were not earning a living from book sales.[144] And so, for political and economic ends, the established definition of a writer as craftsman was contested and ultimately transformed. Writers presented

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[137] See, eg, Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993); Jessica Silbey, 'The Mythical Beginnings of Intellectual Property' (2008) 15(2) *George Mason Law Review* 319; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 1991(2) *Duke Law Journal* 455.

[138] Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'' (1984) 17(4) *Eighteenth-Century Studies* 425, 426.

[139] Ibid.

[140] Martha Woodmansee, 'On The Author Effect: Recovering Collectivity. (Intellectual Property and the Construction of Authorship)' (1992) 10(2) *Cardozo Arts & Entertainment Law Journal* 279, 280.

[141] Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', above n 138, 427.

[142] Ibid 434.

[143] Martha Woodmansee, 'On The Author Effect: Recovering Collectivity. (Intellectual Property and the Construction of Authorship)', above n 140, 280. Here Woodmansee presents writing from the 1753 *Allegemeines Oeconomisches Lexicon* by Georg Heinrich Zinck describing the process for manufacturing a book.

[144] Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', above n 138, 433.

new theory demoting the craftsmanship component of their work and promoting — and internalising — the inspiration component.[145] Rather than ideas received from an external, public source, writers said they drew upon personal, internal genius.[146] This internal inspiration became the 'original genius'[147] of the individual writer. The creative process was portrayed as largely internal, personal and unknowable, rather than determined by external factors such as tradition or heavenly inspiration. This redefinition allowed writers to claim more ownership over their work.[148] As personally inspired authors of original works, as they had so become, writers were entitled to own, control and be remunerated for their efforts.

The redefinition of authorship brought with it a significant normative change. Professor Carys Craig explains 'the idea of an "author" as a "maker" of an "original" text would have been alien to literary thought in the classical period…copying or imitating the great poets and writers that had gone before was considered a worthy objective and, if done successfully, an admirable achievement.'[149] Copying was a worthy objective because a work 'derived its value and authority from its affiliation with the texts that preceded it, its derivation rather than its deviation from prior texts.'[150] Through political action, undertaken in response to a particular

[145] Ibid 427.
[146] Fisher, 'The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States', above n 56, 16.
[147] Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', above n 138, 427. Jessica Silbey argues 'all of the United States copyright, patent, and trademark regimes are structured around and legitimated by central origin myths–stories that glorify and valorize enchanted moments of creation, discovery, or identity'. Silbey, 'The Mythical Beginnings of Intellectual Property', above n 137, 320.
[148] Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'', above n 138, 430.
[149] Carys J Craig, 'Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law' (2006) 15 *American University Journal of Gender, Social Policy & The Law* 207, 212.
[150] Woodmansee, 'On The Author Effect: Recovering Collectivity. (Intellectual Property and the Construction of Authorship)', above n 140, 281. Similar values were held in China, deriving from Confucian ethics. Professor John Lehman describes the 'view of art as imitation, copying, and commentary became especially important with the Ming dynasty, where the primary role of literary creativity was to excel on the highly standardized literary section of the civil service exams'. John Alan Lehman, 'Intellectual Property Rights and Chinese Tradition Section: Philosophical Foundations' (2006) 69(1) *Journal of Business Ethics* 1, 5. Lehman further explains, '[s]imilarly, the view that art promotes socially useful knowledge or behavior (rather than expressing the artist's creativity or entertaining people) is not a new theory which Chairman Mao inflicted on China; it is at least 2500 years old'. See also William P Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press, 1995).

moment in Western economic history, previously highly regarded concepts of appropriation were degraded and ideals of originality promoted.[151]

That the concepts of authorship and originality were formed through political processes does not brand them harmful or erroneous. Indeed, it is difficult to point to any legal doctrine that is not politically and historically contingent. Rather, their history suggests they do not deserve a natural law-like status and should be regarded as limited by the purposes for which they were constructed. Because these concepts were developed in order to improve remuneration to authors, they purposefully neglect external factors relevant to creative practice. Bracha describes the ideology of authorship as 'motivated mystification':[152]

> The practices of creating texts today or in the past have never come close to being anything like solitary individuals creating original works ex nihilo. The creative process, to varying degrees in different contexts, has always been collaborative and cumulative, involving reworking of existing materials and meanings rather than originating completely new ones. It never entailed a sharp distinction among imitating, borrowing or adapting, and creating new, original ideas.[153]

[151] Craig, above n 149, 213. Paradoxically, as Craig argues, the low originality threshold for triggering copyright actually results in a system where individual creative genius is the key justification for copyright but it is not formally necessary to trigger copyright. Craig explains, 'features of the modern copyright system would seem to imply that copyright's author is in fact very far from the individual genius postulated in Romantic rhetoric, this apparent disparity simply reflects a divergence between copyright's reality and its guiding rationale'. At 214. Yet, as Bracha contends, rather than concrete doctrinal consequences, the eighteenth century political process produced the terminology and ideology of authorship:

> At the end of the eighteenth century, abstract conceptions of authorship came to dominate copyright discourse and supplied its underlying theoretical justification. Yet these abstract conceptions had almost no foothold in the doctrinal and institutional details of copyright. During the nineteenth century, elements of original authorship were gradually embedded in actual copyright law but always in an incomplete, convoluted, and sometimes even contradictory way. This process produced the modern copyright framework, which simultaneously is pervaded by the ideology of authorship and has little to do with it.

Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright' (2008) 118(2) *Yale Law Journal* 186, 196-197.

[152] Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright', above n 151, 266. See also Woodmansee, 'On The Author Effect: Recovering Collectivity. (Intellectual Property and the Construction of Authorship)', above n 140, 280.

[153] Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright', above n 151, 267.

A system of copyright built around the personal genius of an individual author obfuscates the social, cumulative and appropriated nature of creativity.[154]

The evolution of artistic genres throughout human history is evidence of the cumulative and appropriative nature of the creative process. Impressionism, Surrealism, Rococo or Art Deco — at various times throughout history, different artistic styles have formed and dominated, adopted by artists in response to social, cultural and technological conditions and through patterns of appropriation. Appropriation is also evident in many of the world's 'great' art and literary works. Geoffrey Chaucer's *Canterbury Tales* appropriates from Giovanni Boccacio's *The Decameron*.[155] Consider Picasso's Cubist collages.[156] Or *The Waste Land* by T.S. Eliot, *Ulysses* by James Joyce, the *Bridge* by Hart Crane, all of which incorporate 'source material from other texts and from popular culture.'[157] For a more contemporary example, the new millennium has seen an ascendancy of soulful female pop singers, for example Amy Winehouse, Adele and Lorde. Their sounds at once derivative and new, finding value in an association with previous soul and gospel works, as well as via conformity with the conventions of modern pop music. Or K-Pop, a consciously derivative genre of popular music that is at once homogenised and manifestly Korean.[158]

Music producer Mark Ronson describes how, in the 1980s, the introduction of digital music sampling technology provided a new way for artists to connect with the music and artists from previous generations:

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[154] Craig, above n 149, 220.

[155] Peter Ackroyd, *Chaucer: Ackroyd's Brief Lives* (Nan A. Talese, 2007) 45. See also, Kenneth Muir, *The Sources of Shakespeare's Plays* (Routledge, 2009).

[156] John Carlin, 'Culture Vultures: Artistic Appropriation and Intellectual Property Law' (1988) 13(1) *Columbia - VLA Journal of Law & the Arts* 103, 108. Indeed, Pablo Picasso is credited as saying, 'Good artists borrow, great artists steal'. Rebecca Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114(3) *Yale Law Journal* 535, 552.

[157] Carlin, above n 156, 106. See also Fisher, 'The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States', above n 56, 16-17. Fisher posits that works are often collaborative, as well as appropriated and cumulative:

> The image of the lone author working in her garret is almost wholly obsolete. Today, most writing (indeed, most creativity of all sorts is collaborative. Equally importantly, the extent to which every creator depends upon and incorporates into her work the creations of her predecessors is becoming ever more obvious. Yet American lawmakers cling stubbornly to the romantic vision.

[158] See Solee I Shin and Lanu Kim, 'Organizing K-Pop: Emergence and Market Making of Large Korean Entertainment Houses, 1980-2010' (2013) 30(4) *East Asia: An International Quarterly* 255.

> Albums like De La Soul's "3 Feet High and Rising" and the Beastie Boys' "Paul's Boutique" looted from decades of recorded music to create these sonic, layered masterpieces that were basically the Sgt. Peppers of their day. And they weren't sampling these records because they were too lazy to write their own music…they were sampling those records because they heard something in that music that spoke to them… [and] they instantly wanted to inject themselves into the narrative of that music. They heard it, they wanted to be a part of it, and all of a sudden they found themselves in possession of the technology to do so, not much unlike the way the Delta Blues struck a chord with the Stones and The Beatles and Clapton…in music we take something that we love and we build on it.[159]

What Ronson identifies is an example of the social, cumulative and appropriative nature of creativity. The works referenced by Ronson found their value in their affiliation with previous works. As Ronson identifies, the value of the album is enhanced rather than diminished by appropriation, forming part of an on-going social discourse.[160]

The point is not that creative works are devoid of originality. Creative works can be at once appropriated and original. Levels of appropriation and originality vary from work to work but all artists are constrained and empowered by the technological, social and cultural conditions in which they work.[161] Creative works are shaped by and comment upon the society and culture in which they are born and authors work 'within and through existing discourses'.[162] As Professor Julie Cohen comprehensively argues, all creative works are socially and culturally

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[159] Mark Ronson, *How Sampling Transformed Music* on *TED* (March 2014) <https://www.ted.com/talks/mark_ronson_how_sampling_transformed_music/transcript?language=en#t-299713>.

[160] See Craig, above n 149, 265; Sunder, above n 135, 324. For an examination of appropriation art in the Australian context see Matthew Rimmer, 'Four Stories About Copyright Law and Appropriation Art.' (1998) 3(4) *Media and Arts Law Review* 180.

[161] See Julie E Cohen, 'Creativity and Culture in Copyright Theory (Symposium: Intellectual Property and Social Justice)' (2007) 40(3) *UC Davis Law Review* 1151, 1183. See also Julie C Van Camp, 'Originality in Postmodern Appropriation Art' (2007) 36(4) *Journal of Arts Management, Law, and Society* 247-258, 255. ('Although a work might originate with an artist– "come from" them in some way–it was not created in complete ignorance, free from the influences of other artists and works of art.')

[162] Sunder, above n 135, 324. See also Julie E Cohen, *Configuring the Networked Self* (Yale University Press, 2012); Cohen, 'Creativity and Culture in Copyright Theory (Symposium: Intellectual Property and Social Justice)', above n 161; Craig, above n 149.

situated.[163] A reflection by Cohen on the differences in individual creative choices elucidates this point:

> A host of cultural and personal factors explains why Alison Krauss became a bluegrass musician but Sarah Chang became a classical violinist and Stefani Germanotta became Lady Gaga, why Joshua Redman became a jazz bandleader rather than a symphony oboist, why Edward Burtynski photographs epic industrial landscapes but Cindy Sherman stages pulp fiction tableaux, and why Barbara Kingsolver's fiction draws on Native American culture but that of Ian McEwan mines the disaffections of the British upper-middle class.[164]

Rather than emanating exclusively from an internal, unknowable source, creative practice is the product of real experiences, responsive to real social and cultural conditions.[165] Creative works, by their very nature, take from and give back to the creator's environment. To summarise, creative practice is always, to some extent, appropriated and cumulative because creative practice is culturally situated. The author's cultural environment inescapably influences their creative practice because creative practice cannot be divorced from the cultural environment in which it exists.

In other words, creative practice is shaped by conditions of access to existing ideas and resources. Access, as Cohen argues, it is not an abstract proposition but one regarding real access to real resources in real spaces:[166]

> What increases the likelihood that someone will see, hear, or conceptualize the world differently in the first place? A critical ingredient is the scope that networks of cultural production afford for the play of everyday practice, including not only the extent to which they permit purposive creative experimentation but also the extent to which they enable serendipitous access

[163] Cohen, *Configuring the Networked Self*, above n 162.
[164] Ibid 83-84.
[165] Ibid 85.
[166] Ibid 79.

> to cultural resources and facilitate unexpected juxtapositions of those resources.[167]

Recognising creativity as a cumulative process, tied to conditions of access to existing knowledge and resources, challenges the dominance of the private property claim that underlies the conventional account of copyright and it conceptually affirms the continued importance of copyright's foundational public access objective. Copyright seeks to benefit authors, but it also seeks to benefit the public by providing access to resources necessary for creative practice. The concepts of authorship and originality central to the copyright orthodoxy were formulated for historically specific purposes. They purposely obscure the social and cultural aspects of creative practice and, in turn, the public interest objective of copyright. This obfuscation is reinforced by key theoretical justifications for copyright.

3. Authors' Rights: The Labour and Personality Theories of Copyright

Two theories of copyright most directly support the concepts of authorship, originality and private rights that dominate in the copyright orthodoxy: the labour and personality theories. Both theories conclude authors *deserve* private property rights. Labour theorists reason authors are entitled to reward for their efforts. Personality theorists reason authors should be entitled to own and control their works because they are personally and psychologically connected to them. Both approaches continue to inform copyright law and politics, justifying a prioritisation of private property rights.

3.1 Labour Theory: Liberty Through Private Property

The labour theory of intellectual property is grounded in the Lockean theory of property rights. Locke proposed a person could obtain a right to property by applying their labour to goods held in common.[168] Professor Justin Hughes describes, '[o]ur handiwork becomes our property because our hands — and the energy, consciousness, and control that fuel their labor — are

[167] Ibid 93-94.

[168] For example, Locke wrote: '[t]hus this law of reason makes the deer that Indian's who hath killed it ; it is allowed to be his goods, who hath bestowed his labour upon it, though before it was the common right of every one.' John Locke, *Two Treatises on Government* (Whitmore and Fenn, 1821) 211-212. See also Fisher, 'Theories of Intellectual Property', above n 130, 170.

our property.'[169] If construed simply, Locke's theory appears to apply neatly to intellectual property: intellectual labour mixes with knowledge from the public domain to create a new work, just as physical labour mixes with physical materials. The normative proposal is that labour is deserving of reward. It is deserving of reward because labour creates value or because labour is unpleasant.[170] Hughes suggests '[t]he value-added theory may explain why labor justifies property at the social level, while the avoidance theory makes the individual feel justified in receiving something for his "pains."'[171]

An alternative interpretation of Locke's value theory of labour derives from Locke's natural law ethical theory.[172] In this explanation, the value of labour does not result from physical or intellectual efforts but from a natural law obligation to preserve one's own life. This natural law gives a person the right to 'take actions necessary to preserve himself, such as laboring to create the products necessary to maintain his life.'[173] Professor Adam Mossoff explains, 'productive labor is a moral activity because it sustains human life and the goods that result from productive labor are of value because they sustain human life.'[174] Viewed in this way, Locke's normative claim is not about rewards deserved for effort but rather about the right to create the conditions necessary to live. Following this reasoning, an expressive work is the product of an author's labour and ownership of it supports individual liberty and self-preservation. As Professor Stewart Sterk identifies, 'the principal attraction of Lockean labor theory is its emphasis on respect for personal autonomy, affording each person an equal opportunity to pursue his own vision of the good life.'[175]

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[169] Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77(2) *Georgetown Law Journal* 287, 302.
[170] Ibid 310.
[171] Ibid. Locke's labour theory of value features a condition or 'proviso'. Locke stipulated that when obtaining property through labour, 'no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others'. Locke, above n 168, 210. Professor Adam Moore explains, '[t]ne underlying rationale of Locke's proviso is that if no one's situation is worsened, then no one can complain about another individual appropriating part of the commons. If no one is harmed by an acquisition and one person is bettered, then the acquisition ought to be permitted.' Adam D Moore, 'A Lockean Theory of Intellectual Property Revisited' (2012) 49(4) *San Diego Law Review* 1069, 1072.
[172] Adam Mossoff, 'Saving Locke From Marx: The Labor Theory of Value in Intellectual Property Theory' (2012) 29(2) *Social Philosophy and Policy* 283.
[173] Ibid 297.
[174] Ibid 298.
[175] Stewart E Sterk, 'Rhetoric and Reality in Copyright Law' (1996) 94(5) *Michigan Law Review* 1197, 1236. Another advantage of Mossoff's interpretation of Locke's labour theory of value is that it avoids the criticism that it fails to recognise the social nature of creative works:

> Invention, writing, and thought in general do not operate in a vacuum; intellectual activity is not creation ex nihilo. Given this vital dependence of a person's thoughts on the ideas of those who came before her, intellectual products are fundamentally social products. Thus even if one assumes that the value of these products is entirely the result of human labor,

The assertion that laws should be crafted to provide opportunity for individuals to pursue conditions facilitative of a good life is uncontroversial, yet, within the Lockean framework, it is unclear why private property rights are specifically necessary. While the ability to own and control property is an important liberty in contemporary life, modern capitalism also features experiences of inequality and exclusion that private property rights exacerbate.[176] As well, there are alternatives to private property that may reward authors and support good living, including public recognition, a substantial fee or ongoing financial support. Enduring, exclusive private properties rights are not clearly or inevitably justified in the Lockean account.[177] Understanding why private property rights are privileged (yet under-justified) within the Lockean framework requires historical context.

In the 17th century, Locke's classical liberalism was a radical political philosophy. Locke delivered a theory of individual liberty in opposition to monarchical control: through private property rights he sought to liberate individuals and societies from systemic, theocratic inequality. Professor Stanley Brubaker describes:

> Locke's story of the right of property is also the story of man's coming into his own, his coming into his own mind, freed from the irrational claims of Revelation. Thus, Locke's theory of property is nothing less than a story of man's Enlightenment.[178]

The historically specific centralised system of property control Locke sought to reform made private property necessary to Locke's framework. Locke promoted principles of individualism

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this value is not entirely attributable to any particular laborer (or any small group of laborers).

Edwin C Hettinger, 'Justifying Intellectual Property' (1989) 18(1) *Philosophy & Public Affairs* 31, 38. Furthermore, the social nature of creative works is less of a concern if value is derived from a natural law right to self-preservation and good living, rather than from the labour of an individual.

[176] In 2015, Credit Suisse published research showing '[t]he top 1% of wealth holders now own half of all household wealth'. Credit Suisse Research Institute, *Global Wealth Report 2015* (October 2015) 1, 4. In 2015, the OECD reported that across OECD nations, 'wealth inequality is much larger than income inequality due to financial assets that are very unequally distributed and mainly accrue to top income and top wealth households.' Fabrice Murtin and Marco Mira d'Ercole, *Household Wealth Inequality Across OECD Countries: New OECD Evidence* (OECD Statistics Brief No 21, OECD Statistics Directorate, June 2015) 1 https://www.oecd.org/std/household-wealth-inequality-across-OECD-countries-OECDSB21.pdf>. In the contemporary context, legal regimes that support private property rights do not alone ensure good living for all.

[177] Hettinger, above n 175, 41. See also Fisher, 'Theories of Intellectual Property', above n 130, 188.

[178] Stanley C Brubaker, 'Coming into One's Own: John Locke's Theory of Property, God, and Politics' (2012) 74 *Review of Politics* 207, 207. See generally C B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Clarendon Press, 1962).

and private property for political reform and for social and economic liberation. In contemporary political and economic conditions, however, these values do not necessarily serve the same goal as Locke conceived. And if they do not, or if they do not do so to the same extent as they did in the 17th century, arguably there is a substantial gap in the theory's justification for and prioritisation of private property rights.

3.2 Personality Theory: Private Property for Self-Actualisation

As a supplement to labour theory, providing support for the specific requirement of private property, personality theory is one possible gap-filler.[179] The key sources for this approach are German theorists Immanuel Kant and Georg Wilhelm Friedrich Hegel. Kant distinguished literary works from other forms of property. For Kant, a book was both a physical object and a personal communication by an author to the public.[180] Although a physical book can have many owners, the communication belongs exclusively and inalienably to the author. Hegel extended these propositions. For Hegel, the human existence is characterised by an internal will seeking external reality,[181] and personality is the manifestation of one's will. Hegel wrote, '[f]ree will, in order not to remain abstract, must in the first instance give itself reality; the sensible materials of this reality are objects, i.e., external things.'[182] For Hegel, property embodies an individual's will and personality and so has a profound connection with the human experience.[183] Professor Margaret Radin explains, '[o]nce we admit that a person can be bound up with an external "thing"…by virtue of this connection the person should be accorded broad liberty with respect to control over that "thing".'[184] In the personality framework, private property is specifically necessary; it is uniquely suitable means of control, 'for self-actualization, for personal expression, and for dignity and recognition as an individual person.'[185] Personality theory proposes the author creates a work that manifests their

[179] Hughes adopts this approach: '[m]y own view is that a labor theory of intellectual property is powerful, but incomplete. I believe we also need the support of a personality theory, such as the one proposed by Hegel, in which property is justified as an expression of the self.' Hughes, above n 169, 329. See also Fisher, 'Theories of Intellectual Property', above n 130, 171.
[180] Atkinson and Fitzgerald, above n 11, 35-36.
[181] G W F Hegel, *Philosophy of Right* (S W Dyde Trans, Dover Publications, 2008) xlix.
[182] Ibid.
[183] Hughes, above n 169, 331.
[184] Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 37. See also William W Fisher III, 'The Implications for Law of User Innovation. (Cyberspace and the Law: Privacy, Property, and Crime in the Virtual Frontier)' (2010) 94(5) *Minnesota Law Review* 1417, 1451.
[185] Hughes, above n 169, 330.

personality and to it they have an irrevocable bond — thereby justifying a prioritisation of private property rights.

Personality theory underpins the doctrine of moral rights, from the European tradition of copyright. Moral rights are rights 'found worthy of protection because of the presumed intimate bond between authors and their works'.[186] They often include, for example, the rights of attribution, integrity, disclosure and withdrawal; providing an author the right to receive continued recognition for their work, control over modifications of their work and control over when a work is available to the public.[187] Moral rights are usually inalienable and apply only to the author, the actual creator of the work, not to any associated interests.[188]

The personality and labour theories of intellectual property encourage lawmakers to be attentive to the value of intellectual labour and to the personal significance of a creative work to its author. A study by Professor Jeanne Fromer found all authors tend to share certain beliefs about their works – for example, they all view their work as deeply personal, they believe strongly in the integrity of their work and they have expectations of 'reputational benefits'.[189] Fromer argues that because these beliefs are widely held and critically important to most authors, consideration of them in copyright policy creates 'expressive incentives to creators'[190] and increases the legitimacy of copyright law. Undoubtedly, many authors of creative works feel personally connected to their work.

Copyright laws, however, reach beyond the minds of individual authors. As I discuss above, there are important social and cultural considerations relevant to creativity that the labour and personality models largely neglect. These theories say little of copyright law's public interest

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[186] Cyrill P Rigamonti, 'Deconstructing Moral Rights' (2006) 47(2) *Harvard International Law Journal* 353, 355. In some jurisdictions moral rights are perpetual, in others they last for the same period of time as economic rights.

[187] See, eg, France's intellectual property code which provides authors *droits moraux* including rights of attribution, integrity, disclosure, modification or withdrawal. *Code de la propriété intellectuelle* arts L121-1 - L121-9.

[188] See, eg, the *Berne Convention for the Protection of Literary and Artistic Works,* which provides:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention for the Protection of Literary and Artistic Works, opened for signature 9 September 1886, (entered into force 5 December 1887) art 6bis(1).

[189] Jeanne C Fromer, 'Expressive Incentives in Intellectual Property' (2012) 98(8) *Virginia Law Review* 1745, 1770.

[190] Ibid 1778.

objective and they do not clearly account for the actors and interests that modern copyright regimes implicate beyond authors or rightsholders.

4. An Economic Model of Copyright: Private Property for Market Transactions

The economic incentive theory of copyright takes the copyright tradition further than do the labour or personality theories, including both private property and access considerations. It provides an economic model of market transactions and offers a utilitarian justification for copyright. Within this framework, copyright is understood as operating within a system of individual producers and consumers making rational production and consumption decisions, resulting in an efficient allocation of resources, to the benefit of society in the aggregate. Like the authors' rights theories, the central propositions from this approach continue to influence copyright law and politics. Yet, again like the authors' rights theories, this approach is not equipped to deal with the full range of variables relevant to contemporary copyright law.

4.1 The Economic Model

Within the economic incentive framework copyright is understood as addressing the problem of public goods: goods that are non-rivalrous and non-excludable.[191] Creative works are non-rivalrous because use by one person does not limit use by others.[192] To illustrate, if I were to drink wine and listen to music, the wine is rivalrous but the music is not. Once drunk, the wine is gone and cannot be enjoyed by anyone else. The music, however, once played, may be enjoyed again by me or others. Creative works are also non-excludable because once a work is made available to the public it can be difficult to prevent continued access. Non-rivalrous and non-excludable works are by their nature easily copied and shared; and, critically for creative works, they can be copied and shared at a cost less than the cost incurred by the author of the work. This is because the author must invest in both the production and distribution of the work, while the copier need only invest in the distribution.

[191] See William W Fisher III, 'Reconstructing the Fair Use Doctrine' (1988) *Harvard Law Review* 1659, 1700.
[192] Fisher, 'Theories of Intellectual Property', above n 130, 169.

The economic model of copyright suggests that if there is a supply of low-cost copies of a work, the amount price-sensitive consumers are willing to pay for the work will fall, potentially to a price that is below the author's cost of production. Consequently, if an author anticipates that they will not be able to recoup the cost of their production, they may decide not to produce their work.[193] In this scenario, copyright intervenes and addresses the non-excludable nature of a creative work: copyright introduces a legal restriction on copying, granting authors the exclusive right to make and distribute copies. This exclusive right allows authors to price their goods above the cost of production. A price above the cost of production yields the author a profit and creates an economic incentive to produce works.

The economic incentive created by copyright occurs at the cost of access to works by consumers. When authors price their works at a price higher than the cost of production, those consumers who are willing to pay more than the cost of production, but not the price set by the author, are labelled a deadweight loss (because given the non-rivalrous nature of a creative work, they too could have consumed the work without exhausting it).[194] The deadweight loss (the total of the potential customers who will not access the work) is deemed an allocative inefficiency. However, economic theory suggests the price mechanism will direct production to wherever demand is strongest and will prevent authors from pricing their works too high. The desire for profit is balanced against the desire to minimise the deadweight loss.

More simply, authors will make pricing decisions based on their expectations of price-sensitive consumers, seeking a balance between high profits and high sales. Rational, self-interested participants in the market will efficiently allocate resources,[195] thus maximising social welfare as measured by levels of wealth (for authors) and consumption (by the public).[196] A high level of incentive and low deadweight loss is an efficient allocation of resources and provides the greatest good for the greatest number of people.[197]

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[193] William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18(2) *The Journal of Legal Studies* 325.
[194] See, eg, Fisher III, 'Reconstructing the Fair Use Doctrine', above n 191, 1702.
[195] Brett M Frischmann, 'Evaluating the Demsetzian Trend in Copyright Law (New Directions in Copyright Law and Economics)' (2007) 3(3) *Review of Law & Economics* 649, 666. See also Fisher III, 'Reconstructing the Fair Use Doctrine', above n 191, 1699.
[196] Frischmann, above n 195, 658.
[197] Fisher summarises:

> to avoid underproduction of original works, it is necessary to empower the creators of such works to charge fees for the privilege of using them, but granting the creators that right causes monopoly losses, which vary between types of copyrighted works. The task of a lawmaker who wishes to maximize efficiency, therefore, is to determine, with respect to

In this economic model, creative works are commodities — property — to be owned and sold and, Professor Yochai Benkler explains, '[m]aintaining a heavily market-based system requires definition and enforcement of property rights'[198] because producers and consumers rely on private property rights when making decisions to sell or purchase goods.[199] Accordingly, the economic model suggests copyright lawmakers should seek to secure for authors enough private property rights to incentivise the production of creative works and to support market transactions.[200]

The prominence of the economic incentive justification for copyright may be explained by its relationship to neoliberal ideology and neoclassical economics, which assume in a free market, individual consumers and producers will make rational decisions and these decisions will lead to an efficient allocation of resources. Indeed, the economic incentive theory of intellectual property law is 'easily recognizable as neoliberal… [it is] primarily analyzed and justified in welfarist terms, and more particularly through the lens of economics, with efficiency posited as the primary goal.'[201]

4.2 Limitations of the Economic Model

That authors are rational decision-makers, only willing to create if the expected return from the sale of their work exceeds the expected cost of production, is a fundamental premise of the economic incentive theory of copyright.[202] Yet, this assumption fails to hold up against even light scrutiny. The limitless quantity of digital creative production occurring today is evidence that an economic incentive is not essential for creative practice to occur. Remixes, gifs, memes, blogs, fan-made music videos, fan-fiction and open source software are examples of

> each type of intellectual product, the combination of entitlements that would result in economic gains that exceed by the maximum amount the attendant efficiency losses.

Fisher III, 'Reconstructing the Fair Use Doctrine', above n 191, 1703.

[198] Yochai Benkler, 'Freedom in the Commons: Towards a Political Economy of Information' (2003) 52(6) *Duke Law Journal* 1245, 1264.

[199] Ryan, above n 75, 657.

[200] Ibid 656. Ryan makes the distinction between the incentive justification as rhetoric and the neoclassical justification in practice: the incentive justification is used rhetorically to claim copyright should be crafted to incentivise creative production, while the neoclassical approach in practice claims free markets should be used to direct copyright production. At 649, 657.

[201] Amy Kapczynski, 'Intellectual Property's Leviathan' (2014) 77(4) *Law and Contemporary Problems* 131, 132.

[202] See Landes and Posner, 'An Economic Analysis of Copyright Law', above n 193, 327.

contemporary creative production undertaken without the guarantee of an economic reward.[203] The prolific creation and distribution of expressive works in the digital environment casts doubt on the accuracy of the economic model.[204]

As an unpredictable social and cultural experience, creative practice cannot be wholly reduced to market transactions. Human behaviour, and therefore creative practice, is contingent upon and constrained by social, economic and technological conditions, and human behaviour is complex, reactive and unpredictable.[205] Cohen eloquently describes, 'like water around boulders in a streambed, everyday practice flows around the structures established by institutional frameworks, producing unpredicted and unpredictable results.'[206] As a reductionist and abstract model, the economic incentive approach cannot 'capture the full range of human motivations, choices, behaviors, and experiences'[207] relevant to creative practice.

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[203] Sunder, above n 135, 303. See also Fisher, 'The Implications for Law of User Innovation', above n 184, 1431. Fisher examines the practice of user modifications of cultural works and other 'products that have been produced and distributed in large quantities'.

[204] Sunder argues the digital environment has 'paradoxically exposed the fragility of its economic foundations while amplifying its social and cultural effects'. Sunder, above n 135, 260. In 1989, applying the economic incentive theory of copyright, Landes and Posner predicted that without copyright, there would be an increase in 'works that are difficult to copy' and that to prevent copying 'authors would be more likely to circulate their works privately than widely'. See Landes and Posner, 'An Economic Analysis of Copyright Law', above n 193, 332. The digital era has tested this prediction and it has not been kind to Landes and Posner. In an era of, arguably, ineffective copyright enforcement, there are more creative works with wider circulation than ever before. Landes and Posner further speculated:

> Without copyright protection, authors, publishers, and copiers would have inefficient incentives with regard to the timing of various decisions. Publishers, to lengthen their head start, would have a disincentive to engage in prepublication advertising and even to announce publication dates in advance, and copiers would have an incentive to install excessively speedy production lines.

This statement illustrates how the economic incentive theory may apply to capital-intensive industries. In the digital environment, however, the costs of production have reduced significantly — digital programs facilitate high quality amateur productions. In the digital environment, creative practice often occurs without high levels of capital investment or the expectation of significant economic reward. See also, Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006) 49.

Notably, a study of the software industry in India between 1993 and 2010 found the introduction of copyright and patent laws for the industry during that period did not produce growth for the industry. Professor Aathi Anand explains:

> If the traditional law and economics prescription were correct, then the two periods during which IP protection increased would have witnessed a surge in growth. Instead, the actual growth curve… demonstrates no such surge after the legislature introduced copyright and patent protections.

Aarthi Anand, ''Less is More': New Property Paradigm in the Information Age' (2012) 11 *Duke Law & Technology Review* 65, 97. Professor Joseph Stiglitz theorises, as part of society's 'innovation system' the monopoly provided by intellectual property laws can impede innovation. Stiglitz argues that 'incentives for innovation are less with monopoly than in a more competitive market place', as 'monopolists produce less–because they can charge higher prices' and they 'do not have the spur of competition'. Joseph E Stiglitz, 'Economic Foundations of Intellectual Property Rights' (2008) 57(6) *Duke Law Journal* 1693, 1711.

[205] Cohen, *Configuring the Networked Self*, above n 162, 51-52.

[206] Ibid 51.

[207] Ibid.

The economic model of copyright also suffers from broader problems of utilitarianism: it seeks to maximise aggregate welfare (and in this model social welfare is 'the sum of the wealth generated by private transactions'[208]) without regard for the equality of access or participation. As Professor Martha Nussbaum describes, 'individual citizens' lives are not merely inputs into a glorious social total or average. It matters how each is placed. Notoriously, utilitarian views approve results that augment the social total or average, even when they give some people extremely miserable lives.'[209] If copyright policy is reduced to the pursuit of economic efficiency and wealth maximisation, measured in the aggregate, it will not account for actual conditions of access to creative works and participation in creative practice.[210]

Furthermore, information and content has 'non-commodity definitions of value'.[211] The economic model assumes '[c]reative works are commodities whose value is best determined by the market',[212] when works can have educative value, historical value, community value, scientific value, political value and so on, value that may change over time and that may never correspond with a market value. The market value of a work may never represent its value to society.[213] For these reasons, as a theory for understanding and justifying copyright, 'the neoclassically-grounded economic theory…is fatally incomplete.'[214]

Importantly, the limitations of the economic model do not diminish its utility entirely. Creative works do have economic value and copyright does have an economic function. Copyright commodifies works and provides an opportunity for authors to earn revenue from their work in a market economy. As Professor Jane Ginsburg eloquently proposes, '[f]ilthy lucre may not have spurred the first endeavor; many new creators hunger for exposure over income. But to *remain* a creator requires material as well as moral sustenance.'[215] By allocating rights,

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[208] Cohen, 'Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"', above n 77. See also Ryan, '[n]eoclassical economic theory equates public interest with a maximization of total social wealth, regardless of the distribution of that wealth.' Ryan, above n 75, 685.

[209] Martha Nussbaum, 'Constitutions and Capabilities: 'Perception' Against Lofty Formalism' (2007) 121(1) *Harvard Law Review* 4, 19.

[210] See also Professor James Boyle: 'a narrow "private property analysis" fails to show the true costs involved. In both cases, the costs of the action are spread out over many people, while the benefits redound mainly to a few easily identified and well-organized groups.' James Boyle, 'A Politics of Intellectual Property: Environmentalism for the Net?' (1997) 47(1) *Duke Law Journal* 87, 110.

[211] Cohen, 'Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"', above n 77, 513.

[212] Ryan, above n 75, 655-656.

[213] Cohen, 'Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"', above n 77, 505.

[214] Ibid 466.

[215] Jane Ginsburg, 'The Author's Place in the Future of Copyright' (Working Paper No 512, The Centre for Law and Economic Studies, Columbia University School of Law, 5 March 2015) 1, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574496>.

copyright assists creators to participate in market transactions — copyright commodifies creative works, facilitating their sale and distribution.[216] In a study of the creative practices of over 50 artists and scientists, Professor Jessica Silbey concluded that intellectual property laws do assist in the 'development and distribution of creative or innovative work but rarely the initiation of that work.'[217] The economic model of copyright may inaccurately assume copyright incentivises creative practice and it may overemphasise the importance of private property rights to creative practice, but it does identify the economic function of copyright: commodification for market transactions.

Identifying the economic function of copyright as commodification rather than incentive is a small but important clarification because it permits us to dispense with the notion that copyright is necessary to incentivise creative practice. It suggests there are other factors motivating and informing creative practice — beyond economic incentive. For the remainder of this chapter, I explore a fourth theory of copyright: cultural theory. Cultural theory accepts that copyright has an economic function, but places copyright and creative practice within a social and political context. As a broad framework, cultural theory is a persuasive descriptive and instrumental theory of copyright and is useful for understanding and evaluating copyright law in current times.

5. A Cultural Theory of Copyright

The cultural theory of copyright provides a normative framework diverging from the authors' rights and economic model.[218] Rather than a justification for private property rights, within the cultural theory framework, copyright is understood as regulating participation in processes of

[216] See, eg, Craig: '[r]ather than creating an environment for communication and facilitating an exchange of meaning, the system creates a marketplace for intellectual products and rules for the exchange of commodities.' Craig, above n 149, 233.

[217] Jessica Silbey, *Eureka Myth Creators, Innovators, and Everyday Intellectual Property* (Stanford University Press, 2014) 12.

[218] A cultural theory of copyright is an approach explored by legal scholars such as Professors William Fisher, Julie Cohen, Neil Natanel, Yochai Benkler, Madhavi Sunder, Oren Bracha and Talha Syed, each with their own theoretical proposals. The works of all of these scholars and others inform this chapter, however, my framework broadly aligns with cultural democracy theory summarised by Bracha and Syed. Accordingly, I use cultural theory to describe an 'eclectic yet loosely connected group of normative accounts of intellectual property' and, as Bracha contends, although the 'various accounts do not form one coherent and uniform theory…they share a strong family resemblance and many common features, arguments, and commitments.' Oren Bracha, 'Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property (Symposium: Frontiers of Intellectual Property)' (2007) 85(7) *Texas Law Review* 1799, 1843. See also Oren Bracha and Talha Syed, 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (2014) 29(1) *Berkeley Technology Law Journal* 229.

meaning-making. Cultural theory advises lawmakers should strive to create a diverse and participatory culture. In a diverse and participatory culture, all people are provided opportunity for participation in processes of meaning-making. A diverse and participatory culture facilitates human flourishing and strengthens democratic political systems. As we will see, placing copyright within a cultural context facilitates an understanding of the interests of a broad range of stakeholders, beyond authors or rightsholders, including the public, and also (for better or worse) the interests of powerful private actors like Google.

5.1 Key Components of the Cultural Theory Framework: Human Flourishing, the Social Human and a Cultural Democracy

Cultural theory suggests copyright laws should be crafted to achieve cultural conditions that support human flourishing.[219] Professor William Fisher explains that the cultural theory framework

> proceeds from the propositions, sometimes associated with the Aristotelian tradition of moral philosophy, that there exists such a thing as human nature, which is mysterious and complex but nevertheless stable and discoverable, that people's nature causes them to flourish more under some conditions than others, and that social and political institutions should be organized to facilitate that flourishing.[220]

Professors Barbara Fredrickson and Marcial Losada suggest human flourishing 'means to live within an optimal range of human functioning, one that connotes goodness, generativity, growth and resilience.'[221] Goodness is 'indexed by happiness, satisfaction, and superior functioning',[222] generativity by 'broadened thought–action repertoires and behavioral flexibility',[223] growth by 'gains in enduring personal and social resources',[224] and resilience by

[219] See generally Fisher III, 'Reconstructing the Fair Use Doctrine', above n 191, 1744-1762.
[220] Ibid 1746. See also Fisher, 'Theories of Intellectual Property', above n 130, 171-172; William W Fisher III, 'CopyrightX: Lecture 10.1, Cultural Theory: Premises' (2015) <https://www.youtube.com/watch?v=sFiKtoE9huA&feature=youtu.be>.
[221] Barbara L. Fredrickson and Marcial F. Losada, 'Positive Affect and the Complex Dynamics of Human Flourishing' (2005) 60(7) *American Psychologist* 678, 678.
[222] Ibid 685.
[223] Ibid.
[224] Ibid.

'survival and growth in the aftermath of adversity'.[225] The cultural theory framework suggests in an ideal society all persons will have the opportunity to experience optimal functioning.[226]

An important contribution to cultural theory is the capabilities approach advanced by Professors Amartya Sen[227] and Martha Nussbaum.[228] The capabilities approach provides a theoretical framework for 'basic political principles'[229] in which the fundamental purpose of the law and government 'is to secure for all citizens the prerequisites of a life worthy of human dignity'.[230] These prerequisites 'range from basic needs, such as the right to life and health, to more expansive freedoms of movement, creative work, and participation in social, economic, and cultural institutions.'[231] The capabilities approach proposes all people deserve respect and respect involves 'supporting human beings in the development and exercise of some central human abilities, especially prominent among which is the faculty of selection and choice'.[232] The capabilities approach suggests human flourishing may be achieved when individuals can make meaningful choices regarding the state of their own existence. In this way, the capabilities approach draws upon liberal ideals, but it is not limited to economic conditions.

Cultural theory assumes humans are social beings.[233] It recognises that we experience our lives through social relationships, personally, professionally, politically and creatively. Our decisions, our experience of identity, our political, economic, religious and ethical beliefs are all 'deeply shaped by the social relations they are enmeshed in and the widespread meanings circulating around them'.[234] In other words, they are shaped by cultural conditions. Within the cultural theory framework, culture is used to describe the 'irreducibly interactive or social processes through which meanings are forged'.[235] Culture is a social phenomenon,

[225] Ibid.
[226] For a more detailed discussion on cultural theory and human flourishing see Fisher, 'The Implications for Law of User Innovation', above n 184, 1463.
[227] See, eg, Amartya Sen, 'Capability and Well-Being' in Martha Nussbaum and Amartya Sens (eds), *The Quality of Life* (Clarendon Press, 1993) 30. See also Fisher, 'The Implications for Law of User Innovation', above n 184, 1466-1468.
[228] See, eg, Nussbaum, above n 209.
[229] Ibid 7.
[230] Ibid.
[231] Sunder, above n 135, 313.
[232] Nussbaum, above n 209, 10. According to Nussbaum, '[p]eople come into the world with rudimentary abilities to lead a dignified life. These abilities, however, need support from the world, especially the political world, if they are to develop and become effective.' At 11.
[233] Bracha and Syed, above n 151, 254.
[234] Ibid 255.
[235] Ibid.

> a set of historically contingent and historically produced social practices and media that human beings employ to exchange ideas and share opinions. These are the methods, practices, and technologies through which dialogue occurs and public opinion is formed.[236]

Our culture is present in all facets of our lives and it shapes our understanding of the world. Professor Tim Wu describes, 'almost like the weather, the flow of information defines the basic tenor of our times, the ambience in which things happen, and, ultimately, the character of a society.'[237]

In our deeply social lives, information and ideas can empower or constrain.[238] Cultural representations challenge or reinforce stereotypes, social and economic hierarchies, values and desires.[239] Ideas in our culture 'determine what individuals understand to be the range of options open to them, and the range of consequences to their actions'.[240] In this way, 'power derives from the ability to shape and influence culture'.[241] Given the influence of the ideas that circulate in our culture and the power that derives from the ability to shape cultural conditions, cultural theory suggests we should strive to create a cultural democracy.

Fundamentally, a cultural democracy contains a diversity of cultural representations, produced by a diversity of voices. Professor Jack Balkin explains:

> A democratic culture is democratic in the sense that everyone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that

[236] Jack M Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1, 36.
[237] Wu, *The Master Switch*, above n 4, 12.
[238] Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, above n 204, 141. See also Wu, *The Master Switch*, above n 4, 302.
[239] See also Niva Elkin-Koren: '[i]dentities are also formed through dialogical interaction with others (family, community, associations), tradition, and shared cultural symbols. We form our views about what is socially appropriate, what is socially desirable, and what future we wish for ourselves based on interaction.' Niva Elkin-Koren, 'Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace' (1996) 14(2) *Cardozo Arts & Entertainment Law Journal* 215, 233.
[240] Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, above n 204, 129.
[241] Sunder, above n 135, 267.

> constitute them and the communities and sub-communities to which they belong.[242]

Cultural theory posits we should seek to participate in the 'semiotic shaping'[243] of our own subjectivity and in the 'semiotic shaping of others' subjectivity.'[244] In other words, in a cultural democracy, all individuals are given 'meaningful opportunity…to take part in a dialogical process of shaping culture.'[245] Through meaningful participation in the shaping of culture, we facilitate human flourishing and achieve a cultural democracy.[246]

A highly diverse and participatory culture is also 'facilitative of a democratic political process…[and forms] the heart of a society and culture that is truly democratic.'[247] Professor Neil Netanel explains that democracy requires 'a domain in which citizens develop the independent spirit, self-direction, social responsibility, discursive skill, political awareness, and mutual recognition.'[248] In this way, democratic governance is more than an electoral process that 'aggregates pre-existing individual preferences',[249] it includes

> an ongoing process of rational preference formation. This process involves public deliberation of important public issues conducted by an involved and informed citizenry. Under ideal speech conditions, this public deliberation would be open to numerous and diverse competing views and arguments. Participation would be as free as possible from hierarchical relations of power, either public or private. Participation and diversity are thus seen as essential conditions for the democratic political process: they ensure that all relevant information, views, arguments, and options are placed before the

[242] Balkin, above n 236, 4. A cultural democracy requires 'robust engagement by persons in their surrounding culture, to take an active part in social processes of meaning-making.' Bracha and Syed, above n 151, 229.
[243] Bracha and Syed, above n 151, 256.
[244] Ibid.
[245] Bracha, 'Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property (Symposium: Frontiers of Intellectual Property)', above n 218, 1846.
[246] Ibid 1846-1847.
[247] Ibid 1846.
[248] Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106(2) *The Yale Law Journal* 283, 343.
[249] Bracha, 'Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property (Symposium: Frontiers of Intellectual Property)', above n 218, 1845.

> public, considered and deliberated, and they cultivate an empowered sovereign citizenry.[250]

Diversity and participation drive experiences of human flourishing, but they are also important to our social and political conditions: a democratic system is enriched by a diverse and decentralised culture.[251] In this way, cultural theory is concerned with social welfare, however, unlike the economic incentive theory, the measures of social welfare are not levels of wealth and consumption but diversity and participation.[252] Rather than observing patterns of creative practice and consumption in the aggregate, the cultural theory approach requires an analysis of what is being produced, who is producing it and how equitably it is being accessed and engaged.[253] It calls for an examination of material and cultural conditions.

5.2 Cultural Theory, Creativity and Copyright

Cultural theory recognises the social nature of creative practice. As Cohen defines, creativity is 'an emergent property of social and cultural systems, continually shaped by and shaping other social changes.'[254] Accordingly, in the cultural theory account, creativity is not a wholly unknowable wonder. It is a social experience 'shaped by all that is culture, including the demands and conventions of knowledge communities and the conventions that crystallize around particular artifacts, places, technologies, and materials.'[255] Cultural theory posits creativity is an intrinsic feature of human nature. Professor Madhavi Sunder describes, '[c]ultural theory takes as a starting point that human beings are creative and cultural, continually seeking to make and remake our world, contributing to commerce and culture,

[250] Ibid.
[251] For discussions on the links between information, media and democracy see, eg, Saima Saeed, 'Negotiating Power: Community Media, Democracy, and the Public Sphere' (2009) 19(4-5) *Development in Practice* 466; Richard van der Wurff, 'Do Audiences Receive Diverse Ideas from News Media? Exposure to a Variety of News Media and Personal Characteristics as Determinants of Diversity as Received' (2011) 26(4) *European Journal of Communication* 328; James Bohman, 'Political Communication and the Epistemic Value of Diversity: Deliberation and Legitimation in Media Societies' (2007) 17(4) *Communication Theory* 348; Serena Carpenter, 'A Study of Content Diversity in Online Citizen Journalism and Online Newspaper Articles' (2010) 12(7) *New Media & Society* 1064; Antonio Ciaglia, 'Pluralism of the System, Pluralism in the System' (2013) 75(4) *International Communication Gazette* 410; D Raeijmaekers and P Maeseele, 'Media, Pluralism and Democracy: What's in a Name?' (2015) 37(7) *Media, Culture and Society* 1042.
[252] Bracha, 'Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property (Symposium: Frontiers of Intellectual Property)', above n 218, 1844.
[253] Sunder, above n 135, 259.
[254] Cohen, 'Creativity and Culture in Copyright Theory (Symposium: Intellectual Property and Social Justice)', above n 161, 1177.
[255] Ibid 1183.

science and spirituality.'[256] As we make and remake our world, we draw upon and contribute to our culture. In this context, creativity takes on new significance. Rather than an outcome valuable only to an individual or to society in the aggregate, creativity is also valuable as a process, 'the process of making-meaning contributes to human flourishing.'[257]

Given the relationship between creative practice and human flourishing and of cultural conditions to democratic political systems, cultural theory suggests copyright regimes should support opportunities for participation in meaning-making and expressive diversity. Professor Rebecca Tushnet elucidates:

> respect for creativity, and for the possibility that every person has new meaning to contribute, should be at the core of our copyright policy. Instead of monetary rewards or even artistic control of how works are transmitted to others as our highest value, we should aim for policies that maximize participation — even when that changes the mix of economic winners and losers. Economic reward and control rights are likely to be part of the proper balance, but only part.[258]

Importantly, cultural theory embraces copyright's economic function and the private interests of authors but also suggests 'allocative efficiency or protecting authors' reputational interest in their work should, in cases of conflict, give way to copyright's vital role in promoting independent thought and the robust exchange of ideas'.[259]

The objective for copyright lawmakers is to provide authors enough exclusive rights to provide them economic opportunity and to protect their personal interests, but at the same time to avoid creating a regime that may 'chill expressive diversity and hinder the exchange of information

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[256] Sunder, above n 135, 323.
[257] Rebecca Tushnet, 'Economies of Desire: Fair Use and Marketplace Assumptions (Boundaries of Intellectual Property Symposium)' (2009) 51(2) *William and Mary Law Review* 513, 537. Scholars such as Professors Julie Cohen and Rebecca Tushnet argue creative occurs through play. In this context, play is not childish amusement but is a social phenomenon, an aspect of humanity that extends from childhood into adulthood. Play is a process by which we engage with objects and meanings in our lives, a 'process of open-ended encounter'. Cohen, *Configuring the Networked Self*, above n 162, 54. Tushnet agrees, '[p]lay can be serious and intense, or relaxed, but mainly play is unpredictable.' Tushnet at 527.
[258] Tushnet, 'Economies of Desire: Fair Use and Marketplace Assumptions (Boundaries of Intellectual Property Symposium)', above n 257, 539.
[259] Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena', above n 15, 227.

and ideas.'[260] In other words, achieving the conditions of a cultural democracy includes providing both economic opportunity for creators and sufficient public access to existing resources to facilitate meaningful opportunity for cultural participation.[261]

Within the cultural theory framework, consideration for authors' economic and non-economic interests — including those articulated by the labour, personality and incentive theories — forms part of a broad evaluation of the role copyright plays in contemporary society and in the facilitation of activities fundamental to our existence as social and creative beings. Accordingly, the cultural theory framework encompasses both of the foundational objectives of copyright law that I discussed in Chapter 1: to protect and advance the private interests of authors of expressive works and to ensure the continued advancement of knowledge and creativity through public access to the ideas and information contained in expressive works.

Like economic incentive theory, within the cultural theory account copyright is an instrument. It is an instrument for regulating the production and circulation of information and ideas and it is a 'legal regime governing the exercise and distribution of cultural power and wealth.'[262] Unlike the economic approach, which calls attention to an economic efficiency formula, cultural theory requires policy-makers be attentive to a broad range of consequences of copyright. According to Professors Oren Bracha and Talha Syed, this includes 'comprehensive interest in the full array of consequences attributable to a particular rule, including effects on individuals not privy to the regulated behavior, and the forward-looking effects'.[263] Cultural theory provides no concise formula for copyright rule-making but calls for consideration of a broad range of variables implicated by copyright.

An obvious criticism of the cultural theory approach is that it is paternalistic, demanding government intervention to craft laws that influence our behaviour in accordance with a

[260] Ibid 220.
[261] Bracha, 'Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property (Symposium: Frontiers of Intellectual Property)', above n 218, 1848. Netanel relates, '[w]hile the democratic paradigm may incorporate neoclassicist insights about how copyright operates in the market, it makes clear that copyright's paramount objective is not allocative efficiency, but citizen participation in democratic self-rule.' Netanel, 'Copyright and a Democratic Civil Society', above n 248, 386. According to Netanel, copyright should 'circumscribe the propertization (sic) of publicly disseminated expression, even as it grants a limited monopoly over the use of expression'. At 363.
[262] Sunder, above n 135, 275. Sunder also suggest copyright should be understood as regulating social and cultural relations. At 274.
[263] Bracha and Syed, above n 151, 234.

preordained plan.[264] While a valid assessment to some degree, it is not uniquely true of cultural theory. All political and economic structures require intervention to sustain their forms. Governments make choices regarding the allocation of resources and state coercion in order to create and enforce laws. Even (or perhaps especially) property rights are not a singular, static phenomenon. As Bracha explains, 'property rights involve a multitude of choices among various institutional forms'.[265] Copyright in particular, embodies a multiplicity of choices. Despite the conventional account, copyright is not a natural property right. It is a selection of rights and regulations governing ownership, control, access, liability and so forth. Copyright is a selection of politically constructed and contested proposals.[266] As Balkin describes, rights are not fixed but are 'a terrain of struggle in a world of continuous change—a site of ongoing controversies, a battleground where the shape and contours of the terrain are remade with each victory.'[267] The challenge for those concerned with crafting copyright law in the public interest is controlling which actors are permitted to influence the shape and contours of the law. Private actors have a long history of influence over modern copyright law and, while the cast of actors may have changed, as this thesis shows, their influence has not declined in the digital age.

5.3 Cultural Theory of Copyright: A Theory Fit for the Digital Age

Just as Locke's labour theory suited the political and economic conditions of the time in which it was formulated, the cultural theory approach appears to befit current times. The complexities and far-reaching consequences of copyright in the digital environment require a broad framework of analysis. The authors' rights and economic incentive theories of copyright set narrow parameters — they frame copyright as an issue mostly relevant to the markets for creative works. Yet, contemporary copyright is not simply an authors' rights regime.[268]

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[264] Fisher, 'Theories of Intellectual Property', above n 130, 192; Fisher III, 'Reconstructing the Fair Use Doctrine', above n 191, 1762-1766.

[265] Bracha, 'Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property (Symposium: Frontiers of Intellectual Property)', above n 218, 1807.

[266] Bracha suggests '[o]nce the premise of one essential form disappears, such choices about the configuration of specific rights require convincing normative support'. Ibid 1807. As I have presented in early sections of this chapter, the political history of copyright reveals the contested nature of the doctrines of authorship and originality in the copyright orthodoxy and, by recognizing these concepts as 'politically, socially, and legally constructed metaphors lacking any essential meaning, it may be possible to reconsider their role and substance in a way that allows them to better serve their function in the furtherance of copyright's public purposes.' Craig, above n 149, 233.

[267] See Balkin who notes, 'the nature, scope, and boundaries of rights, and in particular fundamental rights like speech, are continually shifting with historical, political, economic, and technological changes in the world.' Balkin, above n 236, 55.

[268] As discussed above, Tim Wu argues copyright law is both about authors rights and communications policy. See Wu, 'Copyright's Communications Policy', above n 46.

Copyright implicates actors beyond authors and rightsholders and, more than ever before, copyright regimes regulate the flow of information and distribution of power within societies and economies.[269]

Many cultural theory accounts have argued for the potential of digital technology to serve the goals of a cultural democracy — diversity, participation and human flourishing. The shift from an industrial to a digital information economy has permitted a wider variety of works to be produced, distributed and consumed, works that previously 'could not pass the filter of marketability in the mass-media environment'.[270] New technologies provide low-cost tools for the creation and dissemination of works, providing opportunities to participate in the processes of meaning-making.[271] As Sunder explains, '[i]nternet users can create culture rather than receive it from some omnipotent central stations in the heavens.'[272] In this way, '[d]igitization has the potential to redistribute meaning-making power by shifting that power over meaning from authors, and other producers of information, to users'.[273] Furthermore, digital creativity is not physically constrained: '[t]he boundaries of creative works seem less fixed and more readily amenable to revision, and this creates new fluidity in the cultural environment'.[274]

Yet, digital technologies have also altered the relationship between copyright enforcement and everyday creative expression. In the physical world, copyright owners are less able to enforce their rights. If someone plays a David Bowie song on their guitar at a dinner party, it is unlikely the performance will come to the attention of a copyright owner. And, if it did, it is unlikely the copyright owner would be upset their permission had not been sought. In the physical setting, the risk of triggering copyright liability is limited. Shared on a digital network and the risk increases dramatically. Upload a video of the dinner party performance to YouTube and

[269] As I discussed in Chapter 1, contemporary copyright regimes regulate the market for media and entertainment content, but they also regulate digital information and communication networks, the development and administration of technologies and daily social and cultural interactions.
[270] Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, above n 204, 175.
[271] As Professor Seth Lewis notes, '[i]n a world of ones and zeros, information is no longer scarce, hard to produce, nor difficult to repurpose and share.' Seth C Lewis, 'The Tension Between Professional Control and Open Participation: Journalism and its Boundaries' (2012) 15(6) *Information, Communication & Society* 836, 838.
[272] Sunder, above n 135, 277.
[273] Elkin-Koren, 'Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace', above n 239, 236.
[274] Cohen, *Configuring the Networked Self*, above n 162, 99.

the video is likely to be algorithmically blocked or monetised by an entity that holds rights to Bowie's original work.[275] Enforcement is often the default response in the digital environment.

There is a powerful conflict at the core of the digital copyright experience. Digital technology creates new avenues for participation, diversity, equality and autonomy, but it also brings with it new and more efficient ways to enforce copyright, censor content and restrict participation.[276] Professor Sonia Katyal describes:

> This new surveillance exposes the paradoxical nature of the Internet: It offers both the consumer and creator a seemingly endless capacity for human expression — a virtual marketplace of ideas — alongside an insurmountable array of capacities for panoptic surveillance. As a result, the Internet both enables and silences speech, often simultaneously.[277]

As this thesis shows, Google occupies a central position in this conflict. Through its provision of technology and its facilitation of public access to information and content, Google has the capacity to be an agent of human flourishing. At the same time, Google also has the capacity to restrict participation and diversity. As a dominant information provider in the digital environment, Google has the capacity to be an agent for or against the common good, as envisaged by cultural theory.[278]

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[275] As will be discussed further in this thesis, digital technologies enable unilateral, algorithmic, large-scale, pre-emptive copyright enforcement. See Cohen: '"rights management" technologies that will allow copyright owners to set unilaterally and enforce automatically the terms and conditions of access to digital content. These new technologies radically change the copyright landscape'. Cohen, 'Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"', above n 77, 470-471. Professor Peter Yu argues '[o]ut of all the internationally recognized human rights, the right to freedom of opinion and expression is most threatened by digital copyright enforcement measures.' Peter K Yu, 'Digital Copyright Enforcement Measures and Their Human Rights Threats' (2015), 456. Yu posits:

> Because images, audio files and video clips are now highly important to communication in the digital environment, the tensions and conflicts raised by digital copyright enforcement measures have greatly escalated. For many internet users, the reuse of copyrighted contents is badly needed if they are to actively participate in the online communities.

[276] Elkin-Koren describes, '[w]hile cyberspace enables individuals to access, manipulate and distribute information, and thereby to participate in political deliberation, it also enhances capabilities of restricting and monitoring access to information.' Elkin-Koren, 'Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace', above n 239, 267.

[277] Discussing the tension between property and privacy, see Sonia K Katyal, 'The New Surveillance' (2003) 54(2) *Case Western Reserve Law Review* 297, 299.

[278] Professor Molly Shaffer Van Houweling presents this argument in terms of the distribution of expressive opportunities:

> New technologies for making and distributing creative works are making powerful creativity possible for poorly financed creators. But when this kind of powerful creativity builds on the work of others, it can trigger copyright enforcement. So while the benefits of copyright

Cultural theory also raises deeper questions of power and equality in society. In a global, networked society, more than ever, information is a 'strategic economic resource'.[279] As an increasingly important strategic economic resource, the actors that own information and those that own the infrastructure that facilitates access to it — actors like Google — have become exceptionally powerful. Professor Sheila Jasanoff notes, '[c]ontrolling the kinds of information that people see when they search is a new and unregulated kind of private power. Formerly, it was primarily the nation-state that regulated information flow, through its control of public education and, to greater or lesser extent, news media.'[280]

In the copyright context, a challenge for lawmakers is to ensure that this power does not diminish diversity and participation in meaning-making. Balkin explains:

> Both technological architectures and legal regimes of regulation must be structured to make possible full and robust participation by individuals… That is because the key forms of capital in the digital era—intellectual property and telecommunications networks—can serve both as conduits for increased democratic cultural participation or as chokepoints and bottlenecks, centralizing control in the hands of a relatively few persons and organizations. What form informational capital will take, how it will be used, how it will be shared or if it will be shared at all, are the crucial questions of the digital age.[281]

Balkin further warns that the 'conflicts over capital and property are very real. If they are resolved in the wrong way, they will greatly erode the system of free expression and undermine

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> may be less necessary for poorly financed creators than they were in the past, the burdens are heavier. And they can fall on those who do not exploit the benefits that copyright offers. Unfortunately, just as these technological changes are distorting copyright's distributive impact, standard copyright analysis has become increasingly blind to distributive concerns.

Shaffer Van Houweling, above n 16, 266. See also Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena', above n 15, 226. How law and policy-makers respond to this conflict will depend upon their understanding of the function and purpose of copyright. If copyright is framed as an author's private property right, law and policy outcomes will favour enforcement of private property rights over public access and participation rights. If a cultural theory framework is adopted, the issue may be evaluated in terms of how it furthers the conditions of a cultural democracy.

[279] Fuchs, above n 123, 77.

[280] Sheila Jasanoff, *The Ethics of Invention: Technology and the Human Future* (WW Norton & Company, 2016) 167.

[281] Balkin, above n 236, 52.

much of the promise of the digital age for the realization of a truly participatory culture.'[282] Again, this issue strikes at the heart of Google's position in contemporary society. As I discuss in this thesis, Google has amassed immense information resources; resources that provide it economic, social and political influence.

Cultural theory positions copyright as a critical policy issue of our time. For, as Professor Joseph Stigletz contends, '[h]ow we regulate and manage the production of knowledge and the right of access to knowledge is at the center of how well this new economy, the knowledge economy, works and of who benefits.'[283] Throughout its modern history, economic, political, social and technological forces have influenced copyright. As we move deeper into the digital age, cultural theory provides a framework that can both account for and help guide democratic responses to the current wave of forces.

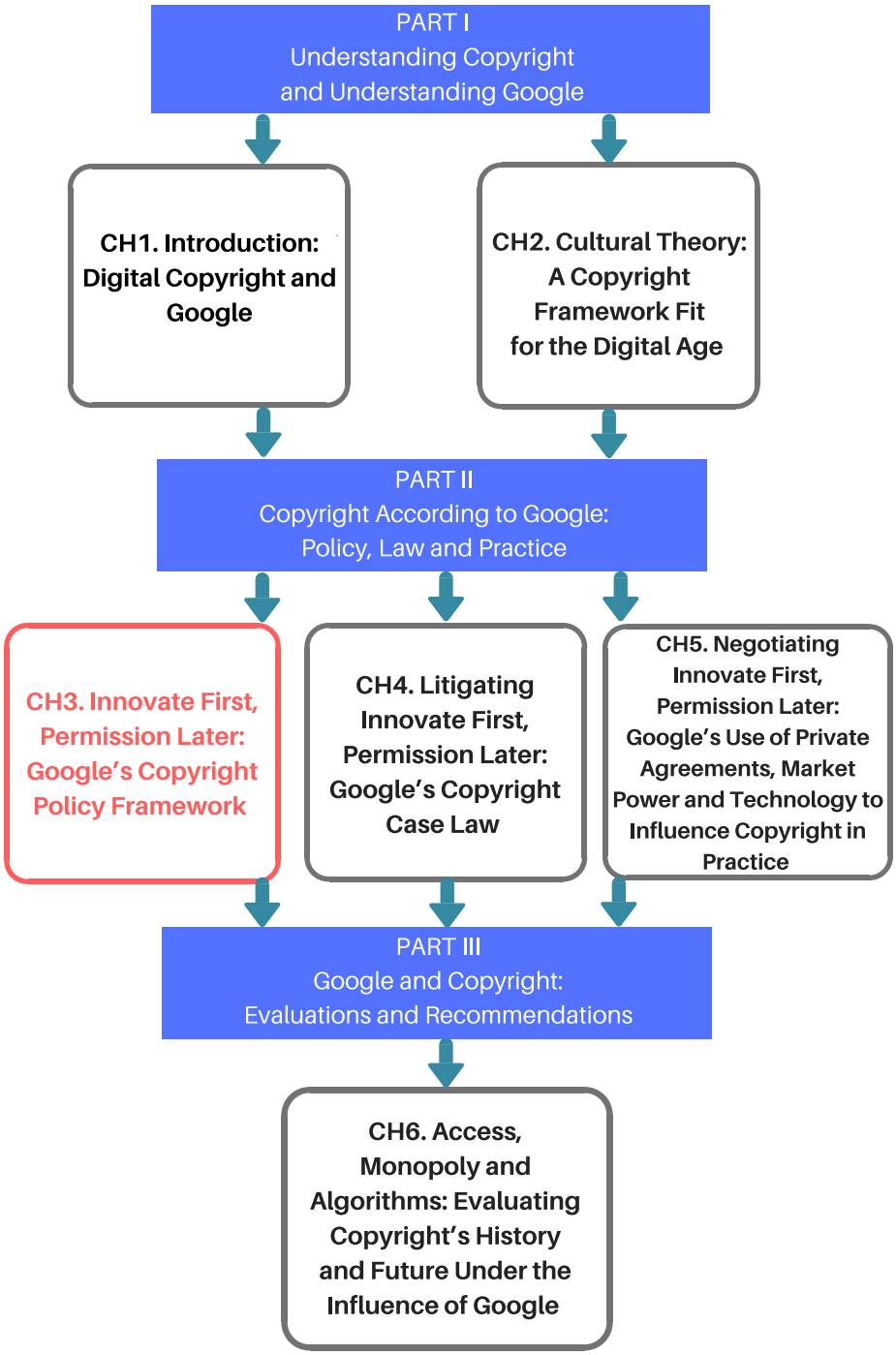
6. Conclusion

Understanding Google's influence upon copyright law and practice requires a framework that extends beyond abstract concepts of authors' rights and market transactions. It requires consideration of the social, economic and political consequences of copyright and the distribution of power in the digital environment. In the cultural theory paradigm, copyright is an instrument that regulates participation in processes of meaning-making, and copyright issues are evaluated according to how they impact upon a cultural democracy. That is, whether they support or impede a culture in which all people have the opportunity to participate in the creation of ideas that circulate in society. Cultural theory frames copyright issues in a useful way, exposing the political, economic and social dynamics that intersect with copyright law. It is through this broadened view of copyright, including cultural theory's normative proposals, that I evaluate Google's influence on copyright law and practice.

[282] Ibid 3.
[283] Stiglitz, above n 204, 1695.

PART II

Copyright According to Google:
Policy, Law and Practice


PART I
Understanding Copyright
and Understanding Google
CH1. Introduction: Digital Copyright and Google
CH2. Cultural Theory: A Copyright Framework Fit for the Digital Age
PART II
Copyright According to Google:
Policy, Law and Practice
CH3. Innovate First, Permission Later: Google's Copyright Policy Framework
CH4. Litigating Innovate First, Permission Later: Google's Copyright Case Law
CH5. Negotiating Innovate First, Permission Later: Google's Use of Private Agreements, Market Power and Technology to Influence Copyright in Practice
PART III
Google and Copyright:
Evaluations and Recommendations
CH6. Access, Monopoly and Algorithms: Evaluating Copyright's History and Future Under the Influence of Google

CHAPTER 3

Innovate First, Permission Later: Google's Copyright Policy Framework

The traditional approach to copyright assumes permission from rightsholders is required to use copyright subject matter, unless the law provides otherwise. Google challenges this assumption. Google submits that a 'permission first, innovate second' approach to copyright chills innovation and to ensure continued technological advancement copyright must be limited. Accordingly, Google's copyright policy framework prioritises public rights to access and engage with information and content, including strong and flexible exceptions to copyright and limitations on liability. Underpinning Google's framework is a philosophy that technological innovation is virtuous, supporting economic and social progress.

1. Introduction

Google cares about copyright. Upon opening its first office in Washington D.C. in 2005, Google confirmed the key policy issues for the company were net neutrality, copyright, fair use and intermediary liability.[284] Google explained its political mission was to '[d]efend the Internet as a free and open platform for information, communication and innovation'.[285] Between 2012-16, Google spent over USD 82 000 000 lobbying the United States government and, according to disclosure reports, during that period, Google most frequently lobbied on issues of intellectual property law.[286] As well, Google is one of the most active lobbyists within

[284] Andrew McLaughlin, 'Google Goes to Washington ' on *Google Official Blog* (6 October 2005) <https://googleblog.blogspot.com.au/2005/10/google-goes-to-washington.html>.
[285] Ibid.
[286] This figure was derived from the data collated by the Centre for Responsive Politics. The Centre for Responsible Politics compiles United States lobbying data using disclosure reports filed with the Secretary of the Senate's Office of Public Records. The category selected by Google most frequently on its disclosure reports was 'Copyright, Patent, Trademark'. See Center for Responsive Politics, *Google Inc* <http://www.opensecrets.org/lobby/>.

the European Union, declaring 157 meetings with European Commission officials between 2014-17.[287] What is it that Google seeks when it lobbies lawmakers on issues of copyright? What is Google's vision for copyright law? In this chapter, I provide a thorough understanding of Google's copyright agenda. I do so by drawing upon submissions made by Google to government agencies in jurisdictions throughout the world, as part of public consultations on proposed copyright law reforms.[288]

Unifying themes emerge from an analysis of Google's submissions. Google approaches copyright law from the perspective of an innovator and appeals to the social and economic benefits of the internet and technological innovation. According to Google, the social and economic benefits of the digital environment renders the conventional accounts of copyright inappropriate. Google calls for a transformed view, one that is sensitive to the relationship between technological innovation and rights to access and use information and content. Google proposes that for society to benefit from technological innovation and the free flow of information in the digital environment, the exclusionary rights provided by copyright must be limited and public rights strengthened.

1.1 Google's Innovation Idealism

Google presents technological innovation as a democratising force — enriching lives economically, socially and politically. Google asserts new technologies have

> democratized communication and creation of information. Capabilities that were once only available to the largest corporations are now available to businesses, political movements, governments, and individuals alike. There

[287] The number of registered meetings provides an indication of lobbying activity within the European Union. The second most active company for the same period was Airbus Group with 120 meetings, followed by Microsoft with 86 meetings. Lobby Facts, Statistics <https://lobbyfacts.eu/reports/lobby-costs/all/0/2/2/2/21/0?sort=meetings&order=desc>. The European Commission's Transparency Register reports Google spent an estimated €5,250,000 - €5,499,999 on lobbying in 2016. Europa Transparency Register, *Google* <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=03181945560-59>.

[288] Drawing on these submissions, as much as possible throughout the chapter, I have tried to use Google's own words, in order to ensure an accurate representation of Google's position. A full list of the submissions collected, including a summary of the key recommendations made by Google in each submission, is provided at the end of this chapter (Figure 3.2).

> is no longer a need to manage servers, updates, and patches; instead, users simply refresh their browser.[289]

According to Google, '[e]very year, it gets clearer that the web helps lead to more successful businesses, stronger economies, more vibrant towns, and more prosperous communities.'[290] For Google, the unremitting march of technology is a positive force in contemporary society.

Google regularly emphasises the social value of its own products and services. Google posits that 'a well functioning society should have abundant, free and unbiased access to high quality information'[291] and, therefore, facilitating internet search is 'an unusually important task'.[292] Google deems Google Books an undertaking in expanding human knowledge[293] and YouTube a tool for social justice. Brin explains:

> While it may have been known for its "lolcats" videos several years ago, YouTube is now used for citizen engagement (such as interviews with President Obama), documenting human rights violations (such as in Tunisia, Egypt, and Libya), full-length movies, education, and much more…The ability to easily publish video has leveled the playing field between the select few and the rest of the world in terms of being able to communicate using this powerful medium.[294]

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[289] Sergey Brin, *2010 Founders' Letter* (2010) Alphabet <https://abc.xyz/investor/founders-letters/2010/>. Page and Brin's involvement with the open source movement informs their belief in the democratising power of technology. Page explains, 'Sergey and I (and Google) grew up with Linux and we have all benefited greatly from that open model. We believe that it is a great way to run a healthy and vibrant high tech ecosystem'. Larry Page and Sergey Brin, *2009 Founders' Letter* (2009) Alphabet <https://abc.xyz/investor/founders-letters/2009/>. Several of Google's products are open source — including Chrome, Chrome OS, Maps and Android — and Google posits that by making these products open source they are encouraging innovation by other developers. Matt Dawes explains: '[o]ur open platforms and services like Android and Google Maps enable other technology developers to create new phones, web services and applications within their own products.' Google, 'Letter from M Dawes, Public Policy & Government Affairs Google Australia to Professor Jill McKeough, ALRC Review 'Copyright and the Digital Economy Google submission" (2012), 7. Of course, said technology developers are innovating and creating within the parameters of Google's platforms.

[290] Jim Lecinski, 'Growing America's Businesses Online' on *Google Public Policy Blog* (17 July 2014) <https://publicpolicy.googleblog.com/2014/07/growing-americas-businesses-online.html>.

[291] Larry Page and Sergey Brin, *2004 Founders' IPO Letter* (2004) Alphabet <https://abc.xyz/investor/founders-letters/2004/ipo-letter.html>.

[292] Ibid.

[293] Brin, above n 289.

[294] Ibid.

As a technology company that provides access to information and content, Google presents itself as a benevolent entrepreneurial endeavour.

Google's co-founder, Larry Page, claims to have had benevolent entrepreneurial aspirations from a young age. Ken Auletta describes a conversation with Page:

> 'I realized I wanted to invent things, but I also wanted to change the world,' Page once said. He became convinced that in order to effect scientific change he needed to start a business. Inventing things, he once said, 'wasn't any good; you really had to get them out into the world and have people use them to have any effect. So probably from when I was about 12, I knew I was going to start a company'[295]

Page's mix of both grand scientific and commercial ambition captures something intrinsic to Google. Google articulates lofty social justice goals and espouses the social benefits of innovation and the free flow of information online. Google develops products that facilitate access to and engagement with information and technology. Google claims to provide access to these products freely and indiscriminately.[296] Yet, Google is a private company, unabashedly amassing immense wealth by systematically profiting from the use of information online. Google's rhetoric and practices exhibit a heady blend of both public and private values.

Google's distinctive socially conscious entrepreneurialism aligns with what Professors Richard Barbrook and Andy Cameron identify as the Californian ideology.[297] Barbrook and Cameron describe the Californian ideology as a 'contradictory mix of technological determinism and libertarian individualism',[298] emerging from 'a bizarre fusion of the cultural bohemianism of San Francisco with the hi-tech industries of Silicon Valley'.[299] In the Silicon Valley context, the unlikely combination of cultural bohemianism and capitalistic entrepreneurialism occurs through 'a profound faith in the emancipatory potential of the new information

[295] Ken Auletta, *Googled: The End of the World As We Know It* (Random House, 2010) 33. Similarly, Sergey Brin lists physicist Richard P Feynman, Steve Jobs and Warren Buffet as 'heroes': at 29-30.
[296] See, eg, Brin, above n 289.
[297] Richard Barbrook and Andy Cameron, 'The Californian Ideology' (1996) 6(1) *Science as Culture* 44.
[298] Ibid 49. Technological determinism refers to the belief that 'technologies have a built-in momentum that shapes and drives the course of history.' Jasanoff, above n 280, 247.
[299] Barbrook and Cameron, above n 297, 44-45. For a historical account of the initial convergence of San Francisco's counterculture and Silicon Valley see Fred Turner, *From Counterculture to Cyberculture: Stewart Brand, the Whole Earth Network, and the Rise of Digital Utopianism* (University of Chicago Press, 2010).

technologies'.[300] Professors Mihaela Kelemen and Warren Smith term this philosophical viewpoint 'cyberliberarianism' and suggest 'cyberlibertarian rhetoric has risen to prominence by capitalizing upon two ideas which lie at the heart of modern civilization: the power of technology and the power of the individual.'[301]

A philosophical mix of technological determinism and economic liberalism is apparent, for example, in Sergey Brin's assertion that technological innovation is inherently virtuous:

> The Internet, mobile phones, and other technologies are having profound effects on the spread of information and the lives of people worldwide. It's a virtuous circle, with the information revolution directly accelerating the pace of technical development as inventors and entrepreneurs benefit from the increased demand for new products, the opening of new markets and dramatic gains in productivity.[302]

A political consequence of an ideological mix of economic liberalism and technological determinism is distrust of government regulation.[303] If technological innovation produces democratic outcomes, enriching the lives of individuals and improving economies and societies, surely it should remain free from government interference.[304] Indeed, Google has stated, '[i]n an increasingly data driven digital world, it is essential that policymakers both minimise regulatory impediments to not only digital based businesses models, but also to

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[300] Barbrook and Cameron, above n 297, 45.

[301] Mihaela Kelemen and Warren Smith, 'Community and its "Virtual" Promises: A Critique of Cyberlibertarian Rhetoric' (2001) 4(3) *Information, Communication & Society* 370, 371. Barbrook and Cameron use a similar term: 'hi-tech libertarianism: a bizarre mishmash of hippie anarchism and economic liberalism beefed up with lots of technological determinism'. Barbrook and Cameron, above n 297, 56.

[302] Brin, above n 289.

[303] Barbrook and Cameron, above n 297, 56. See also Paulina Borsook, 'Cyberselfish: Ravers, Guilders, Cypherpunks, and other Silicon Valley Life-Forms' (2001) 3 *Yale Journal of Law and Technology* 4. Consider too Evgeny Morozo's critique of Silicon Valley's technological solutionism describing the philosophy that any phenomenon can become a 'problem' simply because technology can provide a solution:

> They are driven by a pervasive and dangerous ideology that I call "solutionism": an intellectual pathology that recognizes problems as problems based on just one criterion: whether they are "solvable" with a nice and clean technological solution at our disposal…and not because we've weighed all the philosophical pros and cons.

Evgeny Morozov, 'The Perils of Perfection', *New York Times* (online) <http://www.nytimes.com/2013/03/03/opinion/sunday/the-perils-of-perfection.html>.

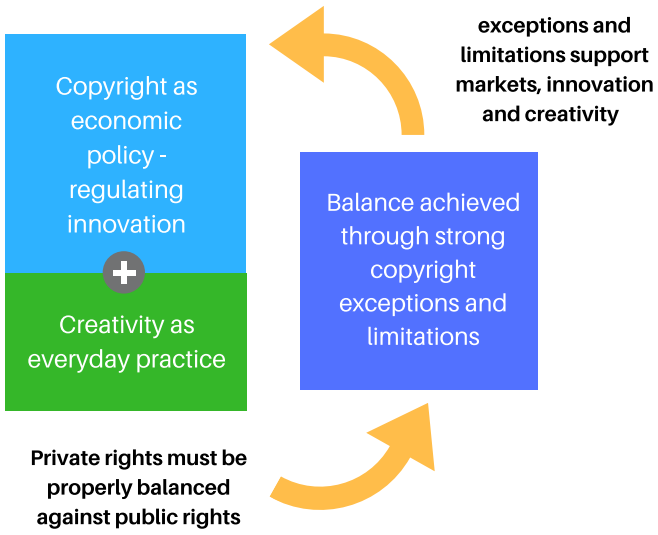
[304] See also O Bracha and F Pasquale, 'Federal Search Commission? Access, Fairness, and Accountability in the Law of Search' (2008) 93 *Cornell Law Review* 1149, 1157.

traditional businesses that are increasingly using digital technologies'.[305] Government regulation, it seems, risks stifling virtuous market and technological forces. In this way, cyberlibertarianism (or the Californian ideology) aligns with the neoliberal framework: both conclude free markets are preferable to government regulation. As we will see, Google's copyright framework is underpinned by this philosophical mix of technological determinism and economic liberalisms; to justify its copyright agenda Google appeals to the efficacy of free markets and unbounded innovation.

Broadly, within Google's copyright framework, copyright is positioned as economic policy. Google suggests governments should create copyright regimes that support innovation in order to encourage economic growth. Google argues current copyright laws are unsuited to contemporary patterns of innovation and creative practice, favouring established content industries over new modes. Given these conditions, Google argues public rights to access and engage with content and information should be strengthened. Google suggests this may be achieved by implementing strong and flexible exceptions to copyright and limitations on liability. Google claims exceptions and limitations benefit both the public and rightsholders because they facilitate innovation, innovation that will lead to the development of new market-based content distribution services to meet consumer demands. In addition to exceptions and limitations, Google suggests markets for content may also be improved through licensing reforms. Google maintains that the current regimes for licensing works for use in the digital environment are inefficient and impede innovation. These proposals are surveyed in the remainder of this chapter.

[305] Google, Submission to Productivity Commission Issues Paper, *Business Set-up, Transfer and Closure*, 23 March 2015, 5 <http://www.pc.gov.au/__data/assets/pdf_file/0004/188122/sub037-business.pdf>.

Figure 3.1 **The Conceptual Foundations of Google's Copyright Policy Framework**



2. Google's Copyright Policy Framework

2.1 Copyright as Economic Policy

Google urges policy-makers to consider copyright 'an aspect of economic policy'.[306] In 2011, Google submitted to the Irish government that if Ireland were to implement 'a flexible copyright regime that enables and encourages new technologies'[307] the digital economy would be key to Ireland's economic recovery.[308] In 2013, Google submitted to the Australian government that copyright reforms had the potential to unlock AUD 600 000 000 in productivity gains.[309] Google reasoned 'more flexible, technology-neutral copyright laws'[310] could unlock this potential, specifically in the areas of education, research, libraries, cultural institutions and digital services.[311] In 2015, Google warned Australia's Productivity

[306] Google, 'Letter from Matt Dawes Public Policy and Government Affairs Google Australia to Professor Jill McKeough, Commissioner of ALRC "ALRC Review — Copyright and the Digital Economy"', 30 November 2012, 22 <http://www.alrc.gov.au/sites/default/files/subs/217._org_google.pdf>. In the same submission, Google counselled the Australian government that '[c]opyright will become an increasingly crucial element of economic policy as Australia transitions to a leading digital economy that relies heavily on knowledge, innovation & [sic] creativity': at 1.
[307] Google, 'Submission to the Copyright Review Committee (Ireland)' (July 2011), 2. Google argued inflexibility in Ireland's current regime was a barrier to creativity, innovation and economic growth. Ibid 5.
[308] Ibid 1-2.
[309] Google Australia, Submission to Issues Paper Competition Policy Review, 10 June 2014, 14 <http://competitionpolicyreview.gov.au/files/2014/06/Google.pdf>.
[310] Ibid.
[311] Ibid.

Commission that without copyright reform 'there is far less scope for new Australian businesses capitalising on the next wave of innovation, unlocking new investments and economic growth.'[312] In Hong Kong, Google linked the adoption of a copyright exception for parodies to economic policy, submitting 'a parody exception will bolster its status regionally and internationally as a critical place to do business because of its free flow of information.'[313]

A central assumption within Google's copyright as economic policy framework is that the digital environment is critical to the way in which modern economies function. In 2008, Google urged the European Commission to recognise that the internet is not simply a tool for entertainment but is a 'central communication means in personal and professional life'[314] and provides citizens with 'a diversity of information and public services'.[315] Similarly, in a 2013 submission to the Australian Law Reform Commission (ALRC), Google urged the ALRC to recognise 'the internet is the critical infrastructure of the digital economy'.[316]

A second assumption in Google's economic framework is that copyright law has a significant impact upon technological innovation. Google explains:

> The innovative technologies that underpin the development of the digital economy depend on making and transmitting multiple copies of content in which copyright subsists, which means they are themselves deeply affected by copyright law.[317]

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[312] Google, 'Submission to Productivity Commission Issues Paper 'Business Set-up, Transfer and Closure'', above n 305, 6.

[313] Asian Internet Coalition, 'Letter from John Ure to Division 3 Commerce Industry and Tourism Branch Commerce and Economic Development Bureau of Hong Kong "Comments on the *Hong Kong Copyright Law* – Parody Exception"', 11 November 2013, 1 <http://www.asiainternetcoalition.org/wp-content/uploads/2013/11/AIC-comments-to-the-HK-LEGCO-Copyright-Bill-dialogue.pdf>. In 2010, Google and eBay founded the Asian Internet Coalition with the objective of promoting 'the understanding and resolution of Internet policy issues in the Asia Pacific region' with current members including Yahoo, Apple, Facebook, LinkedIn and Twitter. Asian Internet Coalition, 'Asian Internet Coalition An Introduction' <http://www.asiainternetcoalition.org/wp-content/uploads/2013/11/About-AIC_29-Oct.pdf>.

[314] Google, *Google Contribution on Creative Content Online* (29 August 2008), 7 <http://ec.europa.eu/archives/information_society/avpolicy/docs/other_actions/col_2008/comp/google_en.pdf>.

[315] Ibid.

[316] Google, Submission to ALRC Discussion Paper *Copyright in the Digital Economy* (ALRC DP 79), 2013, 1, 17 <http://www.alrc.gov.au/sites/default/files/subs/600._org_google.pdf>.

[317] Google Australia, Submission to the Productivity Commission Intellectual Property Arrangements Issues Paper, 15 December 2015, 1 <http://www.pc.gov.au/__data/assets/pdf_file/0011/194861/sub102-intellectual-property.pdf>.

Google further describes, '[t]he very nature of the Internet involves the making and dissemination of copies of information, whether it be through web search where Internet pages must be copied and stored in order to be indexed, through emails, or even watching an online video of a government press conference.'[318] Essentially, Google argues, '[i]nternet tools make multiple copies in order to deliver the kinds of essential services we now take for granted in our lives.[319] Critically, Google explains that this means '[f]or the first time in history, non-consumptive or everyday activities, occurring billions of time a day throughout the world, give rise to potential copyright liability.'[320] In this setting, Google warns, while copyright 'rightly acts to prevent business models that freely ride on the work of prior creators…it oversteps its purpose, and harms innovation, when it enforces rigid constraints to stifle productive and reasonable new uses of copyrighted works.'[321] According to Google, 'digital and internet technology requires constant, continuous copying of material often on vast scales and globally'[322] and 'such copying should not unreasonably run afoul of laws designed by earlier lawmakers with no concept of digital technology.'[323]

Google posits that '[i]n today's digital environment, copyright is no longer simply an issue of cultural or creative policy, but rather is a core part of innovation policy.'[324] In 2011, Google submitted to an independent review of the United Kingdom's copyright laws that the imposition of traditional copyright arrangements upon new internet-based businesses is effectively the imposition of a copyright tax, in the form of money and time spent trying to 'navigate complex licencing and legal processes'.[325] Google suggests a 'lack of clarity within copyright law together with the high risk nature of a potential breach'[326] constrains innovation and investment in the United Kingdom. In 2013, Google warned the European Commission that an expansion of civil copyright enforcement measures could have a deleterious effect on

[318] Google, 'Letter from Matt Dawes Public Policy and Government Affairs Google Australia to Professor Jill McKeough ALRC 'ALRC Review - Copyright and the Digital Economy'', above n 306, 6.
[319] Google, Submission to the Independent Review of Intellectual Property and Growth (UK), March 2011, 3.5 <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-google.pdf>.
[320] Google, 'Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper', above n 317, 10.
[321] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 7.8.
[322] Ibid 8.1.
[323] Ibid 3.5.
[324] Google, 'Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper', above n 317, 10. See also Google: '[i]n today's digital world, properly understood, copyright must be a key plank in Australia's innovation policy'. Ibid 1.
[325] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 7.10.
[326] Ibid 7.11.

innovation and growth within the European Union. Google cautioned against inducing 'spurious claims'[327] which 'are a material burden upon internet intermediaries'[328] and a disincentive to innovation and investment.[329]

Google suggests policy-makers should strive to create a 'regulatory environment that allows for new business models, new ways for consumers to enjoy creative content, new ways to bring content to market, and new ways of advancing knowledge through research.'[330] Google advises:

> In protecting copyright, the law must not create a culture of "permission first, innovate later" for technology innovators. Such a culture threatens to chill socially beneficial innovation that helps content owners, creators and consumers alike…The copyright framework needs to have the space to allow for the creation of transformative innovations that legislatures do not anticipate.[331]

Google claims, '[t]he importance of an environment – social and regulatory – that fosters innovation is central to Google's story. When Google started as a project of two friends from Stanford University, they didn't have to ask anyone's permission to develop an Internet search engine.'[332] Through its rhetoric and practices, Google challenges the assumption that permission from rightsholders should be obtained to use information and content in the digital environment.

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[327] Google, *Civil Enforcement of Intellectual Property Rights: Public Consultation on the Efficiency of Proceedings and Accessibility of Measures* (28 March 2013), 4 <http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights/contributions/registered-organisations/google-inc_en.pdf>.

[328] Ibid. Google also warned that failure to appreciate this risk could deprive rights holders the fruits of 'innovation that would enable their own businesses to flourish at a later stage'.

[329] Ibid. Google argued that any civil enforcement measures should contain an adverse costs order so that speculative claims are discouraged. At 10.

[330] Google, 'Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper', above n 317, 11.

[331] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 5.4.

[332] Google, 'Letter from Carolyn Dalton Head of Public Policy and Government Affairs Google Australia & New Zealand to Department of Broadband Communications and the Digital Economy (Australia) "Consultation Draft: Digital Economy Future Directions Paper"', 11 February 2009, 2.

2.2 Copyright and Creativity

Inasmuch as Google concerns itself with creative practice, Google focuses on new patterns occurring in the digital environment and warns copyright laws can favour established industries and stifle these new modes.[333] In 2011, Google submitted to the Australian government,

> content creation is no longer the sole preserve of "professional" creators…professionally produced content from traditional sources competes and interacts with user generated content shared via social networking sites, blogs and video and photo-sharing sites.[334]

Content industries, Google explains, 'now co-exist with a larger creative community'[335] and 'content consumption and engagement is no longer a one way street: consumers are interactively engaged, responding to content and in that process generating new cultural genres.'[336] In this new environment, according to Google, the conventional categorisation of and dichotomy between authors and consumers is called into question.[337] Google describes, '[t]he model of a professional media sector delivering content to passive consumers has been replaced by a model where the lines between creation and consumption of content have been blurred.'[338]

In 2013, Google submitted to the European Commission that the European Union copyright system was unsuited to contemporary creativity and inconsistent 'with society's legitimate expectations.'[339] Google called for policy-makers to

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[333] For, Google suggests, '[t]he Internet is not just the story of businesses, but also of individuals and social networks'. Ibid 3.
[334] Google, 'Letter from Ishtar Vij Public Policy and Government Affairs Google Australia and New Zealand to Office for The Arts Department of the Prime Minister and Cabinet (Australia) 'National Cultural Policy'' (28 October 2011), 1 <http://creativeaustralia.arts.gov.au/assets/Submission%20420.pdf>.
[335] Google, 'Public Consultation on the Review of the EU Copyright Rules', above n 61, 14.
[336] Google, 'Letter from Ishtar Vij Public Policy and Government Affairs Google Australia and New Zealand to Office for The Arts Department of the Prime Minister and Cabinet (Australia) 'National Cultural Policy'', above n 334, 1. Google has also tacitly rejected the theory that economic incentive is necessary for creative practice stating, '[c]opyright provides an additional, economic incentive for the creation and dissemination of new works, to complement the natural human instinct to be creative.' Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 3.1.
[337] Google, 'Public Consultation on the Review of the EU Copyright Rules', above n 61, 13.
[338] Google, 'Letter from Matt Dawes Public Policy and Government Affairs Google Australia to Professor Jill McKeough ALRC 'ALRC Review - Copyright and the Digital Economy'', above n 306, 35.
[339] Google, 'Public Consultation on the Review of the EU Copyright Rules', above n 61, 13.

> work toward a copyright law that is well suited for 99% of the works being made and 99% of the uses being made. Creation is now everyone's daily activity. The vast majority of works are created by amateurs, are ephemeral in nature, and are not created with any view toward commercial exploitation. Similarly, the vast majority of all uses whether in the form of copies or communications – are personal in nature, as individuals upload and share photographs on Instagram or text messages on WhatsApp.[340]

According to Google, '[i]n the world of digital creativity and automatic copyright, we are all rights-holders, we are all users, and we are all distributors'[341] and relying on such outmoded categorisations 'unhelpfully perpetuates the "them-versus-us" division that has proved so inimical to the development of a unified approach to removing barriers to innovation and creativity'.[342]

2.3 Balanced Copyright

Google argues the social and economic conditions of the digital age — including new patterns of creativity and the critical role of digital technologies — necessitate a copyright regime in which the exclusionary rights of rightsholders are properly balanced against public rights to access and engage with information and content. In 2013, Google submitted to the Australian government that:

> Getting the copyright balance right is critical for the digital economy…If Australia is to achieve its digital economy goals, we need to ensure that policy and regulatory settings support innovation, investment and adoption of digital technology. Nowhere is this more critical than copyright.[343]

[340] Ibid.
[341] Google, Submission to the Copyright Review Committee (Ireland), June 2012, 8 <https://www.djei.ie/en/Consultations/Consultations-files/Google1.pdf>.
[342] Ibid.
[343] Google, Submission to ALRC Discussion Paper *Copyright in the Digital Economy* (ALRC DP 79), above n 316, 3.

And, this balance, according to Google, is primarily achieved through strong exceptions to copyright and limitations on liability, which function as 'a safety valve for what would otherwise be overly broad copyright protection.'[344]

In 2016, Google commended the *Trans-Pacific Partnership Agreement* (TPP) for its balanced approached to copyright.[345] Article 18.66 of the TPP stipulates:

> Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions…including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.[346]

According to Google, 'the TPP balances the interests of copyright holders with the public interest in the wider distribution and use of creative works'[347] and 'promotes a regulatory environment that is well placed to support the innovative technologies that underpin the digital economy'.[348] Google submitted to the New Zealand government the 'this endorsement of balanced copyright is unprecedented for a trade agreement, and has been welcomed by Google.'[349]

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[344] Google New Zealand, 'Letter to Committee Secretariat Foreign Affairs, Defence and Trade Select Committtee (New Zealand) Trans-Pacific Partnership Agreement Amendment Bill', (21 July 2016), 2 <https://www.parliament.nz/resource/en-NZ/51SCFDT_EVI_00DBHOH_BILL68998_1_A524574/8910bff0bfa66dbf7e92aa668ff0be068e6b8756>.

[345] Kent Walker, 'The Trans-Pacific Partnership: A Step Forward for the Internet' on *Google Public Policy Blog* (10 June 2016) <https://blog.google/topics/public-policy/the-trans-pacific-partnership-step/>.

[346] *Trans-Pacific Partnership Agreement*, signed 4 February 2015 (not yet in force). The TPP also includes a requirement for safe harbours for online intermediaries at arts 18.81-82.

[347] Google New Zealand, 'Letter to Committee Secretariat Foreign Affairs, Defence and Trade Select Committtee (New Zealand) Trans-Pacific Partnership Agreement Amendment Bill', above n 344, 1. Although the TPP's political fate seems poor, one might speculate that — like the content industries which after the domestic failure of the United States White Paper shifted their efforts to bilateral and multilateral trade agreements — Google may find international law an effective forum for achieving its desired legislative framework.

[348] Ibid 1. Google has further explained:

> The TPP exports some aspects of US copyright law that strengthen the rights of rights holders, such as extended term of copyright and strong protection for technological protection measures (TPMs). Importantly, however, it does not do this in isolation. Article 18.66 of the TPP also contains a positive obligation for signatory countries to employ limitations and exceptions to achieve "balance" in their copyright law. At 2.

[349] Ibid 1.

For Google, a flexible fair use exception and safe harbours for online intermediaries are the two doctrines most critical to achieving balanced copyright. Google claims these provisions are the 'pillars of the United States copyright framework that enable it to cope with the challenges of rapid technological advance'.[350] The following sections explore Google's assessment of fair use and safe harbours for online intermediaries.

3. A Flexible Fair Use Exception

Invariably, copyright regimes include an exception to the exclusionary rights provided by copyright, establishing that some uses of works without permission from (or remuneration to) rightsholders are fair and do not constitute copyright infringement. In some jurisdictions, the uses that are deemed fair are established in a static list — to be subject to the exception, the use must fall within a category of uses expressly specified by statute.[351] In the United States, the Copyright Act sets out a non-exhaustive list of factors a court must consider in a fair use determination.[352] The first factor is 'the purpose and character of the use, including whether such use is of a commercial nature'.[353] This factor seeks to uncover 'whether and to what extent the new work is "transformative"',[354] or simply supersedes the original work. The second factor is 'the nature of the copyrighted work'.[355] This requires consideration of factors such as whether the copied work was published or unpublished, expressive or factual.[356] The third factor is 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole'.[357] This requires consideration of whether the portion of the work copied was necessary for the purpose and character of the use.[358] The fourth factor is 'the effect of the use upon the potential market for or value of the copyrighted work'.[359] When deciding whether a

[350] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 4.1. See also Google New Zealand, 'Letter to Committee Secretariat Foreign Affairs, Defence and Trade Select Committtee (New Zealand) Trans-Pacific Partnership Agreement Amendment Bill ', above n 344, 2.
[351] See, eg, Australia's fair dealings exception *Copyright Act 1968* (Cth) ss 40-43, ss40-43, 103A-103C.
[352] 17 USC § 107.
[353] 17 USC § 107 (1).
[354] *Campbell v Acuff-Rose Music Inc*, 510 US 569, 579 (1994).
[355] 17 USC § 107 (2).
[356] See, eg, *Blanch v Koons*, 467 F 3d 244 (2nd Cir, 2006).
[357] 17 USC § 107 (3).
[358] See, eg, *Castle Rock Entertainment v Carol Publishing Group*, 159 F 3d 132 (2nd Cir, 1998).
[359] 17 USC § 107 (4).

use is fair, courts will consider all four factors weighed together and 'in light of the purpose of copyright',[360] which is to 'promote the Progress of Science and useful Arts'.[361]

Google submits a flexible fair use exception is necessary in the context of the digital environment.[362] Google explains:

> No matter how forward thinking or careful legislators are, they cannot predict the future. This has always been true, but the consequences of this truth are more pronounced now because the rapid pace of technological innovation brought about by the Internet and digital tools has radically collapsed the time lines for the development of new and innovative goods and services and business models that support them. Put simply, the most appropriate way for effectively and efficiently regulating in a dynamic environment is through a principles-based approach. Static laws that attempt to establish for all time the rules governing technological and market innovation will inevitably remain permanently out of date and impede innovation.[363]

This is why for Google, a flexible exception is preferable to a static exception. Flexible exceptions 'are inherently able to adapt to changing technologies and uses without the need for constant legislative intervention',[364] whereas, Google argues, 'static exceptions will always lag behind the current state of innovation'.[365]

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[360] *Campbell v Acuff-Rose Music Inc*, 510 US 569, 578 (1994). *Kelly v Arriba Soft Corp*, 336 F 3d 811, 818 (9th Cir, 2003).
[361] *United States Constitution* art I s 8 cl 8.
[362] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 4.2.2.
[363] Google, 'Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper', above n 317, 18.
[364] Ibid 2. See also Google's 2013 submission to the Australian government's public consultation regarding the deregulation of Australia's communications sector in which Google argued for the introduction of a flexible fair use provision, proposing it could replace '50 pages of complex and technology specific copyright exceptions'. Google, 'Letter from Iarla Flynn Head of Public Policy Google Australia to The Hon Malcom Turnbull MP Minister for Communications 'Deregulation: Initiatives in the Communications Sector'' (17 December 2013), 4 <https://www.communications.gov.au/sites/g/files/net301/f/webform/hys/doc/Google_0.pdf>.
[365] Google, 'Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper', above n 317, 17.

Google rejects the assertion that static exceptions are advantageous because they provide more legal certainty than do flexible exceptions.[366] Google notes that in its own business activities it relies on fair use with considerable certainty:

> Google's product counsels routinely make decisions in relation to the permissibility of new products and product features that require them to consider fair use. This requires them to consider the competing fairness factors…As with many other legal assessments they make, this requires a careful examination of the factual issues and balancing and weighing of relevant matters having regard to the established legal tests. In the vast majority of cases, Google's product counsels are able to form clear views on whether particular products or features are permissible. Nor is this experience limited to Google: major US media companies routinely rely on fair use without any apparent difficulties.[367]

Furthermore, Google stresses that even if static exceptions offer increased certainty it 'comes at the direct cost of innovation and ultimately economic growth'.[368] Google maintains, '[i]nnovation, culture and creativity are inherently dynamic'[369] and, consequently, in order to flourish they require flexible copyright laws. Google argues, static laws are 'not capable of adapting to changes in technologies, consumer uses or business practices'[370] and they 'enshrine existing business models, and create a barrier to innovation'.[371]

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[366] This assertion has been put forward, for example, by scholars contributing to the debate in Australia over the possible introduction of a flexible fair use exception to replace Australia's static fair dealings exception. See, eg, Professors June Besek, Jane Ginsburg and Philippa Loengard who submitted, '[m]any in the United States – including users, legal practitioners and courts – do not regard the law of fair use as consistent and predictable, although they wish it were. The US benefits from the flexibility of the fair use exceptions, but that flexibility comes at a cost.' June M Besek, Jane C Ginsburg and Philippa S Loengard, 'Comments on ALRC Discussion Paper 79 *Copright and the Digital Economy*' (The Kernochan Centre for Law, Media and the Arts, Columbia University School of Law, 30 July 2013) 6 <https://www.alrc.gov.au/sites/default/files/subs/649._org_kernochan_center_for_law_and_media_and_the_arts_columbia_law_school.pdf>.

[367] Google Australia, Submission to the Productivity Commission's Draft Report into Intellectual Property Arrangements, 3 June 2016, 4 <http://www.pc.gov.au/__data/assets/pdf_file/0018/201546/subdr523-intellectual-property.pdf>.

[368] Google, 'Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper', above n 317, 31.

[369] Google, 'Letter from Matt Dawes Public Policy and Government Affairs Google Australia to Professor Jill McKeough ALRC 'ALRC Review - Copyright and the Digital Economy'', above n 306, 1.

[370] Google, 'Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper', above n 317, 2.

[371] Google, 'Google's Response to the Government Consultation on Proposals to Change the UK's Copyright System' (21 March 2012), 1.

Google claims that in the United States fair use has provided 'room within the framework of copyright law for many of the Internet technologies that have been so crucial to stimulating creativity, free expression, and economic growth in recent years.'[372] Google suggests one has only to look at the thriving technology sector in the United States for evidence of the benefits of a flexible exception: 'no country in the world can compete with the U.S. for the most innovative search technologies, social networks, video and music hosting platforms, and for the sheer generation of the most jobs and wealth in the Internet domain'.[373] Google submits fair use allows entrepreneurs to 'take an informed risk, knowing that if your innovative product serves a genuinely new need and doesn't unfairly harm the people whose work you copied, then it will be on the right side of the law.'[374] A flexible exception, Google argues, creates 'breathing room for creation and technical innovation'.[375]

Google posits a key advantage of the United States fair use exception is that it allows courts to consider the consequences of copyright broadly, balancing the interest of both rightsholders and the public. Google argues it permits lawmakers to find 'a balance between the monopoly rights of the original creator, and the socially and economically beneficial output of subsequent creators or innovators'[376] and that in the United States the 'body of fair use law is shaped by a long history of inquiry into the central motivating factors for creation of new works and

[372] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 4.2.6.
[373] Ibid 4.2.3.
[374] Ibid 7.7.
[375] Google, Submission to ALRC Discussion Paper *Copyright in the Digital Economy* (ALRC DP 79), above n 316, 1. The Asian Internet Coalition also argued the Hong Kong administration should not only introduce an exception for parodies but should also introduce a flexible fair use exception. According to the Asian Internet Coalition, in its current form, 'Hong Kong's fair use defense is narrow and specific to enumerated purposes, which is holding back innovation, creativity, investment and the enjoyment of content.' Coalition, 'Letter from John Ure to Division 3 Commerce Industry and Tourism Branch Commerce and Economic Development Bureau of Hong Kong 'Comments on the Hong Kong Copyright Law – Parody Exception', above n 313, 3-4.
[376] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 4.2.3. Similarly, Google stated that fair use allows courts to assess 'both the social value of new innovations and the market fairness to earlier creators': at 4.2.2.

protections of the public interest.'[377] Indeed, Google claims its own fair use cases have embodied this objective: 'the fair use cases in which Google has been involved are precisely those where litigation has served a broad public interest in advancing the law in the face of new technologies.'[378]

Google further urges policy-makers to consider the activities of online service providers, such as search engines, as firmly within the public interest. For example, Google took issue with the ALRC's illustrative list of 'fair' purposes presented in a proposed fair use provision. The ALRC presented two categories of uses — 'core' and 'non-core' to the public interest.[379] Google argued that the proposed core purposes, which included 'reporting the news, criticism or review, parody or satire',[380] related to the activities of traditional media companies and the classification would have a 'practical consequence of preserving the fair use rights of legacy industries at the expense of consumers and the services offered by new media and technology companies.'[381] And, Google contended, many of the uses designated non-core, such as non-consumptive uses, are 'absolutely core to the public interest'[382] as they ensure the functioning of the internet.

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[377] Ibid. Although a flexible fair use doctrine (and safe harbour for online intermediaries) were the central proposals in Google's submission, Google acknowledged that the capacity of the United Kingdom government to introduce these polices was likely to be constrained by the European Union framework. As such, Google made alternative policy recommendations that it claimed fell within the framework provided by the Copyright Directives of the European Union. Google recommended the adoption of all exceptions to copyright available under European Union law, including exceptions for parodies, format shifting and education, research and archiving. Google also urged the government to 'amend the existing exceptions so they are as widely drawn as possible': at 10.11.13. Google argued doing so would encourage innovation and entrepreneurialism, at 10.11.15. In 2011, Google made the same recommendations to the Irish government. Google, 'Submission to the Copyright Review Committee (Ireland)', above n 307, 11. In addition to the recommendations on exceptions, Google submitted Ireland should amended its exception for private copying so that it is not limited to time-shifting of broadcasts and photographs of television broadcasts and instead allows 'all copying for private use by natural persons for non-commercial purposes': at 12.
In Canada and the Philippines, Google has supported the introduction of an exception for user generated content. See Business Coalition for Balanced Copyright, Submission to the Legislative Committee on Bill C-32, 27 January 2011 <https://dwmw.files.wordpress.com/2012/03/businesscoalitionforbalancedcopyrighte.pdf>. In the Philippines, the Asian Internet Coalition advocated for the inclusion of an exception for non-commercial user-generated content and suggested the government look to Canada's Bill C32 for the language of the exception, which, the Asian Internet Coalition stated, 'reflects the wise judgment that creativity on the Internet is social'. Google, 'Letter from John Ure to Hon Albert Raymond Garcia 'Comments on the Draft Amendments to the Philippines Copyright Law" (4 May 2011), 3 <http://www.asiainternetcoalition.org/wp-content/uploads/2013/11/AIC-Comments-on-Draft-Amendments-to-the-Philippines-Copyright-Law.pdf>.
[378] Google, 'Google Australia's submission to the Productivity Commission's Draft report into Intellectual Property Arrangements', above n 367, 4.
[379] Google, Submission to ALRC Discussion Paper *Copyright in the Digital Economy* (ALRC DP 79), above n 316, 17.
[380] Ibid 17-18.
[381] Ibid.
[382] Ibid 17.

Google warns against a misunderstanding of the nature and effect of the fair use doctrine. Google claims fair use benefits rightsholders by supporting the development of new markets for the sale and distribution of works.[383] Google submits, 'the development and growth of the US technology sector has not been at the expense of the content industries.'[384] Google argues, '[c]reators have nothing to fear from flexible, dynamic copyright exceptions…new platforms, tools and services are enabling cheaper, easier and better ways to create, distribute, and promote content, and to make a living from it.'[385]

Google also posits that, '[t]he idea that fair use somehow reduces copyright owners' rights is belied by the regular practice of large U.S. media companies applying fair use in their every day commercial decisions.'[386] For example, Google suggests, 'Viacom, Inc., a very large, litigious media company…relies heavily on fair use for its popular "Daily Show with Jon Stewart" and "The Colbert Report."'[387] Fair use, according to Google, provides 'critical protections to cultural producers'[388] and should not be 'dismissed as a derogation of authors' rights',[389] when in fact it is a provision for permitting 'legitimate re-use'.[390] According to Google, because it secures public rights to access and engage with information and content, a flexible fair use exception 'should be regarded as an essential tool for all authors to create and innovate'.[391]

4. Safe Harbours for Online Intermediaries

Intermediary safe harbours limit the liability of online intermediaries for acts of copyright infringement occurring on their platforms. In principle, they do so in order to ensure copyright liability does not unduly impede the functioning of digital infrastructure and services. Unsurprisingly, given Google's business structure, safe harbours are the second major

[383] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 5.3.
[384] Ibid 4.2.4.
[385] Google, 'Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper', above n 317, 29. Google asserts it supports copyright policy that 'protects artists and fosters innovation in ways that help people create, distribute, and engage with information'. Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 3.4.
[386] Google, 'Letter from Matt Dawes Public Policy and Government Affairs Google Australia to Professor Jill McKeough ALRC 'ALRC Review - Copyright and the Digital Economy'', above n 306, 14.
[387] Ibid 14.
[388] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 4.2.5.
[389] Google, 'Submission to the Copyright Review Committee (Ireland)', above n 341, 42.
[390] Ibid.
[391] Ibid 45.

constituent of Google's copyright policy framework. Google posits, 'the existence of robust and well defined 'Safe Harbours' for online intermediaries is another crucial pillar of the legal regimes that supports technological innovation and free expression in the US.'[392] For Google, intermediary safe harbours provide a necessary limit on copyright liability, encouraging innovation and investment in digital technologies.

To qualify for safe harbour under the United States DMCA, an intermediary must meet the statutory definition of a service provider, satisfy conditions of eligibility and satisfy the requirements of the relevant safe harbour provision. The DMCA includes four provisions providing safe harbour for transitory digital network communications, caching, storage of information at the direction of users and information location tools including directories, indexes, references, pointers or hyperlinks.[393] A service provider is defined as 'a provider of online services or network access, or the operator of facilities therefor'.[394] The conditions of eligibility include the implementation of a termination policy for repeat infringers[395] and the accommodation of technical measures used to identify or protect copyrighted work.[396] All four safe harbours apply to Google. Google relies on 512(a) for its broadband service Google Fiber, 512(b) for its caching functions, 512(c) for services such as YouTube and Gmail and 512(d) for its internet search services.[397] Google maintains, '[n]one of these services could exist in their current form without the DMCA safe harbors.'[398]

Both 512(c) and 512(d) stipulate that the service provider must not 'receive a financial benefit directly attributable to the infringing activity'[399] where a service provider has the 'right and ability to control'[400] the infringement, and the service provider must not have 'actual knowledge'[401] of infringing material or activities or awareness of 'facts or circumstances from which infringing activity is apparent'.[402] Additionally, 'upon obtaining such knowledge or

[392] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 4.3.1.
[393] 17 USC § 512 (a), (b), (c), (d).
[394] 17 USC § 512 (k)(1)(B).
[395] 17 USC § 512(i)(1)(A).
[396] See 17 USC § 512(i)(1)(B) and 512(i)(2).
[397] Katherine Oyama, 'Testimony of Katherine Oyama, Sr. Copyright Policy Counsel, Google Inc House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet Hearing on "Section 512 of Title 17"', 13 March 2014, 3 <http://docs.house.gov/meetings/JU/JU03/20140313/101837/HHRG-113-JU03-Wstate-OyamaK-20140313.pdf>.
[398] Ibid.
[399] 17 USC § 512 (c)(1)(B) and 512 (d)(2).
[400] 17 USC § 512 (c)(1)(B) and 512 (d)(2).
[401] 17 USC § 512 (c)(1)(A)(i) and 512 (d)(1)(A).
[402] 17 USC § 512 (c)(1)(A)(ii) and 512 (d)(1)(B).

awareness'[403] the service provider must act 'expeditiously to remove, or disable access to, the material'.[404] Because of this requirement to remove or disable access to infringing content upon obtaining knowledge or awareness of infringing material the DMCA safe harbours are commonly termed a 'notice and take-down' model.

According to Google, a key strength of the notice and take down model is its flexibility and scalability. Google explains:

> A key to the effectiveness of the notice-and-takedown process has been its adaptability to all kinds of OSP [online service providers]. For smaller startups, the costs of implementing a notice-and-takedown system are reasonable, especially when compared to the unpredictable (and potentially enormous) costs of litigating with individual rightsholders one by one. For larger OSPs like Google, serving billions of users, the notice-and-takedown process helps focus efforts to combat infringement into a manageable process.[405]

Furthermore, Google claims the notice and take down system has proven to be adaptable to 'innovative new technologies,'[406] supporting the 'most successful cutting-edge online services, including social networking, instant messaging, and live video streaming.'[407] Google maintains without safe harbour these technologies would have faced 'ruinous copyright liability based on the misdeeds of a tiny minority of users'.[408] In this way, Google contends, 'the safe harbor framework is crucial not only to Google's many online products and services, but to the growth of the Internet'.[409]

Google argues intermediary safe harbours also benefit rightsholders as they stipulate 'stringent guidelines for providing and responding to notices of infringement,'[410] creating 'business

[403] 17 USC § 512 (c)(1)(A)(iii) and 512 (d)(1)(C).
[404] 17 USC § 512 (c)(1)(A)(iii) and 512 (d)(1)(C).
[405] Google, 'Letter to The Honourable Maria A. Pallante Register of Copyrights U.S. Copyright Office Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)' 1 April 2016, 7 <https://www.regulations.gov/document?D=COLC-2015-0013-90806>.
[406] Ibid 5.
[407] Ibid.
[408] Ibid.
[409] Ibid 1.
[410] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 4.3.2.

certainty for internet companies, and a clear and swift process for content owners'.[411] Google asserts the notice and take down system benefits rightsholders by providing 'a cheaper and more efficient way to remove infringing content from the Internet quickly without the need for lawyers and court actions'.[412] According to Google, through the notice and take down system, rightsholders 'avoid many of the costs that would previously have come with policing infringement, including registering copyrighted works, hiring an attorney to write a cease-and-desist letter, and engaging in litigation.' [413] Google also argues safe harbours have benefited rightsholders by supporting the development of new online distribution platforms:

> the DMCA has created a plethora of new opportunities for creators to find and engage their audiences. Platforms like YouTube, Flickr, Instagram, Facebook, Twitter, and SoundCloud are just a few of the mechanisms by which musicians, photographers, and video creators are reaching audiences, developing careers, selling their works, and publicizing their events...Before the development of these platforms, creators had far fewer ways to reach global audiences, and most of those avenues often required creators to sign away their copyrights (and much of the value that derived from them) in exchange for distribution.[414]

For Google, the notice and take-down system provides an effective and efficient means for enforcing copyright, while also benefiting creators and the public by supporting innovation within the digital environment.

Google is not supportive of an alternative 'notice and stay down' model for intermediary safe harbour.[415] Broadly, under a notice and stay down regime, in order to qualify for safe harbour, after an initial infringement notice, intermediaries must continue to remove infringing content as it reappears on their platform, without a requirement for additional notices from the rightsholder. Google argues implementation of a notice and stay down policy 'would impose an extraordinary burden on OSPs to monitor all content available through their services.'[416]

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[411] Ibid 4.3.2.
[412] Google, 'Letter to The Honourable Maria A. Pallante Register of Copyrights U.S. Copyright Office Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)', above n 405, 3.
[413] Ibid 3.
[414] Ibid 5-6.
[415] See ibid 10.
[416] Ibid.

Google also asserts effective implementation of a notice and stay down system is not feasible because an intermediary

> would need to know whether the ownership of a specific piece of content has changed or whether the content was licensed for the subsequent use. The OSP would also need to make a legal (and contextual) determination as to whether the posting of allegedly reappearing content was a fair use or covered by another copyright exception[417]

Consequently, according to Google, it is 'both legally and technically difficult to imagine that a "staydown" obligation could feasibly be imposed on all OSPs that are covered by the DMCA safe harbors.'[418]

In jurisdictions throughout the world, Google has advocated for the adoption of safe harbours that mirror the DMCA provisions. For example, in 2010, the Asian Internet Coalition urged the Hong Kong government to adopt intermediary liability provisions that closely followed the DMCA. The Asian Internet Coalition proclaimed, '[b]y following closely the DMCA provisions, we can also take advantage of the wealth of case law that has been established on the application and interpretation of the DMCA by US courts.'[419] In 2013, commenting on proposed amendments to Thailand's copyright laws the Asian Internet Coalition suggested the Thai government look to the DMCA for guidance, stating, '[t]he DMCA has notable safe harbour provisions which protects Internet Service Providers from the consequences of their users' actions, but at the same time legitimately addresses copyright infringement.'[420]

Google has criticised Australia's current safe harbour regime for rendering legally uncertain important activities such as 'transmitting data, caching, hosting and referring users to an online

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[417] Ibid.
[418] Ibid.
[419] Asian Internet Coalition, 'AIC's Response to the Proposal to "Strengthen Copyright Protection in the Digital Environment", email to The Secretary for Commerce and Economic Development, Hong Kong' (17 March 2010), 4 <http://www.asiainternetcoalition.org/wp-content/uploads/2013/11/AIC-Response-to-Strengthening-Copyright-Protection-in-the-Digital-Environment.pdf>.
[420] Asian Internet Coalition, 'Letter from John Ure to Nitwattumrong Boonsongpaisan Deputy Prime Minister and Minister of Commerce Ministry of Commerce Thailand 'Comments on the Proposed Amendments to Thailand's Copyright Act B.E. 2537'' (1 October 2013), 2 <http://www.asiainternetcoalition.org/wp-content/uploads/2013/10/2013_10_01_-Thailand-Copyright-Act-Letter_AIC_FINALMOC.pdf>.

location'.[421] Google argues that by failing to cover the full range of service providers operating in the digital environment Australia's safe harbour regime poses a 'serious impediment to the growth of Australia's digital economy'.[422]

In Europe, Google has expressed strong support for the existing intermediary safe harbour arrangements. In 2013, the European Commission launched a public consultation as part of 'on-going efforts to review and modernise EU copyright rules'[423] and sought public comments on changes that would alter the existing safe harbour arrangements. The European Commission sought comments on whether hyperlinks and transitory copies made in the process of viewing a webpage, including on a screen and in a cache, should be subject to the authorisation of rightsholders.[424] Google was highly critical of the proposal, stating,

> The notion that under EU law the question of whether copies (which are invisible to users) should trigger new permissions or payments highlights that the copyright system is liable to being abused with overbroad claims.[425]

Google argued transitory copying is fundamental to the functioning of the digital environment and that in a system that exists via 'the making and dissemination of copies of information',[426] relying on the concept of individual ownership of a physical work in order to assess all liability places the law 'at odds with current technology.'[427] Similarly, Google took issue with the proposition that hyperlinks could be subject to the authorisation of rightsholders. Google argued, 'links are merely pointers, addresses, like footnotes, and are naturally out of the copyright regime as they do not reproduce a work or make it available.'[428] Google warned:

> If the trillions of links online were to be accompanied by trillions of licenses, information would not circulate smoothly anymore and the very existence of

[421] Google, 'Letter from Ishtar Vij Public Policy and Government Affairs Google Australia and New Zealand to Attorney-Gerneral's Department 'Revising the Scope of the Copyright Safe Harbour Scheme'' (2011), 2 <http://www.ag.gov.au/Consultations/Documents/Google.pdf >.
[422] Ibid.
[423] European Commission, 'Copyright — Commission launches public consultation' (Press Release, 5 December 2013) <http://europa.eu/rapid/press-release_IP-13-1213_en.htm?locale=en>.
[424] Google, 'Public Consultation on the Review of the EU Copyright Rules', above n 61, 9.
[425] Ibid 10.
[426] Ibid 16.
[427] Ibid.
[428] Ibid 7.

> the Web would be undermined. And copyright law would be contrary to the very structure of the Web itself.[429]

Google urged the commission recognise that 'behind the technical legal question…lies a very important socio-economic issue'.[430]

Intermediary safe harbour and a flexible fair use exception are the two central policy proposals within Google's copyright policy framework. Both policies place limits on copyright. They limit the scope of the private property rights granted to authors, increasing opportunities for accessing and engaging with information, which, Google argues, is facilitative of socially beneficial technological innovation. In the following sections, I outline additional copyright policies put forward by Google regarding the issue of online piracy and licensing and collection society reforms.

5. Policies for Addressing 'Piracy'

Google contends a combination of market and technological forces can solve the problem of online 'piracy' (or more accurately, the unauthorised consumption of media and entertainment content online). Google views piracy as a supply and pricing problem, the solution to which is 'new business models and a free marketplace for legal purchasing of content.'[431] Google argues that '[c]onsumers will play by the rules if they are offered high quality content that is convenient to purchase and competitively priced.'[432] In order to encourage the development of such services, Google suggests strengthening copyright exceptions and limitations.

For Google, copyright exceptions and limitations are effective policy instruments for combating piracy because they encourage the development of innovative content distribution services. In 2016, Google submitted to the United States Copyright Office that 'platforms like iTunes, Netflix, Amazon, Hulu, Google Play, Spotify, and Deezer…[b]y providing access to

[429] Ibid 8.
[430] Ibid.
[431] Google, 'Letter from Iarla Flynn Head of Public Policy Google Australia to The Hon Malcom Turnbull MP Minister for Communications 'Deregulation: Initiatives in the Communications Sector'', above n 364, 5.
[432] Asian Internet Coalition, 'AIC's Response to the Hong Kong Copyright (Amendment) Bill 2011' (19 July 2011), 1 <http://www.asiainternetcoalition.org/wp-content/uploads/2013/11/AIC%E2%80%99s-Response-to-the-Hong-Kong-Copyright-Amendment-Bill-2011.pdf>.

convenient and legitimate content offerings to users in markets all around the world…offer the most effective method of fighting piracy.'[433] Google suggests that rather than introducing 'overly harsh regulation to combat piracy',[434] governments should 'adopt copyright exceptions that allow the market, new technologies and new creativity to evolve.'[435]

Along with the implementation of exceptions and limitations to copyright, Google claims piracy can be curbed through policies that restrict the flow of money to websites dedicated to online piracy. Google proposes, '"follow the money" strategies…play a critical role in the effort to fight piracy online.'[436] Accordingly, Google participated in the development of *Best Practices and Guidelines for Ad Networks to Address Piracy and Counterfeiting*, which assist advertising networks to 'maintain and post policies prohibiting websites that are principally dedicated to engaging in piracy or counterfeiting from participating in the ad network's advertising programs.'[437]

The third component of Google's approach to piracy is the implementation of content identification technology, such as Content ID, Google's algorithmic rights management program on YouTube. Content ID allows rightsholders to monetise or block videos containing their works that are uploaded to YouTube.[438] Google explains 'Content ID represents a thoughtful and eminently practical solution to piracy, as well as a new and growing revenue stream for rights holders.'[439] Google also claims 'Content ID is good for users…When copyright owners choose to monetize or track user-submitted videos, it allows users to remix and upload a wide variety of new creations using existing works.'[440]

Yet, Google cautions that while useful for enforcing copyright, there is a 'real possibility that

[433] Google, 'Letter to The Honourable Maria A. Pallante Register of Copyrights U.S. Copyright Office Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)', above n 405, 2.
[434] Google, 'Letter from Iarla Flynn Head of Public Policy Google Australia to The Hon Malcom Turnbull MP Minister for Communications 'Deregulation: Initiatives in the Communications Sector'', above n 364, 5.
[435] Google, 'Letter from Ishtar Vij Public Policy and Government Affairs Google Australia and New Zealand to Office for The Arts Department of the Prime Minister and Cabinet (Australia) 'National Cultural Policy'', above n 334, 10.
[436] Google, 'Letter to The Honourable Maria A. Pallante Register of Copyrights U.S. Copyright Office Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)', above n 405, 4.
[437] Ibid.
[438] Content ID is examined in greater detail in Chapter 5.
[439] Google, 'Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper', above n 317, 5.
[440] Google, 'Letter to The Honourable Maria A. Pallante Register of Copyrights U.S. Copyright Office Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)', above n 405, 3.

identifiers and or permissions markers carry wrong, misleading, or out-of-date information, for instance wrongful attribution of covering works which are in the public domain'.[441] Google further explains that content identification technologies can 'reduce transaction costs',[442] but they can 'never address all of copyright's complexities and subtleties.'[443] In particular, Google argues, content identification technologies cannot identify 'videos which are covered by an exception, and thus require no licensing'.[444] Google urges policy-makers to 'keep in mind the need for mechanisms to protect fair use remixes from being blocked or being "licensed" by rightsholders who have no proper claim on them'.[445] Google suggests content identification systems should be considered 'a supplement to, not a substitute for, fair use.'[446]

Google strongly opposes copyright enforcement measure that block access to digital services, such as internet filtering or site blocking. Google argues 'filtering will not achieve much in preventing infringement online, with the ability for users to encrypt their communications rendering filters totally ineffective.'[447] At the same time, Google warns, filtering technologies can degrade internet quality:

> Packet-filtering and analysis is a process that requires a larger amount of processing power and network reconfiguration. It risks degrading the quality and users' experience for perfectly legitimate online services, raising serious concerns for competition and innovation.[448]

In a 2014 submission to the Australian government, Google described site-blocking as a 'blunt and ultimately ineffective instrument for addressing online piracy.'[449] Google cautioned, '[i]t is imperative that policies designed to address online piracy do not inadvertently stifle the

[441] Google, 'Public Consultation on the Review of the EU Copyright Rules', above n 61, 12.
[442] Ibid.
[443] Ibid 24.
[444] Ibid.
[445] Pablo Chavez, 'Email to The Honorable Teresa Stanek Rea Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office and The Honorable Lawrence E. Strickling Assistant Secretary of Commerce for Communications and Information United States Department of Commerce, Comments: Department of Commerce Green Paper, Copyright Policy, Creativity and Innovation in the Digital Economy', 13 November 2013, 4 <http://www.ntia.doc.gov/files/ntia/google_comments.pdf>.
[446] Ibid.
[447] Google, *Google Contribution on Creative Content Online*, above n 314, 9.
[448] Ibid.
[449] Google Australia, 'Online Copyright Infringement Discussion Paper (Australia)' (2014), 3-4.

explosion in innovation that has opened up new opportunities for creators and creative industries.'[450]

6. Licensing and Collection Society Reform

Google also calls for licensing and collection society reform to eradicate market inefficiencies that inhibit innovation. Google explains:

> copyright plays a vital role in creating commercial support to creativity. The public interest is therefore to minimize transaction costs for both licensees and rights holders so that more of the revenue streams available from the marketplace reach the ultimate beneficiary, whether author, publisher, performer, or someone to whom they have sold the rights.[451]

Google argues transaction costs are high due to the complexity, inefficiency and lack of transparency[452] in existing regimes. According to Google:

> The systemic failure of many collecting societies to adapt their schemes to new business models and formulate reasonable remuneration schemes has led to providers being hesitant or simply unable to monetise content as fully as they otherwise could. Consequently, holders of IP rights are deprived of revenue.[453]

Google argues, '[f]ailure by collecting societies to modernise outmoded business models disadvantages holders of IP rights and stifles innovation.'[454]

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[450] Ibid 7. In 2014, the Asian Internet Coalition submitted to the Singapore government comments on a proposed a site-blocking policy. The Asian Internet Coalition argued while 'the unauthorised distribution of digital copies of audio visual works and literary works remains a serious problem' any policy response must be 'balanced and considered.' Asian Internet Coalition, 'Letter from the Asian Internet Coalition to the Ministry of Law Singapore 'Comments on the Proposed Copyright (Amendment) Bill 2014" (25 April 2014), 1 <http://www.asiainternetcoalition.org/wp-content/uploads/2014/11/AIC-Comments_Copyright-Minlaw.pdf>.
[451] Google, 'Google's Response to the Government Consultation on Proposals to Change the UK's Copyright System', above n 371, 7.
[452] Ibid.
[453] Google, 'Google Contribution to the Online Commerce Group "Issue Paper" (European Union)' (2008), 1 <http://ec.europa.eu/competition/consultations/2008_online_commerce/google_contribution.pdf>.
[454] Ibid.

Google has also argued collection societies should be required to produce publicly available ownership data: 'databases that provide publicly available, territorially specific, ownership data for compositions, as well as data to match composition rights to sound recordings are essential.'[455] In addition, Google has argued that collection societies should be required to provide authors with varied options for assigning their rights, 'rather than being tied to a specific collection society for all forms of exploitation.'[456]

In the European Union, Google has called for a pan-European licence to improve 'the competitive landscape while minimizing fragmentation of licensing coverage for any territory.'[457] Google has also advocated for the creation of an 'online licence', operating as a single licence for online uses, rather than requiring online services to licence separately for the performance, reproduction and publishing rights, which, according to Google 'is an anathema

[455] Google, 'Google's Response to the Government Consultation on Proposals to Change the UK's Copyright System', above n 371, 7.
[456] Ibid 8.
[457] YouTube, 'Opportunities in online goods and services (submission to public consultation) (European Union)' (2009), 1 <http://ec.europa.eu/competition/consultations/2009_online_commerce/google_youtube.pdf>.

in the online world'.[458] Overall, Google seeks a reformed approach to licensing and rights management in the digital environment.[459]

7. Conclusion

Google's view of copyright differs from the conventional wisdom of copyright as an author's private right — Google identifies important economic and social consequence of copyright. In particular, Google presents copyright as a policy instrument that regulates technological innovation. Google calls for limitations on copyright's exclusionary rights and strengthened public rights to access and engage with information and content. Google submits that strong exceptions and limitations prevent a 'permission first, innovate later' culture from stifling innovation. Yet, while Google employs public interest arguments regarding the social and economic impacts of copyright, Google undoubtedly and expectedly pursues a copyright agenda that serves its commercial interests as a technology company; that is, a company that provides access to information and continues to develop and acquire new technologies.

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[458] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 11.3.

[459] Google has put forward a proposal for facilitating the use of orphan works — works for which the ownership status is unknown. Central to Google's scheme is the creation and maintenance of a digital, publically searchable, database of copyrighted works. The database would index all works registered with the Copyright Office and include the author, title, year of publication, publisher, copyright ownership status, contact information for the current rightsholder and date of last update of the contact information. Google suggests the database would facilitate licensing and allow for a determination as to whether a work is orphaned. The designation of orphan would indicate the work is still in copyright, but the rightsholder is unknown and some uses are permitted.
To function, the system would rely on laws requiring rightsholders to update their contact information at regular intervals, in order to avoid having their work designated an orphan. The regime would preclude from liability anyone who relies on the database in good faith. In cases where an orphan work is used by a third party and then subsequently the rightsholder updates their registration, the party that used the work would be granted 'a grace period in which to either halt their use… or negotiate with the copyright holder for a license…at the conclusion of that grace period, the copyright holder would be able to fully enforce its rights in the work.' To address the problem of how a potential user would know whether a work is an orphan or the rightsholder has simply chosen not to reply to their request, Google suggests including a requirement for rightsholders to certify their contact information every five years. Google explains: 'if a user sees that the contact information in the Office's database is more than five years old, the user has a safe harbor with respect to statutory damages.' See Copyright Office Library of Congress, 'Orphan Works Notice of Inquiry', *3739 Federal Register Vol. 70 No. 16* (26 January 2005) <http://copyright.gov/fedreg/2005/70fr3739.pdf>. See also Google, 'Letter from David Drummond, Vice President Corporate Development and General Counsel Andrew McLaughlin, Senior Policy Counsel, Alexander McGillivray, Senior Product and Intellectual Property Counsel, on behalf of Google Inc to Jule L. Sigall, Associate Register for Policy & International Affairs U.S. Copyright Office "Google's Response to Notice of Inquiry Regarding Orphan Works 25 March 2005"', 25 March 2005, 4 <http://www.copyright.gov/orphan/comments/OW0681-Google.pdf>.
Alternatively, Google has suggested a 'more general approach' to the orphan works problem is to amend the United States copyright act so that statutory damages and attorney fees are precluded if the infringement occurs when the rightsholder's contact information is not up to date. See Google, 'Letter from Oliver Metzger Senior Copyright Counsel Google Inc to Office of Policy and International Affairs United States Copyright Office Re: Notice of Inquiry: Orphan Works and Mass Digitization, Docket 2012-12', 4 February 2013, 6 <http://copyright.gov/orphan/comments/noi_10222012/Google-Inc.pdf>.

Google's copyright framework is largely market-based. Google embraces economic liberalism and technological determinism to conclude that a combination of free markets and technological innovation will produce socially beneficial outcomes. This is evident, for example, in Google's argument that the best policy for curbing piracy is ensuring strong exceptions and limitations to copyright. This is an argument that with less regulation, market and technological forces will properly respond to consumer demand, to the aggregate benefit of consumers and producers. Although supply and price conditions may indeed trigger piracy, framing the issue in this way obscures underlying and, arguably, more important questions regarding the vitality and quality of the global creativity economy. Free market models lack the means for addressing qualitative issues such as levels of diversity and participation. Google's economic analysis prioritises economic actors and is principally concerned with the pace of technological change.

But when we formulate policies that regulate access to and the use of information and technologies, and other activities central to life in contemporary society, we may need to, as Professor Sheila Jasanoff posits, 'take better account of the full range of values that humans care about…not just the value of change but also that of continuity, not just physical safety but also the quality of life, and not just economic benefits but social justice.'[460] If viewed through the lens of cultural theory, beyond innovation, in the copyright context we also need to consider levels of cultural diversity and participation. Google's copyright policy framework incorporates social and economic considerations, but nonetheless its parameters are narrowly set according to Google's private interests. In the following two chapters, I explore Google's attempts at implementing its innovation-centric copyright agenda.

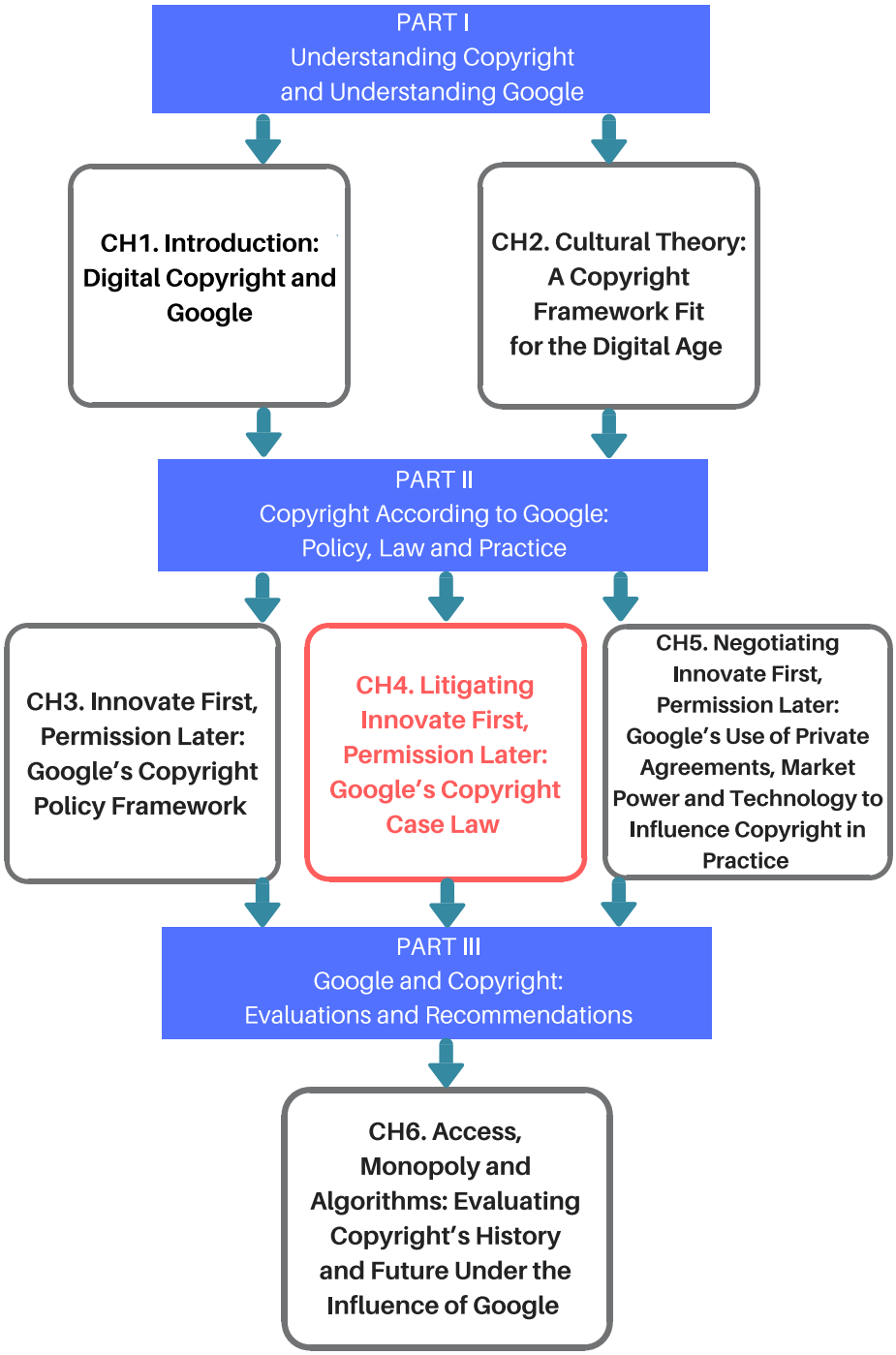
[460] Jasanoff, above n 280, 58.

Figure 3.2 Google's Law Reform Submissions

JURISDICTION	YEAR	SUBMITTING ENTITY	POLICY REVIEW	SUBMISSION TITLE	KEY RECOMMENDATIONS
Australia	2009	Google	Digital Economy	Consultation Draft: Digital Economy Future Directions Paper	Introduce a flexible fair use provision Strengthen limitations on intermediary liability
Australia	2011	Google	Copyright	Revising the Scope of the Copyright Safe Harbour Scheme	Strengthen limitations on intermediary liability
Australia	2011	Google	Cultural Policy	National Cultural Policy	Introduce a flexible fair use provision Strengthen limitations on intermediary liability
Australia	2012	Google	Copyright	ALRC Review – Copyright and the Digital Economy	Introduce a flexible fair use provision
Australia	2013	Google	Copyright	Google submission to ALRC discussion paper Copyright in the Digital Economy	Introduce a flexible fair use provision
Australia	2013	Google	Communications Sector Deregulation	Deregulation: Initiatives in the Communications Sector	Introduce a flexible fair use provision Strengthen limitations on intermediary liability To curb piracy, support the development of legitimate distribution services
Australia	2014	Google	Competition Policy	Submission to Issues Paper Competition Policy Review	Introduce a flexible fair use provision
Australia	2014	Google	Competition Policy	Submission to Competition Policy Review Draft Report	Introduce a flexible fair use provision
Australia	2014	Google	Copyright	Online Copyright Infringement Discussion Paper	Strengthen limitations on intermediary liability Site blocking not effective or desirable policy
Australia	2015	Google	Copyright	Copyright Amendment (Online Infringement) Bill 2015	Ensure site blocking legislation is narrowly targeted
Australia	2015	Google	Business Set-up, Transfer and Closure	Submission to Productivity Commission Issues Paper 'Business Set-up, Transfer and Closure'	Introduce a flexible fair use provision
European Union	2010	Google	Internal Market/Internal Market for Services/Electronic Commerce	Google contribution to the public consultation on the future of electronic commerce in the internal market and the implementation of the [Directive] on electronic commerce (2000/31/EC)	Collection society reform Introduce a multi-territorial digital licence Internet filtering not effective or desirable policy Introduce a notice and takedown or notice and notice regime
European Union	2013	Google	Internal Market, Intellectual Property - Copyright	Civil enforcement of intellectual property rights: public consultation on the efficiency of proceedings and accessibility of measures	Introduce a flexible fair use provision Strengthen limitations on intermediary liability Collection society reform Introduce unique licence for digital services Hyperlinks not copyrightable subject matter Transitory copies should not be subject to an authorisation right Content ID not a substitute for established exceptions To curb piracy, support the development of legitimate distribution services
European Union	2013	Google	Internal Market, Intellectual Property Rights	Public Consultation on the review of the EU copyright rules	Avoid policy that induces spurious copyright claims
Hong Kong	2010	Asia Internet Coalition	Copyright	AIC's Response to the Proposal to "Strengthen Copyright Protection in the Digital Environment"	Strengthen limitations on intermediary liability
Hong Kong	2011	Asia Internet Coalition	Copyright	AIC's Response to the Hong Kong Copyright (Amendment) Bill 2011	Introduce a flexible fair use provision Strengthen limitations on intermediary liability Limit injunctive relief for copyright infringement
Hong Kong	2012	Asia Internet Coalition	Copyright	AIC's Response to the Hong Kong Copyright (Amendment) Bill 2011 Code of Practice for Service Providers Second Draft	Strengthen limitations on intermediary liability
Hong Kong	2013	Asia Internet Coalition	Copyright	Comments on the Hong Kong Copyright Law – Parody Exception	Introduce a parody exception

Australia	2015	Google	Intellectual Property Arrangements	Google Australia's submission to the Productivity Commission Intellectual Property Arrangements Issues Paper	Introduce a flexible fair use provision Strengthen limitations on intermediary liability
Australia	2016	Google	Intellectual Property Arrangements	Google Australia's submission to the Productivity Commission's Draft report into Intellectual Property Arrangements	Introduce a flexible fair use provisionStrengthen limitations on intermediary liability
Australia	2016	Google	Copyright	Google Australia's submission to the Department of Communications and the Arts on the exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill 2016	Strengthen limitations on intermediary liability
Canada	2011	Business Coalition for Balanced Copyright	Copyright	Submission of the Business Coalition for Balanced Copyright To the Legislative Committee on Bill C-32	Introduce a flexible fair use provision Strengthen limitations on intermediary liability
European Union	2008	Google	Creative Content Online in the Single Market	Google Contribution on Creative Content Online	Introduce a multi-territorial digital licence Graduated response and internet filtering not effective or desirable policy To curb piracy, support the development of legitimate distribution services
European Union	2008	Google	Opportunities in online goods and services	Google Contribution to the Online Commerce Group "Issue Paper"	Collection society reform
European Union	2009	YouTube	Opportunities in online goods and services	Untitled	Collection society reform Introduce a multi-territorial digital licence
Ireland	2011	Google	Copyright and Innovation	Submission to the Copyright Review Committee July 2011	Introduce a flexible fair use provision Strengthen limitations on intermediary liability Collection society reform
Ireland	2012	Google	Copyright and Innovation	Submission to the Copyright Review Committee June 2012	Introduce a flexible fair use provision Strengthen limitations on intermediary liability Collection society reform
New Zealand	2016	Google	Trans-Pacific Partnership Agreement	Trans-Pacific Partnership Agreement Amendment Bill	Implementation of TPP must include copyright exceptions and limitations
Philippines	2011	Asia Internet Coalition	Copyright	Comments on the Draft Amendments to the Philippines Copyright Law	Strengthen limitations on intermediary liability Exclude temporary, transitory copying from definition of reproduction Introduce a non-commercial user rights exception Site blocking not effective or desirable policy
Singapore	2014	Asia Internet Coalition	Copyright	Comments on the Proposed Copyright (Amendment) Bill 2014	Strengthen limitations on intermediary liability
Thailand	2013	Asia Internet Coalition	Copyright	Comments on the Proposed Amendments to Thailand's Copyright Act B.E. 2537	Strengthen limitations on intermediary liability
United Kingdom	2011	Google	Intellectual Property and Growth	Submission to the Independent Review of Intellectual Property and Growth March 2011	Introduce a flexible fair use provision Strengthen limitations on intermediary liability Collection society reform Introduce unique licence for digital services Introduce a regime for orphan works
United Kingdom	2012	Google	Intellectual Property and Growth	Google's response to the Government Consultation on proposals to change the UK's copyright system	Collection society reform Introduce unique licence for digital services Pursue a flexible copyright regime

United States	2005 (Mar)	Google	Orphan Works	Google's Response to Notice of Inquiry Regarding Orphan Works	Copyright Office create and maintain a searchable public database of registered copyright works Rights owners required to maintain up to date contact information
United States	2005 (May)	Google	Orphan Works	Google's Response to Notice of Inquiry Regarding Orphan Works	Introduce an objective definition of reasonable search Policy for orphan works should apply to both for profit and not-for-profit activities
United States	2013 (Feb)	Google	Orphan Works and Mass Digitization	Notice of Inquiry: Orphan Works and Mass Digitization, Docket 2012-12	Scope of inquiry should be limited to mass digitization projects that do not come under existing limitations or exceptions Orphan works policy should follow regime outlined in 2005 submission
United States	2013 (Mar)	Google	Orphan Works and Mass Digitization	Notice of Inquiry: Orphan Works and Mass Digitization, Docket 2012-12	Orphan works regime should include a requirement for rights holders to certify contact information every five years
United States	2013	Google	Copyright	Comments: Department of Commerce Green Paper, Copyright Policy, Creativity and Innovation in the Digital Economy	Content ID not a substitute for fair use
United States	2016	Google	Section 512 Study	Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)	DMCA safe harbour framework effective, efficient and crucial to growth of the internet


PART I
Understanding Copyright
and Understanding Google
CH1. Introduction: Digital Copyright and Google
CH2. Cultural Theory: A Copyright Framework Fit for the Digital Age
PART II
Copyright According to Google:
Policy, Law and Practice
CH3. Innovate First, Permission Later: Google's Copyright Policy Framework
CH4. Litigating Innovate First, Permission Later: Google's Copyright Case Law
CH5. Negotiating Innovate First, Permission Later: Google's Use of Private Agreements, Market Power and Technology to Influence Copyright in Practice
PART III
Google and Copyright:
Evaluations and Recommendations
CH6. Access, Monopoly and Algorithms: Evaluating Copyright's History and Future Under the Influence of Google

CHAPTER 4

Litigating Innovate First, Permission Later: Google's Copyright Case Law

Google's innovate first, permission second copyright philosophy has led to major copyright disputes with rightsholders. To create its search indexes, Google has engaged in mass copying of copyright subject matter without permission and has famously confronted rightsholders over Google Search, Google Books, YouTube and Android. Google's litigation strategy has centred upon exceptions to copyright and limitations on copyright liability. When resolving Google's copyright disputes, United States courts have considered the public benefits of Google's services and have exhibited a willingness to limit private rights in favour of the public interest. These decisions have both legitimised Google's activities and influenced the application of copyright law in the digital environment.

1. Introduction

In many ways, the Google story is a legal story. The release of each new Google product or service has brought with it legal challenges; parties contesting the legitimacy of Google's activities — some seeking to preserve the status quo, many pursuing financial gain. Undoubtedly, Google's rejection of a 'permission first, innovate later'[461] approach to copyright has contributed to these conflicts. When developing technology and acquiring businesses, rarely is Google constrained by copyright tradition. The central objective of this chapter is to examine critical moments in Google's history that have intersected with copyright law and, in doing so, to identify Google's contributions to United States copyright doctrine. Accordingly, in this chapter, I examine in detail six copyright cases. These cases relate to Google Search,

[461] Google, 'Submission to the Independent Review of Intellectual Property and Growth (UK)', above n 319, 5.4.

Google Books, YouTube and Google's mobile phone operating system, Android. An examination of these cases also portrays the importance of judicial decisions on copyright law to Google's commercial development.

The first three cases discussed in this chapter commenced in 2004 when three separate plaintiffs each brought suits against Google alleging copyright infringement, each testing the legality of features of Google's core service, Google Search. The cases are *Field v Google* ('*Field*')[462] of the United States District Court, District of Nevada; *Parker v Google* ('*Parker'*)[463] of the United States District Court, Eastern District of Pennsylvania; and *Perfect 10 v Google* ('*Perfect 10*')[464] of the United States Court of Appeals for the Ninth Circuit. The fourth case discussed in this chapter, *Authors Guild v Google Inc* ('*Authors Guild'*)[465] of the United States Court of Appeals for the Second Circuit, commenced in 2005, when the Authors Guild sued Google alleging copyright infringement for Google's use of their works in Google Books. The fifth case, *Viacom International Inc v YouTube Inc* ('*Viacom*')[466] of the United States Court of Appeals for the Second Circuit, commenced in 2007, when Viacom Entertainment sued Google for copyright infringement for videos hosted on YouTube without the permission of rightsholders. The final case discussed in this chapter, *Oracle America Inc v Google Inc* ('*Oracle'*)[467] of the Court of Appeals for the Federal Circuit, commenced in 2010, when Oracle sued Google alleging Google's copying of the Java application programming interface (API) for use in Android infringed Oracle's copyright.

As an initial observation, it is remarkable that one entity has generated such a large amount of copyright law — precedent and obiter dicta — over such a relatively short timeframe. Its own immense wealth affords Google a near inimitable capacity to withstand multiple, extensive copyright litigation. Yet, a company with deep pockets also has the capacity to avoid litigation — through settlements or other financial arrangements[468] — consequently, Google's legal history also evidences a willingness to pursue copyright litigation and an aspiration to win on principle. As the litigation history examined in this Chapter shows, Google's financial position

[462] *Field v Google Inc*, 412 F Supp 2d 1106 (D Nev, 2006).
[463] *Parker v Google Inc*, 422 F Supp 2d 492 (ED Pa, 2006).
[464] *Perfect 10 Inc v Google Inc*, 653 F 3d 976 (9th Cir, 2011); *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146 (9th Cir, 2007).
[465] *Authors Guild v Google Inc*, 804 F 3d 202 (2nd Cir, 2015).
[466] *Viacom International Inc v YouTube Inc*, 676 F 3d 19 (2nd Cir, 2012).
[467] *Oracle America Inc v Google Inc*, 750 F 3d 1339 (Fed Cir, 2014).
[468] Indeed, Google often relies on alternative strategies to resolve copyright disputes and this is the subject of Chapter 5 of this thesis.

affords Google the capacity to pursue to the highest degree cases it deems critical to its copyright agenda.

Through Google's copyright litigation, United States courts have addressed the legality of a wide range of digital technology issues, including copying content for a search index, caching, in-line linking, digital video hosting and the level of copyright protection afforded to APIs. In most cases, Google has successfully defended its activities, primarily relying on fair use and intermediary safe harbour. Both provisions have legitimised Google's activities and facilitated its rapid commercial expansion. Accordingly, this chapter places Google's copyright policy framework — a framework that promotes fair use and intermediary safe harbours as tools for supporting technological innovation — within the context of Google's own legal and commercial history. That is, a history of a company pushing technological and legal boundaries in the process of becoming one of the most significant technology companies of our time.

Figure 4.1 **Overview of Six Google United States Copyright Cases**

YEAR	PARTIES	HIGHEST COURT	TECHNOLOGY IN DISPUTE	KEY DEFENCES	OUTCOME
2004	Blake Field v Google	District Court, District of Nevada	Search engine indexing and caching of websites	Safe harbour Fair use Implied licence Estoppel	No liability for copyright infringement: Safe harbour for caching Copying for the purpose of a search engine a fair use Failure to implement robots.txt exclusion protocol gives rise to an implied license
2004	Gordon Parker v Google	District Court, E.D. Pennsylvania	Search engine indexing and caching of websites Hyperlinking to and display of excerpts of websites	Safe harbour	No liability for copyright infringement: Safe harbour for caching No volitional element in automated indexing, hyperlinking or display of excerpts
2004	Perfect 10 Inc v Google et al	Court of Appeals for the Ninth Circuit	Thumbnails for Google Images In-line linking Caching	Fair use	No liability for copyright infringement: Display of thumbnail images for search index a fair use In-line linking and caching – no dissemination of copy by Google
2005	Authors Guild et al v Google	Court of Appeals for the Second Circuit	Book digitisation for Google Books	Fair use	No liability for copyright infringement: Digitisation of books and display of excerpt for search index a fair use
2007	Viacom et al v YouTube and Google	District Court S.D. New York	Videos posted to YouTube by users	Safe harbour	No liability for copyright infringement: Safe harbour + Private settlement
2010	Oracle v Google	Court of Appeals for the Federal Circuit	Android API	Lack of protectable subject matter Fair use	No liability for copyright infringement: APIs protected by copyright but copying fair use

2. Google Search

In 2004, three rightsholders challenged Google for its copying of their works for use in Google Search. This section examines Google's use of the works, the various claims made by each rightsholder and the reasoning behind each court's rejection of those claims.

2.1 *Field v Google*

For its search index, Google uses an automated software program, the Googlebot, to crawl the internet and gather information about websites.[469] When the Googlebot scans a website, it copies, analyses and stores textual information on Google servers. Google also stores full copies of a website's HTML code in its cache index. When a user searches the internet using Google Search, Google's algorithm searches the information stored on the servers and directs users to relevant websites using hyperlinks. Search results also make available for viewing cached copies of websites. Google does not obtain express prior permission from website owners; if a website owner wishes to exclude their website from Google's index or cache, they can communicate this to the Googlebot by including the robots.txt code in their website's HTML code. The robots.txt code, together with other meta-tags, instruct the Googlebot to exclude either the full website or specific webpages from the Google index.[470] The robots.txt exclusion protocol is widely utilised by website designers globally[471] — it is a firmly established industry practice and community norm.[472]

In 2004, Blake Field, a United States attorney, created a personal website and on it published a collection of his own poetry.[473] When building his website, Field was aware of Google's automated indexing and caching and of the robots.txt exclusion protocol, but chose not to

[469] See Google, *Googlebot Search Console Help* <https://support.google.com/webmasters/answer/182072?hl=en>.
[470] Google, *Block URLs with robots.txt: Learn about robots.txt files* (n.d.) Google Search Console Help <https://support.google.com/webmasters/answer/6062608?hl=en>.
[471] Barry Schwartz, 'Robots.txt Celebrates 20 Years of Blocking Search Engines', *Search Engine Land* (online), 30 June 2014 <http://searchengineland.com/robots-txt-celebrates-20-years-blocking-search-engines-195479>.
[472] See, eg, Jasiewicz: 'the robot exclusion protocol is currently enforced only by web crawlers' voluntary compliance with the community norm of respecting these instructions'. Monika Isia Jasiewicz, 'Copyright Protection in an Opt-Out World: Implied License Doctrine and News Aggregators' (2012) 122(3) *Yale Law Journal* 837, 844.
[473] *Field v Google Inc*, 412 F Supp 2d 1106, 1110 (D Nev, 2006).

include the code in his website design.[474] Subsequently, the Googlebot included Field's website in Google Search. When this occurred, Field sued Google claiming each time a Google user viewed cached versions of his website Google directly infringed Field's exclusive reproduction and distribution rights.[475] Despite Google and other search engines having provided cache indexes for several years, Field's challenge initiated the first ruling on the legality of this activity under United States copyright law.[476]

District Court Decision — 2006

In this early challenge to Google's search engine activities, the United States District Court for the District of Nevada demonstrated a view that copyright applied in the digital environment may require a novel approach. In 2006, the District Court found there was no direct infringement by Google because it was the user, not Google, that created a copy of Field's website when accessing Google's cache index.[477] The District Court considered Google's conduct to be 'automated, non-volitional…[and] in response to a user's request'.[478] Furthermore, the District Court reasoned Google was protected from liability through section 512(b) of the United States Copyright Act, which provides safe harbour for system caching by online service providers.[479] This finding was particularly significant as it required a broad view of the safe harbour provision for caching. As Professor Miquel Peguera notes, it is questionable whether the safe harbour provision for caching was originally intended to cover the type of search engine caching undertaken by Google; Peguera argues the original intention of 512(b) was to cover proxy caching, which is a 'technical function carried out by ISPs and other entities to enhance network efficiency.'[480]

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[474] Ibid 1113.
[475] Ibid 1109.
[476] Miquel Peguera, 'When the Cached Link is the Weakest Link: Search Engine Caches Under the Digital Millennium Copyright Act' (2009) 56(2-3) *Journal of the Copyright Society of the USA* 589, 592. Peguera also notes, '*Field v. Google* is also the first decision that applies the DMCA system caching safe harbor'.
[477] *Field v Google Inc*, 412 F Supp 2d 1106, 1115 (D Nev, 2006).
[478] Ibid.
[479] 17 USC § 512(b). Section 512(b) provides safe harbour for internet service providers against copyright infringement occurring 'by reason of the intermediate and temporary storage of material on a system or network'. 17 USC § 512(b)(1) To qualify for safe harbour under this provision, the material must be 'made available online by a person other than the service provider' 17 USC § 512(b)(1)(A) and be transmitted at the direction of another person (not by the person who made it available or the service provider) 17 USC § 512(b)(1)(B) and 'carried out through an automated technical process'. 17 USC § 512(b)(1)(C). The statute also stipulates several conditions which must also be met including, for example, that the material be transmitted without modification 17 USC § 512(b)(2)(A).
[480] Peguera, above n 476, 610, 601. Peguera concludes:

> despite Field v. Google — a search engine's cache falls outside the boundaries of the caching safe harbor. This is so, essentially, because the statute contemplates a very specific activity,

The District Court also found Google had an implied licence to reproduce and distribute Field's works.[481] The District Court reasoned the ability to opt out of indexing and caching was known by Field and with this knowledge he chose not to include the necessary instructions in his website design.[482] As Monika Jasiewicz notes, this reasoning was particularly noteworthy for, conventionally in United States law, an implied licence is found between parties who have had direct dealings.[483] In *Field*, there were no direct dealings between Google and Field. Instead, the District Court considered Field's knowledge that Google would automatically access and copy his website, and his tacit encouragement of Google to do so as evidenced by his omission of the robots.txt code in his website design, to support a finding of an implied licence.[484] In *Field*, the test for an implied licence was knowledge and encouragement; 'the passive failure to use robots.txt'[485] became an 'active behavior that gives rise to an implied license.'[486]

The District Court's approach to an implied licence in *Field* is significant for its implicit support of an 'opt out' rather than 'opt in' copyright arrangement — it deviates from the convention that rightsholders do not need to actively assert their rights to enjoy copyright protection.[487] By requiring Field to opt out of Google Search, the District Court required Field to actively assert his copyright. Jasiewicz suggests the District Court's 'unusually broad

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> and the one performed by a search engine's cache happens to be a different one altogether — even though we may also refer to it using the word "cache," or even choose to call it a "system-cache". At 610.

[481] The District Court also held Field was estopped from asserting his copyright claim because he knew of Google's allegedly infringing conduct before it took place, he intended for Google to rely upon his decision not to include the robots.txt code in his website design, Google was not aware that Field did not want cached links to his works included in Google Search results and Google relied on Field's silence. *Field v Google Inc*, 412 F Supp 2d 1106, 1116 (D Nev, 2006).

[482] Ibid.

[483] Jasiewicz, above n 472, 845.

[484] Ibid 846.

[485] Ibid.

[486] Ibid.

[487] See Jasiewicz: 'an opt-out scheme for gaining copyright holders' permission online represents a significant departure from the traditional framework of American copyright law, which places the burden on would-be infringers to seek affirmative permission', ibid. See also Professor Matthew Sag:

> The second important question raised by copy-reliant technologies relates to the opt-out mechanisms built into many copy-reliant technologies. The architects of these technologies have chosen to build in these mechanisms to preserve the autonomy of the copyright owner. These mechanisms, however, switch the default position from "no copying without permission" to one in which copyright owners must affirmatively opt out of specific uses of their works. Accordingly, we face the question of whether this modification of the usual copyright default is justified from either a doctrinal or a utilitarian perspective.

Matthew Sag, 'Copyright and Copy-Reliant Technology' (2009) 103(4) *Northwestern University Law Review* 1607, 1609.

application of implied license'[488] in *Field* was an appropriate response to the 'technological reality of opt-out mechanisms on the Internet.'[489] John Sieman explains:

> The Internet was designed to be an open system in the sense that any computer, using a set of standard communication protocols, can communicate with other networked computers without explicit permission…when a website owner wants to restrict access, she must take affirmative steps to block access; in other words, she must opt out.[490]

The decision in *Field* is consistent with this view of the digital environment.

Finally, the District Court also found Google's use of Field's work was a fair use. In its first factor analysis, the District Court in *Field* relied upon *Kelly v Arriba Soft Corp* ('*Kelly*')[491] of the United States Court of Appeals for the Ninth Circuit. In *Kelly*, the Ninth Circuit held the use of thumbnail sized copies of photographs for a search engine index was a transformative use. The Ninth Circuit reasoned a search engine's purpose is to improve access to information, a purpose fundamentally different to the original purpose of a photo, which is artistic expression.[492] Applied to the facts in *Field*, the District Court found Google's use of Field's works was transformative: the original purpose of Field's poetry was artistic expression and entertainment, whereas Google's cache index serves purposes such as providing access to content when the original is unavailable, allowing users to monitor changes to websites over time and facilitating analysis of the results of a search query.[493] The District Court also reasoned Google's for-profit status did not weigh against a fair use finding because 'the transformative purpose of Google's use is considerably more important, and, as in *Kelly*, means the first factor of the analysis weighs heavily in favor of a fair use finding.'[494]

The District Court found the second factor, the nature of the copyrighted work, to fall only slightly in Field's favour. The court reasoned that although Field's poems were creative in

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[488] Jasiewicz, above n 472, 846.
[489] Ibid.
[490] John S Sieman, 'Using the Implied License to Inject Common Sense Into Digital Copyright' (2007) 85(3) *North Carolina Law Review* 885, 889.
[491] *Kelly v Arriba Soft Corp*, 336 F 3d 811 (9th Cir, 2003).
[492] Ibid 818.
[493] *Field v Google Inc*, 412 F Supp 2d 1106, 1112 (D Nev, 2006).
[494] Ibid 1120.

nature, they were published and available for free on his website.[495] The District Court determined the third factor, the amount and substantiality of the use, to neither support nor weigh against a fair use finding, as Google used 'no more of the works than is necessary in allowing access to them through "Cached" links.'[496] The District Court found the fourth factor, the impact on potential markets, to weigh strongly in favour of a fair use determination, because Field presented no evidence of any market for his poems.[497] Finally, the District Court considered the fact that Google acted in good faith — by applying standard industry practices and removing cached links to Field's website upon notice of his complaint — to also weighed in favour of a fair use finding.[498]

In *Field*, through fair use, intermediary safe harbour and implied licence, Google easily survived the first substantial legal challenge to its use of rightsholders' works in its search engine and obtained a ruling that applied limitations on rightsholders' exclusionary rights in the digital environment. The outcome in *Field* was reinforced by the subsequent ruling in *Parker*.

Figure 4.2 **Summary of the Copying and Outcomes in *Field v Google***

FIELD v GOOGLE				
What was copied?	**For what purpose?**	**What did Google gain?**	**What did the public gain?**	**Was Google found liable for © infringement?**
Poetry/ Websites	A search index.	Full copies of websites.	Improved capacity to access information online. Hyperlinks to websites – current and cached.	No. Google's use fair, plus protection by safe harbours and implied licence.

[495] Ibid.
[496] Ibid 1121.
[497] Ibid 1122.
[498] Ibid.

2.2 *Parker v Google*

In 2004, Gordon Parker, the author of an e-book titled '29 Reasons Not To Be A Nice Guy',[499] sued Google for copyright infringement.[500] Parker had posted an excerpt from his e-book to USENET[501] — an internet bulletin board system in which users post and search for information.[502] The Googlebot copied the USENET posts and they were included in Google Search.[503] In his claim, Parker sought to establish Google's automated indexing and caching, as well as hyperlinks to his work and excerpts from his work displayed in Google Search results, constituted direct copyright infringement.[504]

District Court Decision — 2006

In 2006, the United States District Court for the Eastern District of Pennsylvania rejected Parker's claim on the grounds that Google was neutral in the transmission of Parker's work and so there was not the required volition or causation necessary to establish direct infringement.[505] The District Court stated:

> When an ISP automatically and temporarily stores data without human intervention so that the system can operate and transmit data to its users, the necessary element of volition is missing. The automatic activity of Google's search engine is analogous. It is clear that Google's automatic archiving of USENET postings and excerpting of websites in its results to users' search queries do not include the necessary volitional element to constitute direct copyright infringement.[506]

[499] Gordon Parker, *29 Reasons Not To Be A Nice Guy* (Snodgrass Publishing Group, 2000).
[500] *Parker v Google Inc*, 422 F Supp 2d 492, 495 (ED Pa, 2006).
[501] Ibid.
[502] For a more detailed discussion of USENET and internet bulletin boards generally see, eg, John Breslin et al, 'Towards Semantically-Interlinked Online Communities' in Asunción Gómez-Pérez and Jérôme Euzenat (eds), *The Semantic Web: Research and Applications* (Springer Berlin Heidelberg, 2005) 500.
[503] *Parker v Google Inc*, 422 F Supp 2d 492, 496 (ED Pa, 2006).
[504] Ibid 495.
[505] Ibid 497.
[506] Ibid.

Citing the decision in *Field,* the District Court also found the safe harbour for system caching protected Google from liability.[507]

The District Court also dismissed Parker's second claim that Google was liable for contributory copyright infringement because Google permits users to view infringing content.[508] The District Court found Parker had failed to show infringement of a specific copyrighted work (Parker referred only to general claims of 'infringed content' and 'USENET postings') or that Google had knowledge of the infringing activity.[509] Similarly, the District Court dismissed Parker's third claim of vicarious copyright infringement on the grounds that Parker failed to show a specific infringement or to establish any direct financial interest on the part of Google.[510] Although Parker's challenge to Google was weakened by what the District Court described as a 'rambling Complaint',[511] the decision in *Parker* again saw Google easily surviving a rightsholder's challenge to its search engine activities. In *Perfect 10*, however, Google was to face a less rambling and far more substantial challenge to its search engine activities.

Figure 4.3 **Summary of the Copying and Outcomes in *Parker v Google***

PARKER v GOOGLE				
What was copied?	For what purpose?	What did Google gain?	What did the public gain?	Was Google found liable for © infringement?
Book/ Website	A search engine.	Full copies of websites.	Improved capacity to access information online. Hyperlinks to websites – current and cached.	No. Google protected by safe harbours and no volitional element.

[507] In its discussion of the requirement of volitional conduct for direct infringement, the District Court cited the decision in *Field*. The District Court noted, 'the District Court for the District of Nevada recently held that Google is entitled to the Act's safe harbor provisions for its system caching activities'. Ibid 498.
[508] Ibid.
[509] Ibid 499.
[510] Ibid 500.
[511] Ibid 498. Although both cases remained at the District Court level and so their precedential value is limited, at the time of the decisions, Professor Jonathan Band posited both *Field* and *Parker* were decisions valuable to copyright stakeholders other than Google:

> *Field* identifies two strong defenses against copyright liability for libraries seeking to engage in the systematic archiving of websites: implied license and fair use. The *Field* decision also suggest that the display of an archived site might not constitute a direct infringement by the library because it does not involve a volitional act by the library. The *Parker* decision could be understood as applying this volitional act theory to both the reproduction and the display of websites. In the absence of authority to the contrary, these two district court opinions from different circuits provide a solid basis for arguing that copyright law currently permits libraries to archive websites.

Jonathan Band, *A New Day for Website Archiving: Field v Google and Parker v Google* (2006), 1 <http://www.arl.org/storage/documents/publications/band-web-archive-2006.pdf>.

2.3 *Perfect 10 v Google*

Google's search engine includes an image search function, Google Images. In 2004, when its dispute with *Perfect 10* commenced, Google Images drew upon a database of thumbnail images — small, low-resolution images — created by Google by copying images from websites across the internet. Google displayed the thumbnail images to Google users in search results, along with links to the websites hosting the full-sized image.[512] The thumbnail images Google created were stored on its servers, along with textual information about the images.[513] Both the images and textual information were also stored in Google's cache.

When displaying image search results to users, Google employs the website design techniques 'in-line linking' and 'framing'. In-line linking directs a browser to show information stored in different locations.[514] Framing affects how in-line content is displayed, for example, by applying borders, scroll bars, or text.[515] In other words, in-line linking and framing are methods for displaying in the one browser window content hosted on various websites.

Perfect 10 operates an adult website that provides access to photos of nude models for a subscription fee. At the time of the initial claim, in addition to its subscription service, the company was also licensing its photos to a third party who then sold the photos to mobile phone users.[516] In its complaint against Google, Perfect 10 alleged the inclusion of thumbnail versions of Perfect 10's photos in Google's search indexes, along with in-line linking to websites hosting full-sized photos, and Google's cache of websites hosting full-sized photos, constituted

[512] In 2013, Google updated the design and function of Google Images to include larger higher resolution copies of images. Google claimed the change was made in order to 'provide a better search experience'. Hongyi Li, 'A Faster Image Search' on *Google Webmaster Central Blog* (23 January 2013) <https://webmasters.googleblog.com/2013/01/faster-image-search.html>. In 2016, Getty Images cited the change to Google Images as a central reason for an antitrust complaint against Google submitted to the European Commission. Getty Images claims Google's image search is anti-competitive because it creates 'captivating galleries of high-resolution, copyrighted content', which permits Google 'to reinforce its role as the internet's dominant search engine, maintaining monopoly over site traffic, engagement data and advertising spend.' See Getty Images, *Getty Images to File Competition Law Complaint Against Google* (26 April 2016) <http://press.gettyimages.com/getty-images-files-competition-law-complaint-against-google/>.
[513] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1155 (9th Cir, 2007).
[514] See, eg, Lee Burgunder and Barry Floyd, 'The Future of Inline Web Designing After Perfect 10' (2008) 17(1) *Texas Intellectual Property Law Journal* 1.
[515] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1156 (9th Cir, 2007).
[516] *Perfect 10 v Google Inc*, 416 F Supp 2d 828, 832 (CD Cal, 2006).

copyright infringement.[517] Perfect 10 claimed Google had directly infringed Perfect 10's exclusive display and distribution rights.[518]

Court of Appeals for the Ninth Circuit Decision on In-Line Linking — 2007

In 2007, the United States Court of Appeals for the Ninth Circuit held in-line linking to full-size images was not a direct infringement of Perfect 10's display right.[519] To reach this conclusion, the Ninth Circuit decided the District Court's analysis of the 'server test', which defines display as 'the act of *serving* content over the web-i.e., physically sending ones and zeros over the Internet to the user's browser', was consistent with the language of the US Copyright Act.[520] The Ninth Circuit explained:

> a computer owner that stores an image as electronic information and serves that electronic information directly to the user…is displaying the electronic information in violation of a copyright holder's exclusive display right…Conversely, the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information.[521]

As Google did not directly display a copy of Perfect 10's images, but rather provided instructions directing a user's browser to refer to another website's content, the Ninth Circuit found that in-line linking was not an infringement of Perfect 10's display right.[522] In

[517] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146 (9th Cir, 2007).
[518] Ibid 1159. Perfect 10 also claimed Google was liable under the theories of contributory and vicarious copyright infringement, when Google users download Perfect 10's photos and when third party websites reproduce, display and distribute Perfect 10's photos without permission. *Perfect 10 v Google Inc*, 416 F Supp 2d 828, 852 (CD Cal, 2006).
[519] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146 (9th Cir, 2007).
[520] *Perfect 10 v Google Inc*, 416 F Supp 2d 828, 839 (CD Cal, 2006); *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1160 (9th Cir, 2007).
[521] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1159 (9th Cir, 2007).
[522] Ibid 1161. Although the Ninth Circuit rejected the claim of direct infringement, it suggested Google may be liable for secondary liability (involving the direct infringement by third party websites who reproduce, display and distribute Perfect 10's images) and remanded the issue back to the District Court. The District Court was instructed to resolve factual disputes over the nature of Perfect 10's notifications to Google and Google's immunity under the DMCA safe harbor provisions. In 2010, the District Court found Google's caching and Blogger functions qualified for safe harbour, but denied safe harbour for a limited number of Web and Image Search infringements. In 2011, the Ninth Circuit affirmed the District Court's decision and in 2012 the case was dismissed without option for appeal. In the 2011 decision, the Ninth Circuit also considered a claim by Perfect 10 that when Google forwarded take-down notices to chillingeffects.org Google infringed Perfect 10's copyright. The Ninth Circuit rejected this claim. *Perfect 10 Inc v Google Inc*, 653 F 3d 976 (9th Cir, 2011).

accordance with this analysis, the court also found Google's in-line linking was not an infringement of Perfect 10's exclusive distribution right. The court reasoned that distribution requires an act of 'actual dissemination'[523] of a copy and, as 'Google did not communicate the full-size images to the user's computer, Google did not distribute these images.'[524]

The Ninth Circuit's decision was significant to website designers utilising in-line linking, indicating the practice would not infringe display or distribution rights.[525] It was also notable for its conceptual basis — the implicit view of the structure and function of the internet and the role of a search engine. Professors Lee Burgunder and Barry Floyd suggests the internet is often incorrectly perceived to be comprised of independent sites that individuals access, when instead the internet is more akin to a public auditorium with all 'technically unrestricted content'[526] on the one stage:

> Copyright holders (and others) who place their material on the stage have chosen to display their works so that everyone in the auditorium can see it. The difficult problem for members of the audience is determining what items to view and how to organize them in a meaningful way. After all, there are literally billions of literary and artistic works that individuals and businesses have decided to display on the Internet stage. The role of the Internet web site developer is to take on this task by serving as the conductor who selects, crops, filters, and arranges the previously displayed items in a meaningful way so that members of the audience may benefit from them. If this analogy is followed, then a traditional hyperlink does not take a customer to a particular address to view the items at that location. How could it? After all, the customer never leaves his or her seat in the auditorium. Instead, the address is more like a request to a specific conductor to determine what should be visible at that patron's seat on the viewing screen.[527]

Burgunder and Floyd argue the Ninth Circuit's decision was consistent with the view that when a website in-line links to an image, 'it has not expanded the universe of people having

[523] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1162 (9th Cir, 2007).
[524] Ibid.
[525] See, eg, Burgunder and Floyd: 'the *Perfect 10* litigation has to be regarded as a major victory for web site operators who build their sites with inline web designing techniques'. Burgunder and Floyd, above n 514, 17.
[526] Ibid 21.
[527] Ibid 21-22.

immediate access to the piece',[528] instead, it has provided direction 'so that they can see what the copyright owner has already offered them to view'.[529] Effectively, in its decision on in-line linking, the Ninth Circuit viewed certain technical reproductions in the context of the structure and function of the internet and rejected the proposal that they fell within the scope of authors' exclusive rights.

Court of Appeals for the Ninth Circuit Decision on Caching — 2007

In *Perfect 10*, the Ninth Circuit also held that Google's caching of websites hosting full-size images of Perfect 10's photos, without permission, was not an infringement.[530] The Ninth Circuit stated:

> Because Google's cache merely stores the text of webpages, our analysis of whether Google's search engine program potentially infringes Perfect 10's display and distribution rights is equally applicable to Google's cache…it is irrelevant whether cache copies direct a user's browser to third-party images that are no longer available on the third party's website, because it is the website publisher's computer, rather than Google's computer, that stores and displays the infringing image.[531]

As Professor Robert McFarlane observed, in *Perfect 10* the Ninth Circuit's application of the server test effectively narrowed the 'theories under which an Internet search engine company could be held liable for direct and indirect copyright infringement'.[532]

Court of Appeals for the Ninth Circuit Decision on Thumbnails — 2007

The server test did, however, render Google's display of thumbnail images an infringement of Perfect 10's exclusive display rights.[533] Google had stored on its own servers and served directly to users copies of Perfect 10's photos.[534] Yet, the Ninth Circuit found Google's use

[528] Ibid 24.
[529] Ibid.
[530] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1162 (9th Cir, 2007).
[531] Ibid.
[532] Robert A McFarlane, 'The Ninth Circuit Lands a "Perfect 10" Applying Copyright Law to the Internet' (2008) 38(3) *Golden Gate University Law Review* 381, 404.
[533] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146 (9th Cir, 2007).
[534] Ibid.

was fair.[535] In its fair use analysis, the Ninth Circuit emphasised the need to explore each fair use factor in the context of the purpose of copyright — to promote the progress of science and useful arts — and to weigh the results against the objective of serving 'the welfare of the public'.[536] In its analysis of the first fair use factor, the Ninth Circuit found Google's use of thumbnails to be 'highly transformative',[537] transforming a photo from a work of entertainment into a reference tool.[538] The Ninth Circuit stated:

> Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. Just as a "parody has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one," *Campbell*, 510 U.S. at 579, a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.[539]

In accordance with the finding in *Kelly* that 'even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work',[540] the Ninth Circuit held that the transformative nature of Google's use was not diminished by the fact Google copied Perfect 10's photos in their entirety.[541] In addition, the Ninth Circuit stated it was 'mindful'[542] of the Supreme Court's direction in *Campbell* that the more transformative a new work is, the less significant are other factors.[543]

This consideration impacted the Ninth Circuit's appraisal of the commercial elements of Google's use — its AdSense business — and any potential superseding uses. Perfect 10

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[535] Ibid.
[536] Ibid 1163.
[537] Ibid 1165.
[538] Ibid.
[539] Ibid.
[540] Ibid; *Kelly v Arriba Soft Corp*, 336 F 3d 811, 818-819 (9th Cir, 2003).
[541] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1165 (9th Cir, 2007).
[542] Ibid 1166.
[543] *Campbell v Acuff-Rose Music Inc*, 510 US 569, 579 (1994).

claimed Google's thumbnails negatively impacted on its ability to profitably license its photos to mobile phone users. Perfect 10 claimed Google's thumbnails were a direct substitute for this product.[544] The Ninth Circuit specified that in a fair use analysis any superseding or commercial uses must be weighed against the transformative use, the purpose of copyright and the public interest.[545] The Ninth Circuit therefore concluded that the 'significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails'.[546] Accordingly, the Ninth Circuit concluded the first factor weighed heavily in favour of fair use.[547]

The Ninth Circuit found the second fair use factor, the nature of the copyrighted work, to weigh slightly against fair use. The court reasoned that although the photos were creative in nature, they had been published and once Perfect 10 had published its photos on its website, the company had exploited the 'commercially valuable right of first publication'[548] and was 'no longer entitled to the enhanced protection available for an unpublished work.'[549] The third factor, the amount and substantiality of the portion used, was deemed neutral, mirroring the decision in *Kelly,* where the Ninth Circuit held an exact copy was an appropriate amount for the purpose of a search engine.[550] In its analysis of the fourth factor, the effect on potential markets, the Ninth Circuit held 'Google's use of thumbnails for search engine purposes is highly transformative, and so market harm cannot be presumed'.[551]

The Ninth Circuit also argued for 'the importance of analyzing fair use flexibly in light of new circumstance'[552] and, weighing all four factors together and against the purpose of United States copyright law, concluded Google's use of Perfect 10's images was fair.[553] With this outcome, Google had amounted three decisions providing it assurance that, under United States law, using rightsholders' works without permission for the purpose of a search index will not

[544] *Perfect 10 v Google Inc*, 416 F Supp 2d 828, 851 (CD Cal, 2006).
[545] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1166 (9th Cir, 2007).
[546] Ibid.
[547] Ibid 1167.
[548] Ibid.
[549] Ibid.
[550] *Kelly v Arriba Soft Corp*, 336 F 3d 811 (9th Cir, 2003).
[551] *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1168 (9th Cir, 2007).
[552] Ibid 1166.
[553] Ibid 1168.

give rise to copyright liability.[554] Importantly, the decisions in *Field*, *Parker* and *Perfect 10,* along with *Kelly*, had implications for other aspects of Google's business. As Professor Pamela Samuelson remarks: '[w]ithout these precedents, Google might well have been more reluctant to scan in-copyright books from university libraries.'[555]

Figure 4.4 Summary of the Copying and Outcomes in *Perfect 10 v Google*

PERFECT 10 v GOOGLE				
What was copied?	**For what purpose?**	**What did Google gain?**	**What did the public gain?**	**Was Google found liable for © infringement?**
Photos/ Websites	A search index.	Full copies of images.	Improved capacity to access visual information online. Thumbnails of images and hyperlinks to websites containing images – current and cached.	No. Display of thumbnails in a search index a fair use; no actual dissemination of a copy by Google when in-line linking.

3. Google Books

3.1 *Authors Guild v Google*

According to Sergey Brin and Larry Page, they first formulated their book digitisation concept as students at Stanford University: they envisioned a future where digital libraries were common, made possible by a 'web crawler' which would scan and index the content of entire books, 'determining any given book's relevance and usefulness by tracking the number and

[554] See, eg, Meng Ding who posits *Perfect 10* set 'a favorable standard for internet search engines on the "transformative" nature of an appropriation of a copyrighted work'. Meng Ding, 'Perfect 10 v. Amazon.com: A Step Toward Copyright's Tort Law Roots' (2008) 23(1) *Berkeley Technology Law Journal* 373, 373.

[555] Pamela Samuelson, 'The Google Book Settlement as Copyright Reform' (2011) 480 *Wisconsin Law Review* 477, 492. Ding reached a similar conclusion, reasoning: '[i]f storing an exact copy of an original picture for the purpose of providing access to internet searches constitutes fair use because it serves a different function, storing exact copies of a book digitally for the purpose of providing access to an internet search could also constitute fair use.' Ding, above n 554, 394. While Google's thumbnail images were not full-sized copies Ding suggests the fair use finding in *Perfect 10* could be interpreted as extending to even full-sized copies of copyrighted images. Ding argues, given the Ninth Court's clear decision that a search engine serves a transformative purpose, along with the Ninth Circuit's reference to the decision in *Nunez v Caribbean International News Corporation* ('*Nunez*') of the United States Court of Appeals for the First Circuit, the decision in *Perfect 10* could be interpreted as a potential 'willingness to find fair use for storing and displaying full-sized pictures for the purpose of internet search'. Ibid 394. In *Nunez* the First Circuit found a newspaper's full-sized copies of copyrighted modeling portfolio photos was transformative. See *Nunez v Caribbean International News Corp*, 235 F 3d 18 (1st Cir, 2000).

quality of citations from other books.'[556] In 2002, Google began developing its book scanning technology and forming relationships with libraries and publishers.[557] In 2004, Google entered into an agreement with Oxford University's Bodleian library, the first of several agreements struck that year, granting Google permission by the library to scan its full collection.[558] In late 2004, Google launched 'Google Print', with a projected collection of over 15 million books.[559]

There are two divisions within Google Books. The Google Books Partner Program sees Google scan, or incorporate scans of books provided by publishers, into the Google Books database, with the express permission of publishers.[560] Within this division, Google displays excerpts from the book (relevant to a user's search query) and provides links for purchasing the full book, along with bibliographic information about the book.[561] The second division, the Google Books Libraries Project, sees Google scan books held in library collections.[562] The libraries are provided with a digital copy of each book for cataloging and preservation purposes and the books are made available to the public for searching and excerpts of the books are displayed in search results.[563] The copyright status of books within the library collections varies; some are in the public domain, while others remain under copyright protection and the majority are out of print.[564] Within the Libraries Project, Google does not obtain permission from rightsholders to copy or display books and it does not compensate rightsholders.[565]

In 2005, Google was sued by the Authors Guild, a writers' organisation that advocates for 'the copyright and contractual interests of published writers'.[566] The Author's Guild claimed Google was 'engaging in massive copyright infringement'[567] by copying works held in libraries

[556] Google Books, *Google Books History* <http://www.google.com.au/googlebooks/about/history.html>.
[557] Ibid.
[558] Ibid. For an examination of the initial participating libraries see Matthew Rimmer, *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007) 229-232.
[559] Google Books, *Google Books History*, above n 556.
[560] *Authors Guild Inc v Google Inc*, 954 F Supp 2d 282, 285 (SD NY, 2013). See also Google Books, *Promote Your Books On Google — For Free* (n.d.) <https://www.google.com/googlebooks/partners/tour.html>.
[561] Google, *Google Books - Promote Your Books On Google - For Free*, above n 560.
[562] Google Books, *Google Books Library Project — An Enhanced Card Catalog of the World's Books* <https://www.google.com/googlebooks/library/>.
[563] *Authors Guild Inc v Google Inc*, 954 F Supp 2d 282, 286 (SD NY, 2013).
[564] Ibid 285.
[565] Ibid 286.
[566] *Complaint, Authors Guild Inc v Google Inc*, No 05-CV-8136, 2 (SD NY, 2005).
[567] Ibid.

without the permission of copyright holders.[568] The Authors Guild alleged Google was infringing 'the electronic rights of the copyright holders'[569] and Google was required to 'obtain authorization from the holders of the copyrights…before creating and reproducing digital copies of the Works for its own commercial use'.[570] The Authors Guild sought damages, injunctive and declaratory relief.[571]

In an initial response to the suit, Google publicly expressed confidence that its use of the books was fair. Susan Wajcicki, Vice President of Product Management at Google, stated the 'Library Project is fully consistent with both the fair use doctrine under U.S. copyright law and the principles underlying copyright law itself'.[572] Google Chief Executive Officer Eric Schmidt also stated:

> The program's critics maintain that any use of their books requires their permission. We have the utmost respect for the intellectual and creative effort that lies behind every grant of copyright. Copyright law, however, is all about which uses require permission and which don't; and we believe (and have structured Google Print to ensure) that the use we make of books we scan through the Library Project is consistent with the Copyright Act, whose "fair use" balancing of the rights of copyright-holders with the public benefits of free expression and innovation allows a wide range of activity, from book quotations in reviews to parodies of pop songs — all without copyright-holder permission.[573]

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[568] Ibid. The same year, a suit was also filed against Google by members of the Association of American Publishers. In 2012, the publishers and Google announced a settlement agreement providing Google access to the publishers' works for the Google Library Project. See Google, 'Publishers and Google Reach Agreement ' on *Google News from Google* (4 October 2012) <http://googlepress.blogspot.com.au/2012/10/publishers-and-google-reach-agreement.html>.

[569] *Complaint, Authors Guild Inc v Google Inc*, No 05-CV-8136, 2 (SD NY, 2005).

[570] Ibid 2-3.

[571] Ibid.

[572] Susan Wajcicki, 'Google Print and the Authors Guild' on *Google Official Blog* (20 September 2005) <https://googleblog.blogspot.com.au/2005/09/google-print-and-authors-guild.html>.

[573] Eric Schmidt, 'Books of Revelation', *The Wall Street Journal* (online), 18 October 2005 <http://www.wsj.com/articles/SB112958982689471238>. Eric Schmidt is currently a technical advisor to Alphabet, Inc. He stepped down as CEO of Google in 2011 and as Executive Chairman of Alphabet, Inc. in 2017. Alphabet, 'Eric Schmidt to Become Technical Advisor to Alphabet' (Press Release, 21 December 2017) <https://abc.xyz/investor/news/releases/2017/1221.html>.

Regardless of any apparent legal certitude, at the time, it was far from clear that copying full books for a search index fell within the parameters of fair use — Google's use of the library books unquestionably tested 'the boundaries of fair use'.[574]

A Proposed Settlement — 2008

Plausibly, tacit legal uncertainty accounts for Google's initial decision to pursue a settlement with the Authors Guild. In 2008, after three years of legal proceedings and negotiations, the parties sought court approval for a settlement agreement that included all books registered with the United States Copyright Office or published in the United Kingdom, Australia or Canada.[575] The settlement provided Google permission to continue its book digitisation, in return for various forms of compensation to rightsholders.[576] For example, Google agreed to pay rightsholders a percentage of revenues earned from subscription fees, electronic sales and advertising.[577] The agreement also established a 'Book Rights Registry', responsible for maintaining a database of rightsholders and for distributing revenues.[578] The agreement required Google to implement an 'opt-out' policy, facilitating the exclusion of books from all or some of the proposed uses at the request of a rightsholder.[579]

In 2011, the United States District Court for the Southern District of New York rejected the proposed settlement. The District Court suggested the parties change the agreement from an 'opt-out' to an 'opt-in' arrangement.[580] The District Court found the opt-out policy to 'expropriate rights of individuals involuntarily'[581] and to produce a system in which 'if copyright owners sit back and do nothing, they lose their rights…class members who fail to

[574] *Authors Guild v Google Inc*, 804 F 3d 202, 206 (2nd Cir, 2015).
[575] Google, 'Authors, Publishers, and Google Reach Landmark Settlement' on *Google News From Google* (28 October 2008) <http://googlepress.blogspot.com.au/2008/10/authors-publishers-and-google-reach_28.html>. A revised settlement submitted to the United States District Court for the Southern District of New York in 2009. See Google, *Increasing Access to Books: The Google Books Settlement* <https://sites.google.com/a/pressatgoogle.com/googlebookssettlement/home>; Google, 'The Revised Google Books Settlement Modifications Overview' (2009) <https://sites.google.com/a/pressatgoogle.com/googlebookssettlement/home>.
[576] Google, 'The Revised Google Books Settlement Settlement Modifications Overview', above n 575.
[577] *Authors Guild v Google Inc* 770 F Supp 2d 666, 671 (SD, 2011).
[578] Ibid.
[579] Ibid 672.
[580] Ibid 686. Pamela Samuelson contends the Google Books Settlement (GBS) was effectively an attempt at copyright law reform: '[a]n intriguing way to view the GBS settlement is as a mechanism through which to achieve copyright reform that Congress has not yet been and may never be willing to do.' Samuelson, 'The Google Book Settlement as Copyright Reform', above n 555, 482.
[581] *Authors Guild v Google Inc* 770 F Supp 2d 666, 680 (SD, 2011).

opt out will be deemed to have released their rights even as to future infringing conduct.'[582] The District Court held that releasing Google from liability for future acts 'exceeds what the court may permit'.[583] The District Court also expressed that 'it is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission.'[584]

Following the rejection of the settlement, the Authors Guild sought class certification for a class including any United States resident holding a copyright interest in a book copied by Google,[585] however, in 2013, the Court of Appeals for the Second Circuit remanded the case to the District Court for consideration of Google's fair use defence.[586]

District Court Decision – 2013

In 2013, the District Court agreed with the Authors Guild that Google's digital copies, stored on its servers, provided to libraries and displayed in search results, without the permission of rightsholders, was *prima facie* an infringement of the rightsholders' exclusive reproduction, distribution and display rights.[587] However, the District Court held Google's use was fair.[588]

In the years since the original complaint, Google had continued its book scanning, partnering with libraries and publishers worldwide. By the time the District Court considered Google's fair use defence in 2013, Google had scanned over 20 million books, each available to the public for full-text searches and for view either in full or in snippets.[589] In its opinion, the District Court recognised Google Books had become an 'essential research tool'[590] providing 'a new and efficient way for readers and researchers to find books'[591] and to undertake data mining activities.[592] The District Court acknowledged the contribution of Google Books to

[582] Ibid 681.
[583] Ibid 677.
[584] Ibid 682.
[585] *Authors Guild, Inc v Google Inc* 721 F 3d 132, 134 (2nd Cir, 2013).
[586] Ibid 135.
[587] *Authors Guild Inc v Google Inc*, 954 F Supp 2d 282, 289, 293 (SD NY, 2013).
[588] Ibid 293.
[589] *Authors Guild v Google Inc*, 804 F 3d 202, 208 (2nd Cir, 2015). The portion of the book available for view depends upon the copyright status of the book or, in the case of the Google Books Partner Program, Google's agreement with the rightsholders.
[590] *Authors Guild Inc v Google Inc*, 954 F Supp 2d 282, 287 (SD NY, 2013).
[591] Ibid.
[592] Ibid.

preserving, reviving, promoting and expanding access to books,[593] particularly for the print-disabled and other 'traditionally underserved populations'.[594]

In its fair use analysis, the District Court held Google's use of the works was highly transformative, transforming 'expressive text into a comprehensive word index that helps readers, scholars, researchers and others to find books'.[595] The District Court further stipulated that the display of snippets was transformative:

> The display of snippets of text for search is similar to the display of thumbnail images of photographs for search or small images of concert posters for reference to past events, as the snippets help users locate books and determine whether they may be of interest. Google Books thus uses words for a different purpose — it uses snippets of text to act as pointers directing users to a broad selection of books.[596]

The District Court held Google's for-profit status did not weigh against fair use, reasoning that because Google did not sell its scans and was not running advertisements against the books, Google was not engaging in 'the direct commercialization of copyrighted works'.[597] Furthermore, the District Court concluded any commercial benefit enjoyed by Google must be considered in the context of the other educational purposes Google Books serves.[598]

The District Court rejected the argument that Google Books served as a market replacement for books and instead held 'Google Books enhances the sale of books to the benefit of copyright

[593] Ibid 288.
[594] Ibid.
[595] Ibid 291. The District Court also held the display of snippets of the books in search results was a transformative use, relying on the Ninth Circuit's decisions in *Perfect 10* and *Kelly,* as well as *Bill Graham Archives v Dorling Kindersley* of the United States Court of Appeals for the Second Circuit. In *Bill Graham Archives v Dorling Kindersley* the Second Circuit held the display of copies of Grateful Dead tour posters in a Grateful Dead biography was transformative. *Bill Graham Archives v Dorling Kindersley* 448 F 3d 605 (2nd Cir, 2006).
[596] *Authors Guild Inc v Google Inc*, 954 F Supp 2d 282, 291 (SD NY, 2013).
[597] Ibid 292.
[598] Ibid. The second factor, the nature of the works, was also found to weigh in favour of fair use, on the grounds that all the books copied were published works and a majority of the books copied were non-fiction. In 2013, over 90 percent of the books in Google's database were non-fiction and a majority were no longer in print, at 285. The District Court found the third factor, the amount and substantiality of the portion used, to weigh only slightly against fair use. Google had copied the works in full, however, the court reasoned, copying the entire work was necessary in order to facilitate full-text searches of books, at 292. In its third factor analysis, the District Court also considered significant Google's policy and technological measures for preventing users from viewing copyrighted books in full.

holders.'[599] Weighed together, and viewed in light of the purpose of copyright law, the District Court concluded Google's use of the books was a fair use, providing 'significant public benefits'[600] and advancing 'the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors'.[601]

Court of Appeals for the Second Circuit HathiTrust Decision — 2014

In 2008, several of the libraries participating in Google Books collaborated to create the HathiTrust Digital Library (HDL),[602] a joint repository of digitised books, including the books provided to the libraries by Google for preservation and archiving purposes.[603] The HDL provides public access to its database of digital books, permitting users to conduct full-text keyword searches. The results returned to users include the number of times the search term appears in a book and page numbers, however, unlike Google Books, HDL search results do not include snippets of text from the books.[604]

The Authors Guild sued the HathiTrust seeking 'a declaration that the systemic digitization of copyrighted materials without authorization'[605] infringed their exclusive rights in their works, along with an injunction preventing 'the reproduction, distribution, or display'[606] of their works and prohibiting the 'provision of works to Google for digitization without authorization'.[607] In *HathiTrust*, the Second Circuit held that copying entire books for the purpose of full-text searching was a fair use, stating, 'the creation of a full-text searchable database is a quintessentially transformative use.'[608] This decision assisted Google in the Authors Guild's

[599] Ibid 293.
[600] Ibid.
[601] Ibid.
[602] *Authors Guild Inc v HathiTrust*, 755 F 3d 87, 90 (2nd Cir, 2014). See also HathiTrust Digital Library, *Our Digital Library* <https://www.hathitrust.org/digital_library>. The Second Circuit also cited the decision in *Perfect 10*. See *Authors Guild v Google Inc*, 804 F 3d 202, 217, 227 (2nd Cir, 2015).
[603] *Authors Guild Inc v HathiTrust*, 902 F Supp 2d 445, 448 (SD NY, 2012). In its agreement with the libraries, Google agreed to indemnify the libraries against copyright infringement claims, for example, the agreement between Google and the University of California provides, in clause 10.1 that 'Google shall defend, indemnify, and hold harmless University from and against any and all liabilities, damages, charges, fees, including reasonable attorneys' fees, costs and expenses arising out of or in any way related to a third party claim, lawsuit, and/or any other legal, quasi-legal, or administrative proceeding alleging…copyright infringement'. Google and the University of California, *Google Library Agreement* <http://www.cdlib.org/services/collections/massdig/docs/uc_google_agreement.pdf>.
[604] *Authors Guild Inc v HathiTrust*, 755 F 3d 87, 91 (2nd Cir, 2014). The HDL also provides access to books in full for persons with a print disability and it provides a book preservation function for members, issuing replacement copies of books previously owned by a member library that are lost, stolen or damaged and are otherwise 'unobtainable at a fair price'. At 92.
[605] *Authors Guild Inc v HathiTrust*, 902 F Supp 2d 445, 449 (SD NY, 2012).
[606] Ibid.
[607] Ibid.
[608] *Authors Guild Inc v HathiTrust*, 755 F 3d 87, 97 (2nd Cir, 2014).

appeal in 2015.

Court of Appeals for the Second Circuit Decision — 2015

On appeal, the Authors Guild argued Google's copying of books in full, and the display of snippets, was not transformative but rather produced substitutes for their works.[609] The Authors Guild also argued Google's for-profit status precluded a fair use finding.[610] Additionally, the Authors Guild claimed the use of books in search technologies, including snippet displays, infringed rightsholders' exclusive derivative rights.[611]

In 2015, the United States Court of Appeals for the Second Circuit rejected the Authors Guild's arguments, affirming the District Court decision.[612] In its decision, the Second Circuit described the history of copyright law and fair use:

> For nearly three hundred years, since shortly after the birth of copyright in England in 1710, courts have recognized that, in certain circumstances, giving authors absolute control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge…Courts thus developed the doctrine, eventually named fair use, which permits unauthorized copying in some circumstances[613]

The Second Circuit also assessed Google's book scanning and display of snippets of copyrighted books without the permission of rightsholders, within the context of this history and purpose of copyright. The Second Circuit stated:

> The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial

[609] *Authors Guild v Google Inc*, 804 F 3d 202, 207 (2nd Cir, 2015).
[610] Ibid. The Authors Guild made two further claims: they claimed Google's book database was vulnerable to hackers who might release their books online for free, diminishing the value of their copyrights, and they claimed providing digital copies of books to libraries was not a fair use and represented another potential risk to the value of their copyright. The Second Circuit found there was not sufficient evidence to show hacking posed an unreasonable risk and, regarding the provision of copies to libraries, the court maintained that given the purpose of the digital copy was non-infringing digital searches and that 'the possibility that libraries may misuse their digital copies is sheer speculation' there was 'no basis…to impose liability on Google'. At 229.
[611] Ibid 207.
[612] Ibid.
[613] Ibid 212.

> incentive to create informative, intellectually enriching works for public consumption…Thus, while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.[614]

Furthermore, the Second Circuit advised fair use should be regarded flexibly, stating each fair use factor 'stands part of a multifaceted assessment of the crucial question: how to define the boundary limit of the original author's exclusive rights in order to best serve the overall objectives of the copyright law to expand public learning while protecting the incentives of authors to create for the public good.'[615]

In its first factor analysis the Second Circuit concluded Google Books' purpose is to 'provide otherwise unavailable information about the originals.'[616] The Second Circuit explained, 'the purpose of Google's copying of the original copyrighted books is to make available significant information *about those books,* permitting a searcher to identify those that contain a word or term of interest'.[617] According to the Second Circuit, this included the text and data mining functions of Google Books, such as the ngram research function, which provides information about the use of individual words and phrases over time.[618] Furthermore, the Second Circuit held Google's snippet view feature 'adds important value to the basic transformative search function'.[619] According to the Second Circuit, snippet view provides a reader 'just enough context surrounding the searched term to help her evaluate whether the book falls within the scope of her interest (without revealing so much as to threaten the author's copyright interests).'[620] The Second Circuit held Google's copying and display of snippets of books was a transformative use, providing information about books rather than providing a substitute for or derivative of the original work.[621]

The Second Circuit asserted the significance of transformativeness to a fair use determination: 'transformative uses tend to favor a fair use finding because a transformative use is one that

[614] Ibid.
[615] Ibid 213.
[616] Ibid 215.
[617] Ibid 217.
[618] Ibid 209.
[619] Ibid 217.
[620] Ibid 218.
[621] Ibid 207.

communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public knowledge.'[622] The Second Circuit rejected the Authors Guild's argument that Google's for-profit status should preclude a finding of fair use, stating that in cases where there is a 'convincing transformative purpose and absence of significant substitutive competition with the original'[623] this argument had been 'repeatedly rejected'.[624]

In its analysis of the second factor, the nature of the copyrighted work, the Second Circuit observed that in isolation, the second factor does not perform a 'large role in explaining a fair use decision.'[625] The Second Circuit connected the second factor to the first, explaining that analysis of the nature of the original work is necessary in order to understand 'whether the copying work has an objective that differs from the original'.[626] Accordingly, the Second Circuit held 'the second factor favors fair use not because Plaintiffs' works are factual, but because the secondary use transformatively provides valuable information about the original, rather than replicating protected expression in a manner that provides a meaningful substitute for the original.'[627]

Of the third factor, the amount and substantiality of the portion used, the Second Circuit found that Google was required to make full copies of the books, for, without full copies, 'its search function could not advise searchers reliably whether their searched term appears in a book (or how many times).'[628] The Second Circuit followed the decision in *HathiTrust,* which concluded full copies of the books were 'reasonably necessary'[629] for a full-text search function. Accordingly, in *Authors Guild* the Second Circuit concluded Google's copying of the full book was 'reasonably appropriate to Google's transformative purpose'.[630] Regarding the snippets displayed to readers, the Second Circuit concluded the 'fragmentary and scattered nature'[631] of the snippets ensures Google 'does not reveal matter that offers the marketplace a

[622] Ibid 214.
[623] Ibid 219.
[624] Ibid. The Second Circuit cited *Cariou v Prince* 714 F 3d 694 (2nd Cir, 2013); *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994); *Castle Rock Entertainment v Carol Publishing Group* 150 F 3d 132 (2nd Cir, 1998).
[625] *Authors Guild v Google Inc*, 804 F 3d 202, 220 (2nd Cir, 2015).
[626] Ibid.
[627] Ibid.
[628] Ibid 221.
[629] *Authors Guild Inc v HathiTrust*, 755 F 3d 87, 98 (2nd Cir, 2014).
[630] *Authors Guild v Google Inc*, 804 F 3d 202, 221 (2nd Cir, 2015).
[631] Ibid 223.

significantly competing substitute for the copyrighted work.'[632]

In its fourth factor analysis, the Second Circuit reasoned the ability to search a book for words or phrases is not a substitute for the original work, and while the snippet view may cause some loss of sales, 'some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favour of the rights holder in the original'.[633] The Second Circuit reasoned it was also likely that lost sales would occur on occasions when the reader is seeking information not subject to copyright — for example, historical facts — rather than protected expression.[634]

The Second Circuit rejected the Authors Guild's secondary claim that Google Books infringed the exclusive derivative right in 'the application of search and snippet view functions to their works'.[635] The Second Circuit concluded an author's copyright does not include all information about a work, for example, information regarding how often a word or phrase is used in a work.[636] The Second Circuit explained the underlying reasoning for the derivative right is that '[a]n author's right to control and profit from the dissemination of her work ought not to be evaded by conversion of the work into different forms.'[637] The Second Circuit held, '[n]othing in the statutory definition of a derivative work, or of the logic that underlies it, suggests that the author of an original work enjoys an exclusive derivative right to supply information about that work of the sort communicated by Google's search function.'[638]

In late 2015, the Authors Guild unsuccessfully petitioned the United States Supreme Court to review the Second Circuit's decision.[639] With the 2015 Second Circuit decision in place, Kenneth Plevan argues that '*Google Books* should secure the role of the transformative use analysis in copyright jurisprudence for the foreseeable future.'[640] Where previous courts had

[632] Ibid 222.
[633] Ibid 224.
[634] Ibid.
[635] Ibid 225.
[636] Ibid.
[637] Ibid.
[638] Ibid 226.
[639] *Petition For A Writ of Certiorari* No 15-849 (In the Supreme Court of the United States, 31 December 2015). The Authors Guild's petition was denied in April 2016. *Order List: 578 US*, Orders in Pending Cases, 2 (Supreme Court 18 April 2016).
[640] Kenneth A Plevan, 'The Second Circuit and the Development of Intellectual Property Law: The First 125 Years' (2016) 85 *Fordham Law Review* 143, 157. See also Matthew Rimmer, 'The Foxfire of Fair Use: The Google Books Litigation and the Future of Copyright Laws' (2017). Cf Kelvin Hiu Fai Kwok, 'Google Book Search, Transformative Use, and Commercial Intermediation: An Economic Perspective' (2015) 17(2) *Yale Journal of Law & Technology* 283; Caile Morris, 'Transforming Transformative Use: The Growing Misinterpretation of the Fair Use Doctrine' (2015) LF 5(1) *Pace Intellectual Property, Sports & Entertainment Law Forum* 10.

deemed commercial factors critical to fair use, the Google Books decision consolidates a shift away from commercial considerations. For example, in 1985, the United States Supreme Court in *Harper & Row v Nation Enterprises* stated the fourth fair use factor, the effect on the market, was 'undoubtedly the single most important element of fair use.'[641] In 1990, in *Stewart v Abend,* the Supreme Court again stated the fourth factor was the most important factor in a fair use analysis.[642] It was not until *Campbell* in 1994 that the United States Supreme Court made its significant articulation of the importance of transformative works.[643] Google's fair use cases, the decisions in *Perfect 10* and *Authors Guild* in particular, fortify the *Campbell* approach.

In *Field*, *Parker*, *Perfect 10* and *Authors Guild*, Google tested the boundaries of copyright law as applied to digital technologies. Through these decisions, Google limited the scope for copyright liability for search engines and widened the parameters of fair use and other limitations on rightsholders' exclusive rights in the digital environment, in line with Google's vision for copyright law. Undoubtedly, the outcome in each of these cases was overwhelmingly favorable to Google. However, since 2007, Google had been fighting a copyright battle on another front, against a different media entity, regarding its video hosting platform, YouTube.

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[641] *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 (1985), 566.
[642] *Stewart v Abend* 495 US 207 (1990), 238A.
[643] *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994). In *Campbell v Acuff-Rose Music* the Supreme Court stated:

> Although such transformative use is not absolutely necessary for a finding of fair use…the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright…the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. At 579.

Notably, the 2015 Second Circuit decision in *Authors Guild* was written by Judge Pierre N Leval, author of the 1990 article 'Towards A Fair Use Standard', in which Leval argues the critical factor in a fair use analysis is whether a work is transformative, the approach adopted by the Supreme Court in *Campbell*. See Pierre N Leval, 'Toward a Fair Use Standard' (1990) 103(5) *Harvard Law Review* 1105.
As noted in this Chapter, the District Court in *Field* held Google's for-profit status did not weigh against a fair use finding because 'the transformative purpose of Google's use is considerably more important'. *Field v Google Inc*, 412 F Supp 2d 1106, 1120 (D Nev, 2006). In *Perfect 10,* the Ninth Circuit concluded 'the transformative nature of Google's use is more significant than any incidental superseding use of the minor commercial aspects of Google's search engine and website.' *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146, 1166 (9th Cir, 2007). As well, regarding the market impact, in *Perfect 10* the Ninth Circuit concluded 'Google's use of thumbnails for search engine purposes is highly transformative, and so market harm cannot be presumed'. At 1168. In *Authors Guild,* the Second Circuit stated: '[t]he more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives, shrinking the protected market opportunities'. *Authors Guild v Google Inc*, 804 F 3d 202, 214 (2nd Cir, 2015).

Figure 4.5 **Summary of the Copying and Outcomes in *Authors Guild v Google***

AUTHORS GUILD v GOOGLE				
What was copied?	For what purpose?	What did Google gain?	What did the public gain?	Was Google found liable for © infringement?
Books	A book search index.	Full copies of books.	Improved capacity to access information. Capacity to conduct full-text searches of books and access excerpts.	No. Google's use a fair use.

4. YouTube

4.1 *Viacom v YouTube*

YouTube, a digital video hosting service that allows users to upload, share and watch video clips, was founded by Chad Hurley, Steve Chen and Jawed Karim in 2005. In 2006, despite evident copyright liability risk,[644] Google acquired YouTube for a reported value of USD1.65 billion.[645] In 2007, Viacom International (Viacom), a global media organisation that produces and distributes content for television, film, radio and online, sued YouTube and Google alleging YouTube was liable for copyright infringement for videos posted to YouTube containing works owned by Viacom.[646] In its complaint against Google, Viacom alleged 'direct and secondary copyright infringement based on the public performance, display, and reproduction of approximately 79,000 audiovisual "clips" that appeared on the YouTube website between 2005 and 2008.'[647]

YouTube sought protection from liability under section 512(c) of the United States Copyright Act which provides safe harbour for internet service providers against copyright infringement occurring from 'storage at the direction of a user of material that resides on a system or network

[644] See, eg, Andrew Ross Sorkin, 'Dot-Com Boom Echoed in Deal to Buy YouTube', The New York Times (online), 10 October 2006 <http://www.nytimes.com/2006/10/10/technology/10deal.html>.
[645] Google, 'Google to Acquire YouTube' (Press Release, 9 October 2006) <https://investor.google.com/releases/2006/1009.html>.
[646] *Viacom International Inc v YouTube Inc*, 718 F Supp 2d 514 (SD NY, 2010). Viacom and YouTube had attempted to negotiate an advertising revenue sharing agreement, but negotiations broke down, prompting Viacom to send YouTube takedown notices seeking the removal of more than 100 000 YouTube videos. Hassanabadi Amir, 'Viacom v. YouTube--All Eyes Blind: The Limits of the DMCA in a Web 2.0 World' (2011) 26 *Berkeley Technology Law Journal* 405, 421.
[647] *Viacom International Inc v YouTube Inc*, 676 F 3d 19, 26 (2nd Cir, 2012).

controlled or operated by or for the service provider.'[648] Section 512(c) protects a service provider from infringing activities of its users if several requirements are met. Firstly, the service provider must not have 'actual knowledge' of infringing material or activities[649] or awareness of 'facts or circumstances from which infringing activity is apparent'.[650] Additionally, 'upon obtaining such knowledge or awareness',[651] or 'upon notification of claimed infringement',[652] the service provider must act 'expeditiously to remove, or disable access to, the material'.[653] The provision also requires that the service provider must not 'receive a financial benefit directly attributable to the infringing activity'[654] where a service provider has the 'right and ability to control'[655] the infringement.

Viacom claimed Google was disqualified from protection under 512(c), asserting Google had actual knowledge and was aware of facts and circumstance from which infringing activity was apparent and failed to act expeditiously to remove the infringing videos.[656] Viacom claimed YouTube was aware infringing videos were uploaded to YouTube by users and YouTube welcomed the practice, for 'such material was attractive to users, whose increased usage enhanced defendants' income from advertising'.[657] Viacom stated:

> YouTube's founders single-mindedly focused on geometrically increasing the number of YouTube users to maximize its commercial value. They recognized they could achieve that goal only if they cast a blind eye to and

[648] 17 USC § 512(c)(1) stipulates:

> A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider -
> (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
> (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
> (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

[649] 17 USC § 512 (c)(1)(A)(i).
[650] 17 USC § 512 (c)(1)(A)(ii).
[651] 17 USC § 512 (c)(1)(A)(iii).
[652] 17 USC § 512 (c)(1)(C).
[653] 17 USC § 512 (c)(1)(A)(iii).
[654] 17 USC § 512 (c)(1)(B).
[655] 17 USC § 512 (c)(1)(B).
[656] *Viacom International Inc v YouTube Inc*, 718 F Supp 2d 514, 516 (SD NY, 2010).
[657] Ibid 518.

> did not block the huge number of unauthorized copyrighted works posted on the site. The founders' deliberate decision to build a business based on piracy enabled them to sell their start-up business to Google[658]

Viacom cited internal correspondence between YouTube employees to show YouTube's knowledge of specific infringements. For example, Viacom cited an email sent between YouTube staff prior to a meeting with sporting league personnel, requesting the removal of infringing Premier League broadcast footage from YouTube.[659] Viacom also cited email correspondence between the YouTube founders in which they discussed their obligation to remove Budlight television commercials; in the emails, Steve Chen suggested delaying the removal of the videos.[660]

Viacom claimed YouTube received a financial benefit directly attributable to the infringing activity by selling advertising placements throughout YouTube.[661] Viacom also asserted YouTube had the right and ability to control the activity.[662] Viacom argued YouTube 'had and exercised the unfettered right to remove videos from the site and terminate accounts for any reason at YouTube's complete discretion',[663] and often did so for videos containing hate speech, violent or erotic content, thus exercising 'the ultimate editorial judgment and control over the content available on the site.'[664] Viacom argued YouTube could have, if they chose to, extended this practice to remove videos infringing copyright.[665] Viacom also argued YouTube could have conducted keyword searches to identify and remove infringing content, or to block it before it is uploaded.[666] As well, Viacom argued YouTube had the ability to control infringement through its community flagging policy, under which YouTube users could flag infringing content, but YouTube chose to abandon the policy.[667] Similarly, Viacom argued YouTube had the ability to find and remove infringing content through digital fingerprinting

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[658] *Memorandum of Law in Support of Viacom's Motion for Parial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defence*, Case No 1:07-cv-02103, 1 (SD NY).
[659] *Viacom International Inc v YouTube Inc*, 676 F 3d 19, 34 (2nd Cir, 2012).
[660] Ibid.
[661] *Memorandum of Law in Support of Viacom's Motion for Parial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defence*, Case No 1:07-cv-02103, 31 (SD NY).
[662] Ibid 32.
[663] Ibid.
[664] Ibid.
[665] Ibid 33.
[666] Ibid 34.
[667] Ibid 33.

or content identification technology but chose not to implement the technology uniformly across YouTube.[668]

Viacom asserted YouTube's use of the videos also went beyond storage at the direction of the user, as required under 512(c).[669] Viacom pointed to the automated software functions that are activated when a video is uploaded to YouTube. In a process known as transcoding, when a video is uploaded to YouTube, the video is copied into various formats to enable access across multiple platforms.[670] YouTube also had in place agreements with third party device suppliers (for example Apple, Sony and Panasonic), allowing users of those devices to access videos directly from YouTube.[671] In addition, YouTube makes videos available to view on a 'watch' page and 'related videos' features. [672] Viacom argued all of these uses were not for reason of user storage.[673]

In response, YouTube argued that United States statute and case law did not place on service providers an obligation to investigate and ascertain the copyright status of a work. YouTube argued that when creating the DMCA safe harbour provisions, 'Congress decided that copyright holders, rather than service providers, should bear the primary responsibility for pursuing unauthorized uses of copyrighted materials.'[674] YouTube asserted, 'the statute expressly provides that a service provider need not monitor its service for possible infringement to obtain safe-harbor protection.'[675]

YouTube also claimed Viacom could not establish that YouTube had actual knowledge or awareness of facts and circumstances from which infringing activity is apparent,[676] as Viacom used YouTube to promote its content in a manner that made it impossible for YouTube to know whether videos were infringing.[677] For example, YouTube provided evidence showing Viacom uploaded content anonymously as part of stealth marketing campaigns, it used techniques to diminish the quality of some of its clips so that they appeared to be made by fans, it purposely

[668] Ibid 34.
[669] *Viacom International Inc v YouTube Inc*, 718 F Supp 2d 514, 516 (SD NY, 2010).
[670] *Viacom International Inc v YouTube Inc*, 676 F 3d 19, 28 (2nd Cir, 2012).
[671] *Viacom International Inc v YouTube Inc*, 940 F Supp 2d 110, 122 (SD NY, 2013).
[672] *Viacom International Inc v YouTube Inc*, 676 F 3d 19, 39 (2nd Cir, 2012).
[673] Ibid.
[674] *Memorandum of Law in Support of Defendants' Motion for Summary Judgement*, Case No 1:07-cv-02103, 18 (SD NY).
[675] Ibid.
[676] Ibid 20.
[677] Ibid 39.

leaked content and, on one occasion, it expressly decided infringing clips of *The Daily Show* and *The Colbert Report* could remain on YouTube believing 'their presence on YouTube was important for their ratings as well as for their relationship with their audience'.[678]

In addition, YouTube claimed it did not have control over the infringing activity because control over a system does not equate to control over particular infringing activity.[679] YouTube insisted 'Congress presupposed that service providers would have control over their systems'[680] and that the right and ability to control infringing activity requires more than an ability to remove or block access to content.[681] YouTube argued, 'the DMCA's control inquiry is specific, not general'[682] requiring control over the 'particular infringing activity at issue'.[683]

District Court Decision — 2010

In 2010, the United States District Court for the Southern District of New York held YouTube was entitled to safe harbour under section 512(c).[684] The District Court considered the critical

[678] Ibid 46.
[679] Ibid 58.
[680] Ibid 59.
[681] Ibid.
[682] Ibid 58.
[683] Ibid.
[684] *Viacom International Inc v YouTube Inc*, 718 F Supp 2d 514 (SD NY, 2010). In addition to Viacom, the Football Association Premier League Limited et al were named as Plaintiffs in the case. In 2007, The Football Association Premier League (Football Association), along with other rightsholders including the French Tennis Federation, the National Music Publishers Association and several music publishers, sued YouTube for copyright infringement for the appearance of their works on YouTube. In 2009, the United States District Court for the Southern District of New York dismissed the claims for punitive damages and statutory damages for works not registered in the United States, with the exception of statutory damages for works that qualified for the live broadcast exemption. *The Football Association Premier League v YouTube Inc*, 633 F Supp 2d 159 (SD NY, 2009). Under s 412 of the United States Copyright Act, to be eligible for statutory damages a work be registered either before the act of infringement or within three months of first publication. 17 USC § 412. The Football Association argued this requirement did not apply to foreign works, but the District Court held the Copyright Act included no express exemption for foreign works and the legislative history showed no congressional intention for such an exemption. At 162-163. The court rejected the Football Association's argument that requiring registration would violate the United States' obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). The Court held the Berne Convention's requirement that copyright protection is provided without formalities was not incompatible with the requirement for registration for statutory damages under 17 USC § 412. At 164. Moreover, the District Court held that if there was an inconsistency with TRIPs, Congress had mandated that in such cases of conflict, United States domestic law should prevail. Ibid. The District Court found the Football Association did qualify for statutory damages for any live broadcasts, which are exempt from the requirements for registration under 17 USC § 411(c) but dismissed the Football Association's claim for punitive damages, stating, 'such damages are, as a matter of law, not obtainable under the Act'. At 167. In 2010, YouTube filed a motion for summary judgment against both Viacom and The Football Association, claiming safe harbour under the DMCA. In 2013, YouTube and the Football Association agreed to a voluntary dismissal. See Owen Gibson, 'Premier League Drops Copyright Infringement Case Against YouTube', *The Guardian* (online), 12 November 2013 <http://www.theguardian.com/football/2013/nov/11/premier-league-copyright-case-youtube>.

question to be whether the statutory language 'actual knowledge' and 'facts and circumstances from which infringing activity is apparent' (red flag knowledge), should be understood to mean a general awareness of infringement or actual knowledge of specific and identifiable infringements.[685] The District Court concluded knowledge of specific and identifiable infringements of individual items is required for disqualification from safe harbour.[686] The District Court described the application of the DMCA safe harbour principle as 'clear and practical',[687] placing the burden on rightsholders to identify the infringement[688] and not imposing on service providers an obligation to investigate and verify infringing material.[689] The District Court reasoned:

> Mere knowledge of prevalence of such activity in general is not enough. That is consistent with an area of the law devoted to protection of distinctive individual works, not of libraries. To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings infringe a copyright would contravene the structure and operation of the DMCA.[690]

The District Court determined that while YouTube was generally aware of the presence of infringing videos on its platform, '[g]eneral knowledge that infringement is "ubiquitous" does not impose a duty on the service provider to monitor or search its service for infringement'.[691] The District Court found YouTube had satisfied the statutory requirements and was entitled to safe harbour, because YouTube had engaged a designated agent who swiftly removed clips, including the clips named in the suit, upon receiving notification from a rightsholder.[692] The District Court also rejected Viacom's claim that YouTube had the right and ability to control the infringing activity, stating, '[t]he "right and ability to control" the activity requires knowledge of it, which must be item-specific.'[693]

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[685] *Viacom International Inc v YouTube Inc*, 718 F Supp 2d 514, 519 (SD NY, 2010).
[686] Ibid 523.
[687] Ibid 525.
[688] Ibid.
[689] Ibid 524.
[690] Ibid 523.
[691] Ibid 525.
[692] Ibid 519.
[693] Ibid 527.

Court of Appeals for the Second Circuit Decision — 2012

In 2012, the United States Court of Appeals for the Second Circuit vacated the District Court's decision. The Second Circuit affirmed the District Court's holding that both actual knowledge and red flag knowledge refer to specific and identifiable infringements.[694] However, the court explained the two forms of knowledge are not specific versus generalised knowledge,

> but instead between a subjective and an objective standard. In other words, the actual knowledge provision turns on whether the provider actually or "subjectively" knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement "objectively" obvious to a reasonable person.[695]

The Second Circuit held that a 'reasonable jury could find that YouTube had actual knowledge or awareness of specific infringing activity on its website.'[696] The Second Circuit considered the internal company correspondence cited by Viacom to raise 'a material issue of fact regarding YouTube's knowledge or awareness of specific instances of infringement.'[697] The Second Circuit remanded the case to the District Court in order to determine whether YouTube had specific knowledge of the clips-in-suit.[698]

The Second Circuit also remanded for consideration by the District Court the question of whether YouTube had the right and ability to control the infringing activity and whether YouTube had received direct financial benefit from the activity.[699] The Second Circuit rejected the District Court's conclusion that item specific knowledge was necessary in order to have the

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[694] *Viacom International Inc v YouTube Inc*, 676 F 3d 19, 30 (2nd Cir, 2012).
[695] Ibid 31.
[696] Ibid 26.
[697] Ibid 34.
[698] Ibid. The Second Circuit also asked the District Court to determine whether YouTube was willfully blind to the infringing activities of its users. At 36. The Second Circuit held 'the willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA'. At 35. However, on remand, the District Court held Viacom had failed to show 'knowledge or awareness of any specific infringements of clips-in-suit' and so held Viacom had not successfully established YouTube willfully blinded itself to specific infringements. *Viacom International Inc v YouTube Inc*, 940 F Supp 2d 110, 115-116 (SD NY, 2013).
[699] *Viacom International Inc v YouTube Inc*, 676 F 3d 19, 38 (2nd Cir, 2012).

right and ability to control,[700] instead, the Second Circuit reasoned, the right and ability to control required 'something more'[701] than the ability to remove or block access to infringing material. The Second Circuit suggested 'something more' would 'involve a service provider exerting substantial influence on the activities of users, without necessarily –or even frequently– acquiring knowledge of specific infringing activity.'[702]

District Court Decision — 2013

On remand in 2013, the District Court found Viacom had failed to provide 'proof that YouTube had knowledge or awareness of any specific infringements of clips-in-suit.'[703] The District Court also held YouTube did not have the right and ability to control infringing activity under section 512(c). The District Court stated, 'a service provider, even without knowledge of specific infringing activity, may so influence or participate in that activity, while gaining a financial benefit from it, as to lose the safe harbor.'[704] Yet, the District Court asserted, 'the governing principle must remain clear: knowledge of the prevalence of infringing activity, and welcoming it, does not itself forfeit the safe harbor. To forfeit that, the provider must influence or participate in the infringement.'[705] The District Court recognised that YouTube did exercise some influence over its users, for example:

[700] The Second Circuit stated:

> The trouble with this construction is that importing a specific knowledge requirement into §512(c)(1)(B) renders the control provision duplicative of §512(c)(1)(A). Any service provider that has item-specific knowledge of infringing activity and thereby obtains financial benefit would already be excluded from the safe harbor under §512(c)(1)(A) for having specific knowledge of infringing material and failing to effect expeditious removal. No additional service provider would be excluded by §512(c)(1)(B) that was not already excluded by §512(c)(1)(A). Ibid 36.

[701] Ibid 38. The Second Circuit also considered whether YouTube's activities went beyond storage at the direction of a user. The Second Circuit held the structure of the DMCA and relevant case law make certain the statute covers software functions facilitating access to user-stored material, and, therefore, YouTube's transcoding and the 'watch' and 'related video' features on fell within the scope of 512 (c). At 39. The Second Circuit remanded the third-party syndication issue back to the District Court for fact finding, in order to establish whether YouTube had syndicated any of the clips in suit. At 40. On remand, the District Court found the clips in suit were not syndicated and stated that the syndication agreements fell within the scope of the provision as they were 'steps by a service provided taken to make user-stored videos more readily accessible'. *Viacom International Inc v YouTube Inc*, 940 F Supp 2d 110, 123 (SD NY, 2013).

[702] *Viacom International Inc v YouTube Inc*, 676 F 3d 19, 38 (2nd Cir, 2012).

[703] *Viacom International Inc v YouTube Inc*, 940 F Supp 2d 110, 115 (SD NY, 2013). This was not disputed by Viacom which submitted to the court '[i]t has now become clear that neither side possesses the kind of evidence that would allow a clip-by-clip assessment of actual knowledge'. At 113.

[704] Ibid 118.

[705] Ibid.

> exercising its right not to monitor its service for infringements, by enforcing basic rules regarding content (such as limitations on violent, sexual or hate material), by facilitating access to all user-stored material regardless (and without actual or constructive knowledge) of whether it was infringing, and by monitoring its site for some infringing material and assisting some content owners in their efforts to do the same.[706]

However, the court found there was no evidence that YouTube

> induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their infringing activity[707]

Accordingly, the District Court concluded YouTube did not influence or participate in the infringing activity in such a manner that provided YouTube the right and ability to control the infringing activities of its users, and so was not disqualified from safe harbour.[708] Viacom sought to appeal the District Court's decision, however, in 2014, the parties agreed to a confidential settlement.[709]

Despite settling with Viacom, Google claims *Viacom* as an important contribution to intermediary liability law in the United States. In a 2016 submission to the United States Copyright Office, Google asserted that the standard for requiring actual knowledge of specific infringement, as articulated in *Viacom,* is 'consistent with the intent of the DMCA'[710] and appropriately 'recognised the importance of the notice-and-takedown process…[avoiding] overly burdensome demands on OSPs to make unilateral judgments regarding potentially infringing material.'[711] Google also stated, 'the consistent case law has aided in the

[706] Ibid 121.
[707] Ibid.
[708] Ibid 122.
[709] Viacom, *Viacom and Google Resolve Copyright Lawsuit* (18 March 2014) <http://ir.viacom.com/releasedetail.cfm?ReleaseID=833547>.
[710] Google, 'Letter to The Honourable Maria A. Pallante Register of Copyrights U.S. Copyright Office Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)', above n 405, 13.
[711] Ibid.

effectiveness of the statute in promoting innovation online.'[712] Moreover, the decision in *Viacom* has been followed by numerous other courts, including in *Capitol Records v Vimeo*, *EMI Christian Music Group v MP3tunes*, *Lenz v Universal Music Corp, BWP Media USA Inc v Clarity Digital Group* and *Square Ring Inc v John Doe-1*.[713] In *Viacom*, Google gained another decision consistent with its view that limitations on copyright are appropriate in the digital environment.

Figure 4.6 Summary of the Copying and Outcomes in *Viacom v YouTube*

VIACOM v YOUTUBE				
What was copied?	For what purpose?	What did Google gain?	What did the public gain?	Was Google found liable for © infringement?
Audio-visual works	Public circulation.	Profitable and widely utilised video hosting platform.	Access to and capacity to share audiovisual content online.	No. Google given safe harbour. Private settlement.

5. Android

5.1 *Oracle v Google*

In 1996, Sun Microsystems released Java, a computer programing platform that facilitates the 'development of portable, high-performance applications for the widest range of computing platforms'.[714] Put simply, the Java platform enables computer programmers to create applications that can run on multiple devices. It provides a 'standard for developing and delivering embedded and mobile applications, games, Web-based content, and enterprise

[712] Ibid 14.

[713] *Capitol Records v Vimeo* 826 F 3d 78 (2nd Cir, 2016); *EMI Christian Music Group v MP3tunes* (2nd Cir, 2016); *Lenz v Universal Music Corp*, 801 F 3d 1126 (9th Cir, 2015); *BWP Media USA Inc v Clarity Digital Group* (D Colo, 2015); *Square Ring Inc v John Doe-1* (D Del, 2015). Plevan explains:

> The decision in Viacom was immediately recognized as landmark precedent. Just a few months before the Second Circuit decision, the Ninth Circuit addressed similar questions on the limits of service provider protection in UMG Recordings, Inc. v. Shelter Capital Partners LLC. Although that court's interpretation of the DMCA differed slightly from the Second Circuit's analysis, the Ninth Circuit issued a superseding opinion in 2013 in light of Viacom. Viacom has also been followed by a number of district courts outside the Second Circuit. Plevan, above n 640, 158.

[714] Java, *About* <https://www.java.com/en/about/>.

software.'[715] Java is widely used by program developers. Professor Christopher Sprigman explains:

> Java is an efficient way to build software, and over the years it has attracted a large community of developers who have become fluent in Java's declaring code–that is they have learned the names for many of the hundreds of methods available in the Java library. Which is why Google decided to use Java as the platform upon which developers build Android apps.[716]

When developing its phone operating system, Android, Google held discussions with Sun Microsystems regarding Google licensing and modifying the full Java platform for Android, however, the companies were unable to finalise an agreement and, ultimately, Google developed its own software, using the 'the Java language'.[717]

The Java language contains words, symbols and 'a set of pre-written programs'[718] that execute commands. The set of pre-written programs is called the application programming interface (API).[719] When Google developed Android, the Java API had 166 'packages', divided into six hundred 'classes', including six thousand 'methods'[720] which 'is very close to saying the Java API had 166 "folders" (packages), all including over six hundred pre-written programs (classes) to carry out a total of over six thousand subroutines (methods).'[721] Each method or subroutine contains declaring code and implementing code. Essentially, declaring code is the method's name or title and the implementing code is the code that performs the method's task. The declaring code does not perform a command itself, rather, declaring code directs a computer to execute the method's implementing code. As Sprigman explains, the declaring code is central to the functioning of the Java platform:

> Programmers working in Java do not need to know the implementing code for any particular method they wish to use…Instead, programmers simply

[715] Ibid.
[716] Christopher Jon Sprigman, *'Oracle v. Google*: A High-Stakes Legal Fight for the Software Industry' (2015) 58(5) *Communications of the ACM* 27, 28.
[717] *Oracle America Inc v Google Inc*, 872 F Supp 2d 974, 978 (ND Ca, 2012).
[718] Ibid 977.
[719] Ibid.
[720] Ibid.
[721] Ibid.

> input the declaring code. Using the name within software written in Java results in the software performing the function. In this way, a programmer uses declaring code to operate the methods.[722]

For Android, Google used the Java language to 'design its own virtual machine via its own software and to write its own implementations for the functions in the Java API that were key to mobile devices.'[723] Google 'replicated the exact names and exact functions' of 37 packages, however, it wrote and used its own implementing code.[724] Google claimed it copied the names and functions of the 37 packages so that Android would be interoperable with other Java based applications.[725]

In 2010, Oracle acquired Sun Microsystems and sued Google seeking close to USD10 billion in damages.[726] Oracle claimed Google's copying of the 37 packages from the Java API constituted copyright infringement.[727] The parties agreed Google's use of the Java language, Google's virtual machine and the implementing code did not infringe Oracle's copyrights:

> All agree that Google was and remains free to use the Java language itself. All agree that Google's virtual machine is free of any copyright issues. All agree that the six-thousand-plus method implementations by Google are free of copyright issues. The copyright issue, rather, is whether Google was and remains free to replicate the names, organization of those names, and functionality of 37 out of 166 packages in the Java API, which has sometimes been referred to in this litigation as the "structure, sequence and organization" of the 37 packages.[728]

[722] Sprigman, above n 716, 28.
[723] *Oracle America Inc v Google Inc*, 872 F Supp 2d 974, 978 (ND Ca, 2012).
[724] Ibid 977.
[725] Ibid 978.
[726] Peter Menell, 'API Copyrightability Bleak House: Unraveling and Repairing the Oracle v Google Jurisdictional Mess' (UC Berkeley Public Law Research Paper No.2859740, 30 April 2017) 41 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2859740>.
[727] *Oracle America Inc v Google Inc*, 872 F Supp 2d 974, 978 (ND Ca, 2012).
[728] Ibid.

The central question for the court was whether by copying the names and the 'structure, sequence and organization of the overall code for the 37 API packages'[729] Google had infringed Oracle's copyright.

District Court Decision — 2012

In 2012, the United States District Court for the Northern District of California held the Java packages contain creativity and originality, however, the 'elements of the structure, sequence and organization of the Java application programming interface'[730] that were copied by Google were not protected by copyright.[731] The District Court held the declaring code copied by Google was a method of operation, as the declaring code is used to operate the implementing code.[732] Section 102(b) of the United States Copyright Act provides that methods of operation are not afforded copyright protection.[733] The Act stipulates:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[734]

Accordingly, the District Court specified:

> no matter how creative or imaginative a Java method specification may be, the entire world is entitled to use the same method specification (inputs, outputs, parameters) so long as the line-by-line implementations are different…The method specification is the *idea*. The method implementation is the *expression*. No one may monopolize the *idea*.[735]

[729] Ibid 975.
[730] Ibid.
[731] Ibid 999-1000.
[732] Ibid 998.
[733] 17 USC § 102(b).
[734] 17 USC § 102(b).
[735] *Oracle America Inc v Google Inc*, 872 F Supp 2d 974, 998 (ND Ca, 2012).

The District Court explained, '[y]es, it is creative. Yes, it is original. Yes, it resembles a taxonomy. But it is nevertheless a command structure, a system or method of operation'.[736]

In addition to finding the declaring code a method of operation, the District Court also held two additional principle precluded copyright protection for the Java API. First, the District Court relied upon the merger doctrine, which establishes that when there is only one way of expressing something that expression is not copyrightable.[737] Second, the District Court relied upon the principle that names and short phrases are not protected subject matter.[738] For these reasons, the District Court dismissed Oracle's claim and held 'the particular elements replicated by Google were free for all to use under the Copyright Act'.[739]

Federal Circuit Decision — 2014

In 2014, the United States Court of Appeals for the Federal Circuit reversed the District Court's decision.[740] The Federal Circuit held Google had copied protected elements of the Java API.[741] The Federal Circuit reasoned excluding a computer program from copyright protection on the grounds that it is a method of operation would create a far too broad exemption because 'computer programs are by definition functional'.[742] The Federal Circuit agreed that the declaring code was a method of operation, however, it stated 'a set of commands to instruct a computer to carry out desired operations may contain expression that is eligible for copyright protection.'[743] The Federal Circuit held that Section 102(b) does not deny copyright protection to a work that has a functional element, rather, section 102(b) requires courts to 'ferret out

[736] Ibid 999-1000.
[737] Ibid 985. The District Court cited the United States Supreme Court decision in *Baker v Selden*, 101 US 99 (1880).
[738] The District Court cited United States Copyright Office regulation 37 CFR 202.1(a) on material not subject to copyright — which includes '[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents' — and noted the regulation was followed in *Sega Enterprises Ltd v Accolade Inc*, 977 F 2d 1510 (9th Cir, 1992). The District Court further warned, 'we should not yield to the temptation to find copyrightability merely to reward an investment made in a body of intellectual property.' *Oracle America Inc v Google Inc*, 872 F Supp 2d 974, 983-984 (ND Ca, 2012).
[739] *Oracle America Inc v Google Inc*, 872 F Supp 2d 974, 1002 (ND Ca, 2012).
[740] *Oracle America Inc v Google Inc*, 750 F 3d 1339 (Fed Cir, 2014). 17 USC § 102 (b). The Court of Appeals for the Federal Circuit had jurisdiction on appeal because the original complaint included allegations of patent infringement. See generally Clark D Asay, 'Copyright's Technological Interdependencies' (2014) *Stanford Technology and Law Review* 189, 230.
[741] *Oracle America Inc v Google Inc*, 750 F 3d 1339 (Fed Cir, 2014).
[742] Ibid 1367.
[743] Ibid.

apparent expressive aspects of a work',[744] separating protected expression from unprotected functional components.[745]

To identify whether Google copied protected expression in the Java API, the Federal Circuit employed the 'abstraction-filtration-comparison' test established in *Computer Associates International v Altai* of the United States Court of Appeals for the Second Circuit.[746] According to the Federal Circuit, this test appropriately 'eschews bright line approaches and requires a more nuanced assessment of the particular program at issue in order to determine what expression is protectable and infringed.'[747] The test requires a court to separate the program into structural parts, to filter out all non-protected components and finally to compare the remaining components with the program accused of infringement.[748] The Federal Circuit asserted the filtration step is the critical step in the analysis and should consider whether the copying was 'dictated by considerations of efficiency, required by factors already external to the program itself, or taken from the public domain — all of which would render the expression unprotectable.[749] The Federal Circuit provided, 'these conclusions are to be informed by traditional copyright principles of originality, merger, and scenes a faire.'[750]

The Federal Circuit rejected the District Court's finding that the declaring code copied by Google was not protected by copyright. The Federal Circuit held words and short phrases copied by Google were protected expression because 'the manner in which they are used or strung together exhibits creativity.'[751] The Federal Circuit also found the merger doctrine did not apply to the declaring code, for Sun Microsystems had available to it unlimited different ways of writing the declaring code copied by Google.[752] Significantly, the Federal Circuit emphasised that copyright subsistence 'had to be evaluated at the time of creation, not at the time of infringement'[753] and so it was not relevant whether Google had only the one option when it copied the work, relevant to the analysis were the options available to Sun

[744] Ibid 1357.
[745] Ibid.
[746] *Computer Associates International Inc v Altai Inc,* 982 F 2d 693 (2nd Cir, 1992).
[747] *Oracle America Inc v Google Inc*, 750 F 3d 1339, 1357 (Fed Cir, 2014).
[748] Ibid.
[749] Ibid 1357-1358
[750] Ibid 1358.
[751] Ibid 1363.
[752] Ibid 1361.
[753] Ibid.

Microsystems when it created Java.[754] The Federal Circuit also held the *scènes à faire* doctrine did not render the declaring code uncopyrightable, as the *scènes à faire* doctrine 'is a component of the infringement analysis'[755] and does not exclude a work from protection, rather, 'certain copying is forgiven as a necessary incident of *any* expression of the underlying idea.'[756]

With regard to Google's copying of the structure, sequence and organisation of the packages, the Federal Circuit explained, 'a computer program is eligible for copyright protection where it qualifies as an expression of an idea, rather than the idea itself.'[757] The Federal Circuit remarked that it was 'well established'[758] that copyright protection extends to the literal (for example the source and object codes) and the non-literal (for example sequence, structure, organisation and user interface) features of a computer program.[759] The Federal Circuit asserted that an original work that serves a function qualifies for copyright protection 'as long as the author had multiple ways to express the underlying idea.'[760] As it was undisputed that Java's API structure and organisation of packages involved creativity and originality, with multiple options for structure and organization,[761] the Federal Circuit concluded that although 'Google may employ the "package-class-method" structure…Google, like any author, is not permitted to employ the precise phrasing or precise structure chosen by Oracle'.[762] Accordingly, the Federal Circuit concluded the declaring code and the structure, sequence and organisation of the API packages copied by Google were subject to copyright protection.

In its decision, the Federal Circuit rejected interoperability arguments presented by Google. The Federal Circuit stated:

> Google was free to develop its own API packages and to "lobby" programmers to adopt them. Instead, it chose to copy Oracle's declaring code and the [structure, sequence and organization] to capitalize on the preexisting community of programmers who were accustomed to using the Java API

[754] Ibid.
[755] Ibid 1364.
[756] Ibid.
[757] Ibid 1366.
[758] Ibid 1357.
[759] Ibid 1355.
[760] Ibid.
[761] Ibid 1365.
[762] Ibid 1368.

> packages. That desire has nothing to do with copyrightability. For these reasons, we find that Google's industry standard argument has no bearing on the copyrightability of Oracle's work.[763]

However, the Federal Circuit, suggested interoperability might prove relevant in a fair use analysis, and remanded the case back to the District Court for a jury to decide on the validity of Google's fair use argument.[764]

Jury Decision — 2016

In 2015, Google petitioned the United States Supreme Court to review the Federal Circuit decision; however, Google's petition was denied leaving intact the Federal Court's holding that

[763] Ibid 1372.

[764] Ibid 1377. The Federal Circuit decision has been widely criticised, see, eg, Sean Hogle who described the decision as 'deeply, dangerously flawed', stating the Federal Circuit 'failed to grasp the significance of what Google copied and why Google copied it.' Sean Hogle, 'Software Copyright and Innovation After Oracle v. Google' (2016) 33(3) *The Computer & Internet Lawyer* 19, 19. Menell argues the Federal Circuit 'misinterpreted §102(b) of the Copyright Act, misconstrued the Ninth Circuit's software copyright jurisprudence, conflated expressive and technological "creativity," and applied an overly rigid approach to copyright law's limiting doctrines.' Menell, above n 726, 42-43. Nicholas Holton suggests the Federal Circuit misunderstood and mischaracterized APIs:

> The Federal Circuit…used purely legal reasoning while misunderstanding the subject matter…Unlike Judge Alsup, the Federal Circuit addressed merger, names, interoperability, and industry practices as separate considerations. This treatment allowed the court to summarily dismiss each of the considerations in turn without having to understand the whole picture of the technology at issue. The court dismissed merger and interoperability with one argument based on focusing the analysis on the software creator. This distinction makes little sense in the API context, because an API is software written for software writers. When software writers write software in a free language, they are subject to constraints imposed by the language…Because of the nature of an API, a copyright over the code that limits the use of the API amounts to a copyright of the language itself. Languages are not copyrightable. The panel failed to recognize this legal consequence because it did not understand the API.

Nicholas A Holton, '*Google, Inc. v. Oracle America, Inc.*: Supreme Court Declines to Review Reversal of Landmark API Copyright Decision' (2016) 62(1) *Loyola Law Review* 189, 230. See also Pamela Samuelson, 'Three Fundamental Flaws in CAFC's Oracle v. Google Decision' (2015) 37(11) *European Intellectual Property Review* 702.

APIs are subject to copyright protection.[765] Yet, in 2016, in what Professor Peter Menell describes as 'one of the most momentous fair use jury trials in U.S. history'[766] a jury found Google had 'shown by a preponderance of the evidence that its use in Android of the declaring lines of code and their structure, sequence, and organization from Java'[767] constituted fair use. In an order denying Oracle's request 'to set aside the jury verdict and rule in its favor as a matter of law',[768] District Judge William Alsup provided insight into the jury decision, stating:

> With respect to transformativeness, our jury could reasonably have found that (i) Google's selection of 37 out of 166 Java API packages (ii) re-implementation with new implementing code adapted to the constrained operating environment of mobile smartphone devices with small batteries, and (iii) combined with brand new methods, classes, and packages written by Google for the mobile smartphone platform – all constituted a fresh context giving new express, meaning or message to the duplicated code.[769]

Judge Aslup further explained:

> Google copied only so much declaring code as was necessary to maintain inter-system consistency among Java users. Google supplied its own code for

[765] Supreme Court of the United States, *Google Inc, Petitioner v Oracle America Inc No. 14-410* <https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-410.htm>. In response to the Supreme Court's denial, Google removed the 37 packages from the Android platform. Holton, above n 764, 235. However, note that in *SAS Institute v World Programming*, the District Court for the Northern District of California did not follow *Oracle.* SAS alleged World Programming had infringed SAS software copyrights when World Programming used SAS 'language functions and by copying the resulting output formats that are produced when a user runs those language functions through the SAS System' — SAS argued the SAS Language elements were analogous to the Java declaring code copied by Google. The District Court for the Northern District of California rejected this claim. See *SAS Institute v World Programming* 125 F Supp 3d 579 (ND Cal, 2015). In another factually similar case, *Cisco Systems v Arista Networks* of the District Court of the Northern District of California, a jury found Arista's copying of Cisco's command-line interface was not copyright infringement, accepting 'a *scenes a faire* defense in which Arista argued that its actions in copying Cisco was legally permissible because of Arista's need for hardware technical compatibility with Cisco's industry standard commands.' Steve Brachmann, 'Cisco v. Arista Patent and Copyright Infringement Cases See Conflicting Rulings at ITC, N.D. Cal.', *IPWatchdog* (online), 12 January 2017 <http://www.ipwatchdog.com/2017/01/12/cisco-v-arista-patent-copyright-infringement-conflicting-rulings/id=76615/>. See *Cisco Systems Inc v Arista Networks, Inc* Case No. 14-cv-05344-BLF (ND Cal, 2016).

[766] Menell, above n 726, 40-41.

[767] *Oracle America Inc v Google Inc*, Special Verdict Form No. C 10-03561 WHA (ND Cal, 2016).

[768] Pamela Samuelson, 'Fair Use Prevails in Oracle v. Google' (2016) 59(11) *Communications of the ACM* 24, 25.

[769] *Oracle America Inc v Google Inc*, Order Denying Rule 50 Motions No C 10-03561 WHA, 14 (ND Ca, 2016).

> the rest. Overall, avoiding cross-system babel promoted the progress of science and useful arts – or so our jury could reasonably have found.[770]

Menell argues that while the jury decision 'ranks among the most significant computer software intellectual property trials and copyright fair use trials in U.S. history',[771] the case ultimately 'contributed to, rather than quelled, confusion surrounding API copyright protection.'[772] Yet, Samuelson maintains the jury decision was 'good news for competition in the software industry'[773] and suggests it serves the public interest through 'the ongoing competition and innovation that reuse of APIs has brought and will bring.'[774] According to Samuelson, 'while most cases have struck down copyright claims in interfaces necessary for interoperability on lack of copyrightability grounds, fair use is now a proven alternative path to defense victories.'[775] Indeed, through *Field*, *Perfect 10*, *Authors Guild* and *Oracle,* Google confirmed the viability of a fair use defence in the digital environment several times over.

Figure 4.7 Summary of the Copying and Outcomes of *Oracle v Google*

ORACLE v GOOGLE				
What was copied?	For what purpose?	What did Google gain?	What did the public gain?	Was Google found liable for © infringement?
API	A phone operating system.	Use of API to improve interoperability of Android platform.	No direct gain for the public.[776]	No. Google's use a fair use.[777]

[770] Ibid 10.
[771] Menell, above n, 50.
[772] Ibid.
[773] Samuelson, 'Fair Use Prevails in Oracle v. Google', above n 768, 26.
[774] Ibid 26.
[775] Ibid.
[776] I acknowledge this description is debatable and perhaps an oversimplification of the outcomes of this case. While primarily Google privately benefits and there are no direct benefits in terms of public access to content or infrastructure, scholars have for example praised the outcome in *Oracle* for its positive impact upon competition and innovation in the software industry. See, eg, ibid.
[777] Oracle is appealing the jury decision. *Oracle America Inc v Google Inc*, 17-1118 1202 (Fed Cir, 2017).

6. Conclusion

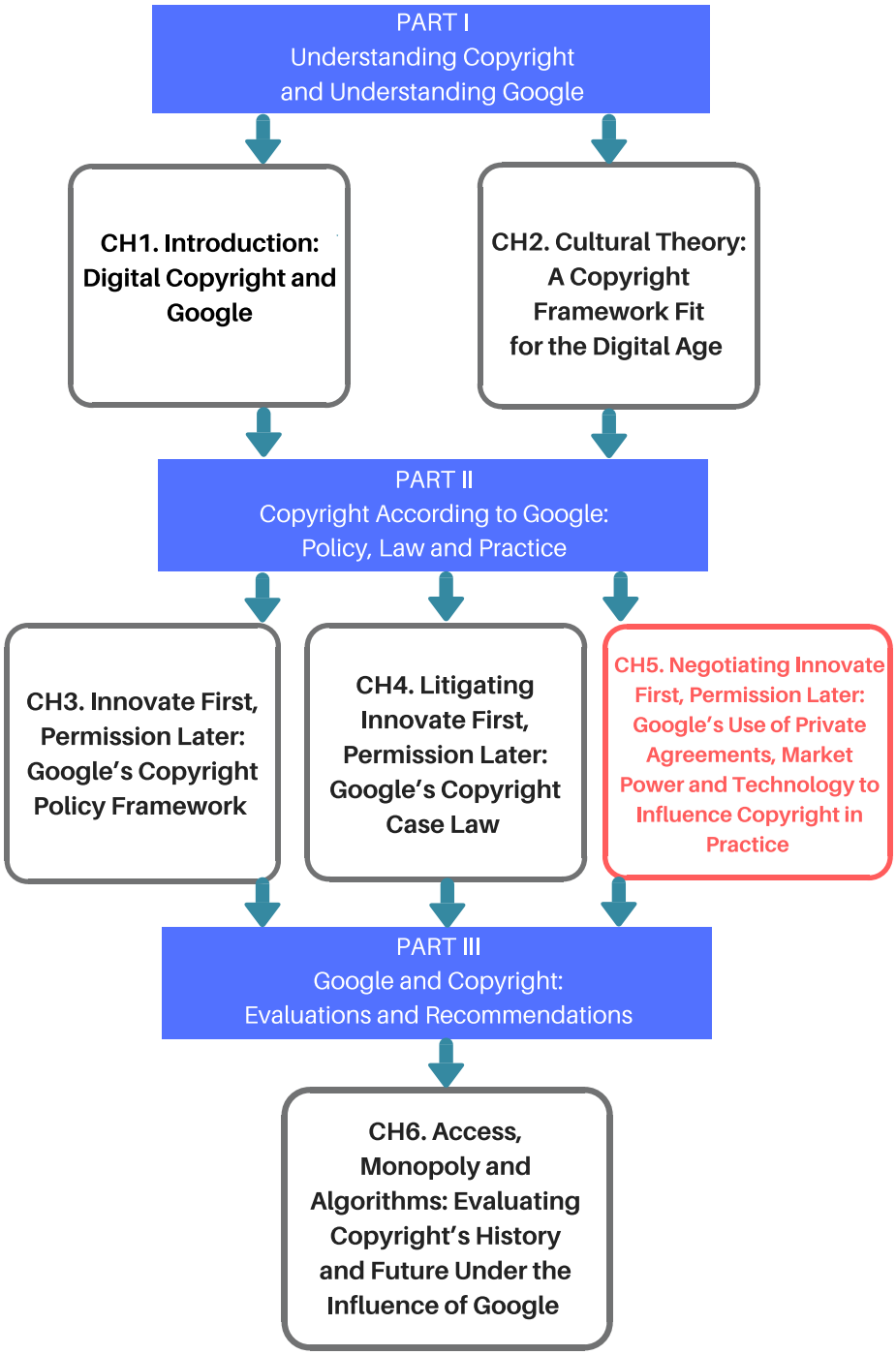
Google's copyright litigation history demonstrates Google's capacity to shape copyright law in its interest. Google has employed its extraordinary wealth to pursue copyright disputes on principle, repeatedly gaining decisions that have shaped the contours of copyright in accordance with its commercial interests and copyright agenda. When deciding in Google's favour, while courts may not have explicitly accepted Google's innovate first, permission second philosophy, they have certainly exhibited a willingness to apply limits on the exclusionary rights of rightsholders in the digital environment. In these decisions, courts decided Google did not need the explicit permission of rightsholders to copy websites, books, images and code, and they have also limited Google's liability for copyright infringement occurring on its platforms.

An examination of Google's copyright case law also verifies Google's claim that a flexible fair use exception is useful for resolving copyright disputes and supporting innovation in the digital environment. As Samuelson notes, 'Congress expected the fair use doctrine to evolve when it passed the 1976 Act, and evolve it certainly has.'[778] In Google's fair use cases, courts have evaluated the public benefits of Google's services and embraced public interest arguments over private property claims. Indeed, underlying each case is the tension between a rightsholders' right to control and be remunerated for the use of their work and the public interest — the public interest in access to information (in *Field*, *Parker*, *Perfect 10* and *Authors Guild*), in the continued development of technological infrastructure (in *Viacom*), or in the interoperability of digital technology (in *Oracle*). Through these cases, courts have been asked to contemplate the architecture and function of the internet, as well as other socially valuable digital technologies. And repeatedly, courts have been willing to limit private rights in favour of the public interest.

Yet, from each of these decisions, Google has also received substantial private gains. Not only has Google gained legal decisions that legitimise its activities, but through several of these decisions Google has also amassed considerable informational resources. Google has generated

[778] Pamela Samuelson, 'Possible Futures of Fair Use' (2015) 90 *Washington Law Review* 815, 863-864. Samuelson posits: 'Congress certainly did not foresee the advent of digital networked environments in which every access to and use of a work involves a reproduction, but fortunately the codification of fair use has helped courts sort out which of these reproductions are fair or foul'. At 864.

immense repositories of information and content — copies of websites, books, and images, along with databases of information about each copy — repositories to which only Google has unfettered access. As I will discuss further in Chapter 6, both gains — the legal decisions and informational resources — have been critical to Google's commercial and technological ascension in the digital environment.


PART I
Understanding Copyright
and Understanding Google
CH1. Introduction: Digital Copyright and Google
CH2. Cultural Theory: A Copyright Framework Fit for the Digital Age
PART II
Copyright According to Google:
Policy, Law and Practice
CH3. Innovate First, Permission Later: Google's Copyright Policy Framework
CH4. Litigating Innovate First, Permission Later: Google's Copyright Case Law
CH5. Negotiating Innovate First, Permission Later: Google's Use of Private Agreements, Market Power and Technology to Influence Copyright in Practice
PART III
Google and Copyright:
Evaluations and Recommendations
CH6. Access, Monopoly and Algorithms: Evaluating Copyright's History and Future Under the Influence of Google

CHAPTER 5

Negotiating Innovate First, Permission Later: Google's Use of Private Agreements, Market Power and Technology to Influence Copyright in Practice

This chapter examines Google's influence upon copyright law in practice. Throughout Europe, Google has employed a variety of measures to avoid seeking permission from and remunerating news media organisations for the use of content in Google News. Yet, at the same time, across its platforms, Google implements a comprehensive range of policies aimed at enforcing copyright on behalf of rightsholders. Overall, an examination of the history of Google News in Europe and Google's copyright enforcement policies shows Google negotiating with rightsholders and employing various manifestations of private power to achieve outcomes in its interest.

1. Introduction

As one of the world's largest technology companies, Google has at its disposal a range of tools it can employ to protect its interests and pursue its agenda. Beyond the judicial setting, in pursuit of its vision for copyright, Google employs a combination of private agreements, technology and market power to influence copyright in practice. In this chapter, I examine the history of Google News in Europe, which shows, where legal efforts have failed, Google shifting to partnerships with rightsholders to resist an expansion of the scope of copyright and other actions antithetical to its vision for copyright. In this chapter, I also examine the copyright rules that Google applies across its own platforms. Devised through processes of self-regulation and private negotiations with rightsholders, across its platforms Google has in place a variety of rules and technological tools for enforcing copyright. Broadly, Google's approach to copyright in practice shows an increasing willingness on Google's behalf to negotiate and

cooperate with rightsholders. It also shows Google exercising considerable power in digital copyright governance.

2. Google News in Europe: Resisting an Expansion of Private Rights

Google's search engine includes the news aggregation service, Google News. For Google News, Google scans and indexes news articles published online globally.[779] The Google News home page displays news articles algorithmically grouped by subject (for example, 'top stories', 'sports', 'technology'). Users of Google News can conduct keyword searches of the news database and search results display the article headline, the name of the newspaper or media organisation that published the story, a thumbnail image of a photograph taken from the article, and until late 2017, Google also displayed a short snippet from the article known as the story 'lead'.[780] The news headlines are hyperlinks, linking users to the website hosting the full article. News publishers can opt out of Google News using the robots.txt exclusion protocol.[781]

Generally, Google does not acquire permission from or remunerate news publishers for the use of their works in Google News. Google maintains that its news aggregation activities do not require permission from rightsholders because they fall outside rightsholders' exclusive rights. Google asserts news headlines and snippets are not protectable subject matter, that Google News is an information location tool and qualifies for intermediary safe harbour, and that Google's use of the news articles is a fair use.[782] Google also argues that news aggregation expands markets for news content — Google News increases the speed and ease of finding

[779] Google, *Our History in Depth* <https://www.google.co.uk/about/company/history/#2002>. Google News was taken out of beta in 2006. Krishna Bharat, 'And Now, News' on *Google Official Blog* (23 January 2006) <https://googleblog.blogspot.com.au/2006/01/and-now-news.html>.

[780] As I discuss in the conclusion of this section, in June 2017, Google made substantial design changes to Google News and stopped including snippets of news articles in Google News. Anand Paka, 'Redesigning Google News for Everyone' on *Google Blog* (27 June 2017) <https://www.blog.google/topics/journalism-news/redesigning-google-news-everyone/>.

[781] Carlo D'Asaro Biondo, 'Let's Work Together to Support Quality Journalism' on *Google Europe Blog* (25 April 2015) <https://europe.googleblog.com/2015/04/lets-work-together-to-support-quality.html>.

[782] As we will see below, these are the claims Google has made in its disputes with European publishers over Google News. They are claims that are likely to find at least some support under United States law. See, eg, Robert Denicola, 'News on the Internet' (2012) 23(1) *Fordham Intellectual Property, Media & Entertainment Law Journal* 68. For an historical account of copyright protection afforded to news media under United States law see Robert Brauneis, 'The Transformation of Originality in the Progressive-Era Debate Over Copyright in News' (2009) 27(2) *Cardozo Arts & Entertainment Law Journal* 321.

news and directs traffic to newspaper websites, contributing to the vitality of the news industry in the digital economy.[783]

Several news publishers, however, have rejected Google's position. They claim that rather than clicking through to read full articles, readers simply scan the headlines and leads on Google News.[784] As I outline in detail below, with palpable hostility, in jurisdictions throughout Europe, news media organisations have sued Google for copyright infringement, seeking to compel Google to pay for the use of their articles in Google News. They have also lobbied European legislatures, in some cases successfully, for the introduction of a *sui generis* copyright or neighbouring right that requires Google to pay news media for the use of their work in Google News.

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[783] Google claims that '[t]hrough Search and News, we send over 10 billion visits, for free, to publishers globally each month. We're proud of that, and those readers represent real revenue opportunities for the publishers. And through our advertising platforms, such as AdSense, we shared 10 billion dollars with publishers around the world in 2014.' Biondo, above n 781.

[784] Indeed, News Corporation's Rupert Murdoch asserts, '[t]o aggregate stories is not fair use. To be impolite, it is theft.' Mercedes Bunz, 'Rupert Murdoch: 'There's No Such Thing as a Free News Story'', *The Guardian* (online), 1 December 2009 <https://www.theguardian.com/media/2009/dec/01/rupert-murdoch-no-free-news>.

The data to support the news publishers' position is contentious. A study undertaken in 2013 found evidence of a substitution effect: the study found text snippets and images satisfied the requirements of some readers, reducing click-through rates. See C Dellarocas et al, 'Attention Allocation in Information-Rich Environments: The Case of News Aggregators' (2016) 62(9) *Management Science* 2543; Mihai Calin et al, 'Attention Allocation in Information-Rich environments: The Case of News Aggregators' (Research Paper No 2013–4, Boston University School of Management, 16 February 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225359>. However, a 2015 study, which included a review of eight unique studies undertaken between 2011-2015, found that while news aggregators do have a substitution effect, they also have a market expansion effect and, overall, news aggregation services produce a net positive effect in terms of traffic to newspaper sites. The authors of the study concluded 'the substitution effect is very small while the expansion effect is significant. Thus aggregators are complementary vs. competing services and convey more benefit to publishers than harm. This is especially true for small, relatively unknown publications, such as some native digital newspapers.' NERA Economic Consulting, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual* (9 July 2015) x, <http://www.aeepp.com/pdf/InformeNera.pdf>.

Hostility towards news aggregation may also be provoked by the more abstract confrontation it represents to the traditional news media industry. News aggregation effectively 'upends the traditional model of information gatekeeping…by inverting the normal pattern of information retrieval'. Hsiang Iris Chyi, Seth C Lewis and Nan Zheng, 'Parasite or Partner? Coverage of Google News in an Era of News Aggregation' (2016) 93(4) *Journalism & Mass Communication Quarterly* 789, 792. Rather than reading content curated by one authoritative publication, news aggregation provides content from multiple sources and readers choose a publication to visit, based on their interest in a particular news item. This model challenges both the traditional structure and function of new distribution, as well as the ideology of journalism as a profession. As Lewis explains, journalists perceive their role to serve a social purpose; the role of a journalist is to 'fulfill the functions of watch-dog publishing, truth-telling, independence, timeliness, and ethical adherence in the context of news and public affairs.' Lewis, above n 271, 845. Furthermore, journalists 'derive much of their sense of purpose and prestige through their control of information in their normative roles'. At 845. In this way, news aggregation is 'more than a challenge to an industry model built on scarcity. It also strikes at the heart of a model that was built on an implicit bargain between journalists and the public – an assumption about how society should handle the collection, filtering, and distribution of news information'. At 838.

To properly understand the dispute over Google News in Europe, it must be placed within its economic context. With the advent of the digital environment, the organisations that dominated the news media market in the 20th century have experienced a steep decline in advertising revenues and they have struggled to establish robust business models for the digital economy.[785] These organisations have faced increased competition from internet-based news businesses, internet users and social media and their business models have been undermined by a loss of control over content online.[786] Professor Seth Lewis explains:

> for much of the twentieth century, both the business model and the professional routines of journalism in developed nations were highly stable and successful enterprises because they took advantage of scarcity, exclusivity, and control. In the local information market, news media dominated the means of media production, access to expert source material, and distribution to wide audiences — which translated to tremendous capital, both in gatekeeping authority…and economic power[787]

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[785] See Gareth Price, 'Opportunities and Challenges for Journalism in the Digital Age: Asia and European Perspectives' (*Research Paper, Chatham House, The Royal Institute of International Affairs,* August 2015), 3 <https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150826JournalismDigitalAgePrice.pdf>. Price details the historic context of the newspaper industry decline:

> While newspaper circulation in some countries in Europe has been in decline since the 1950s, as consumers have increasingly relied on television, rising advertising revenue long compensated for this and allowed print news media to continue to flourish. Between 1950 and 2000 advertising revenues in Europe grew by 300 per cent in real terms. However, the rise of the internet and digital/social media in the past 15 years has changed the picture: since 2000 newspaper advertising sales in Europe have fallen across the board.

See also Amy Mitchell and Jesse Holcomb:

> In 2015, the newspaper sector had perhaps the worst year since the recession and its immediate aftermath. Average weekday newspaper circulation, print and digital combined, fell another 7% in 2015, the greatest decline since 2010. While digital circulation crept up slightly (2% for weekday), it accounts for only 22% of total circulation. And any digital subscription gains or traffic increases have still not translated into game-changing revenue solutions. In 2015, total advertising revenue among publicly traded companies declined nearly 8%, including losses not just in print, but digital as well.

Amy Mitchell and Jesse Holcomb, *State of the News Media 2016* (15 June 2016) Pew Research Center Journalism & Media <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016/2012/>. See also a 2017 Pew Research study which found, 'weekday circulation for U.S. daily newspapers – both print and digital – fell 8% in 2016, marking the 28th consecutive year of declines.' Michael Barthel, 'Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall' (1 June 2017) at <http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/>.

[786] In the current media ecosystem, 'amateur online journalists, from bloggers to posters of videos on YouTube, regularly compete with established media for audience attention'. Neil Weinstock Netanel, 'New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age' (2008) 76(4) *George Washington Law Review* 952, 953.

[787] Lewis, above n 271, 838.

Diminished control in the digital environment brought with it a diminished capacity to demand payment for access to content. Critically, as news media revenue streams have declined, the costs associated with professional journalism have remained high: digital technologies may significantly reduce the cost of distributing content, but they do 'little to reduce the investment of labor and skill required to engage in sustained investigative journalism and produce well-edited, thoroughly fact-checked product.'[788] Overall, a combination of stable production costs and emaciated revenue streams has caused a severe decline in profitability within the news media industry in the 21st century. A 2016 Reuters Institute and University of Oxford *Digital News Report* summarises, in jurisdictions throughout the world, 'we see a common picture of job losses, cost-cutting, and missed targets as falling print revenues combine with the brutal economics of digital in a perfect storm.'[789]

In this way, as Lewis contends, the contest over news aggregation 'strikes at the very heart of the economic arrangement for news: Who will underwrite the original creation of news reports?'[790] Two decades into the digital age, with news organisations still struggling to establish sustainable business models, some European lawmakers have looked to Google. They have sought to compel Google to pay for its use of news content. As we will see, while Google is willing to invest significant resources to support the news industry, it remains steadfast in its opposition to policies that require it to pay for using news content in Google News.

If assessed against Google's copyright framework, Google's position is unsurprising. Placing news aggregation within the scope of exclusive rights of authors, stands at odds with Google's

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[788] Netanel, 'New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age', above n 786, 978.

[789] Nic Newman et al, 'Digital News Report 2016' Reuters Institute for the Study of Journalism, 7 <http://www.digitalnewsreport.org/survey/2016/>. Price further describes that

> [f]or news organizations, if 15 per cent of revenue comes from digital products, they are performing well; few receive as much as 20 per cent of their revenue from digital. It seems clear that revenues from subscriptions and advertising, along with current print revenues, will not approach that from print revenues pre-2000. Price, above n, 3.

[790] Chyi, Lewis and Zheng, above n 784, 790. A conceptually satisfying and efficacious solution to the economic problems faced by the news media industry in the digital economy remains elusive. One the one hand, the internet and digital technologies have significantly increased access to news content and participation in its creation. They have provided individuals seeking to engage with and speak on issues of news and public affairs 'meaningful opportunities to bypass the mass media'. Netanel, 'New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age', above n 786, 953. Netanel explains, '[t]o the extent cost reductions enable nonmarket speakers, such as bloggers, to make their voices heard, our First Amendment goal of expressive diversity is well served'. At 978. On the other hand, if the institutions that produce high quality journalism are left to erode, there is a social loss: 'public discourse may be significantly impoverished' if high quality journalism is abandoned in favour of cheaply produced 'fluff and diverting entertainment'. At 978.

copyright philosophy and the decisions Google obtained in *Authors Guild*, *Perfect 10*, *Field* and *Parker*.[791] Indeed, the contest over news aggregation also strikes near to the heart of Google's business model. If using news content in a search index requires permission from and remuneration to rightsholders, what are the implications for other types of content and indexes? Conceivably, Google views this issue as an attack on its vision for copyright, one that could, if further applied, threaten the economic viability of Google's search indexing business. Conceivably, along with a potentially onerous financial burden, Google fears a slippery slope of expanding rights — expanding the requirements for permission from and remuneration to rightsholders in the digital environment.

Google's response to efforts to compel it to remunerate news media rightsholders has varied. Where legal arguments have failed, in some limited cases, Google has negotiated private agreements granting Google permission to use news content. In a majority of cases, Google has successfully leveraged its wealth, market power and technological capabilities to achieve its desired outcome. For example, Google has de-indexed (or threatened to de-index) newspapers from Google News, leading to acquiescence to Google's terms. Google has also provided financial resources to support the development of digital journalism in Europe, through grant-based innovation funds. In the following section of this chapter, I detail key legal and political encounters of Google News in France, Belgium, Italy, Spain, Germany and at the level of the European Union.

2.1 The Problems of Google News in Europe

Agency France Presse — United States

French news agency, Agency France Presse (AFP), licenses news photography and articles to third parties, including 'newspapers, wires, web sites, aggregators, companies, governments, national and international agencies, and data services like Lexis-Nexis'[792] and owns the copyright in all its images and articles. In 2005, AFP filed suit against Google in the District

[791] See Chapter 4: *Authors Guild v Google Inc*, 804 F 3d 202 (2nd Cir, 2015); *Perfect 10 Inc v Google Inc*, 653 F 3d 976 (9th Cir, 2011); *Field v Google Inc*, 412 F Supp 2d 1106 (D Nev, 2006); *Parker v Google Inc*, 422 F Supp 2d 492 (ED Pa, 2006). In these cases, courts found Google did not require permission from rightsholders to use their works.

[792] *Complaint for Preliminary and Permanent Injunction and Copyright Infringement, Agence France-Presse v Google Inc* No 1:05 Civ 00546, 3 (D DC, 2005).

Court of the District of Columbia claiming Google willfully infringed the copyrights in AFP's photographs and news stories by 'reproducing and publicly displaying APF's photographs, headlines, and story leads'[793] in Google News. AFP sought a preliminary and permanent injunction and statutory damages of approximately USD 17.5 million.[794] In response, Google asked the District Court to dismiss AFP's claims on the grounds that the works copied by Google were not subject to copyright protection.[795] Google argued news article headlines are 'terse factual phrases'[796] and copyright does not protect facts or 'words and short phrases such as names, titles and slogans'.[797] AFP countered that story headlines and leads are critical for capturing readers' attention and 'are qualitatively the most important aspects of a story'.[798]

In April 2007, AFP and Google agreed to a confidential settlement.[799] While the details of the settlement were not made available to the public, in August 2007 Google announced it had in place a licensing agreement with AFP, Associated Press, Canadian Press Association and the United Kingdom Press Association granting Google permission to host content on Google News.[800] In the announcement, Google explained:

> Because the Associated Press, Agence France-Presse, UK Press Association and the Canadian Press don't have a consumer website where they publish their content, they have not been able to benefit from the traffic that Google News drives to other publishers. As a result, we're hosting it on Google News.[801]

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[793] Ibid 1.
[794] Ibid 17.
[795] *Google's Motion and Memorandum for Partial Summary Judgment Dismissing Count II for Lack of Protectable Subject Matter Agence France-Presse v Google Inc* No 1:05 Civ. 00546 (D DC, 2005). Google also argued it had an implied licence to use AFP's articles because AFP failed to implement the robots.txt exclusion protocol. *Google Inc Answer and Counterclaims Agence France Presse v Google Inc* No 1:05-cv-00546, 19, 29 (D DC, 2005).
[796] *Google's Motion and Memorandum for Partial Summary Judgment Dismissing Count II for Lack of Protectable Subject Matter Agence France-Presse v Google Inc* No 1:05 Civ. 00546, 3 (D DC, 2005).
[797] Ibid. Google cited CFR 37 § 202.1(a).
[798] *Complaint for Preliminary and Permanent Injunction and Copyright Infringement, Agence France-Presse v Google Inc* No 1:05 Civ 00546, 4 (D DC, 2005).
[799] Eric Auchard, 'AFP, Google News Settle Lawsuit Over Google News' *Reuters* (online) 8 April 2007 <http://www.reuters.com/article/us-google-afp-idUSN0728115420070407>. *Agency France Press v Google Inc Stipulation of Dismissal*, Civial Action No,: 1:05CV00546 (GK) (D DC, 2007).
[800] Josh Cohen, 'Original Stories, From the Source' on *Google News Blog* (31 August 2007) <https://news.googleblog.com/2007/08/original-stories-from-source.html>.
[801] Ibid.

Ken Auletta contends the agreement was an acknowledgement by Google that organisations like the AFP who syndicate rather than publish news articles (organisations that cannot directly benefit from increased website traffic that results from content being included in Google News) were particularly problematic for Google.[802] However, as Auletta notes, '[s]olving one problem created another…More than a few newspapers tried to make the same deal but were rebuffed'.[803] Google's willingness to seek permission from and pay rightsholders for the use of content in Google News was strictly limited.

Copiepresse — Belgium

In 2006, Copiepresse, a Belgian copyright collection society representing Belgian publishers of French and German language press, filed suit against Google in Belgium, claiming Google's inclusion of its members' articles in Google News and in Google's cache index, without permission, were acts of copyright infringement.[804] In May 2011, a Belgian Court of Appeals found in favour of Copiepresse.[805] The court held article headlines and leads are protected elements of copyrighted works and cannot be reproduced without the permission of rightsholders.[806] The court stated:

> Contrary to what Google maintains, "Google News" is not a "signpost" which allows cybernauts to find press articles on a specific subject matter more efficiently, but is a slavish reproduction of the most important sections of the inventoried articles.[807]

The court also rejected Google's argument that by not implementing the robots.txt exclusion protocol Copiepresse members had granted Google an implied licence to include their articles

[802] Auletta, above n 295, 164-165.
[803] Ibid 165.
[804] Two additional collection societies were parties to the claim against Google: *Société de droit d'Auteur des Journalistes*, which represents journalists, and Assucopie, which represents scientific and educational authors. *Google Inc v Copiepresse* Vol JBC No 2176, 6 (The Court of Appeal of Brussels, 9th Chamber, 2011).
[805] Notably, Google had argued American law was applicable 'on the grounds that it is in the United States that it inserted, on its servers, the pages published on the Belgian websites of the Belgian newspaper editors'. Ibid 13. The court disagreed and held that under the Berne Convention, protection in the country of origin is governed by that country's domestic law and the country of origin is the country of first publication. The court decided that as the articles were published first in Belgium and it was in Belgium where protection was sought, Belgian law, not American law, governed. See art 5(3) and art 5(4)(a) of the *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, (entered into force 5 December 1887).
[806] *Google Inc v Copiepresse* Vol JBC No 2176, 26 (The Court of Appeal of Brussels, 9th Chamber, 2011).
[807] Ibid 25.

in Google News and Google's cache. The court held an opt-out copyright system was 'incompatible with the requirement of explicit permission which is inherent to copyright.'[808]

The court stated a copyright holder is not 'deprived of his rights simply because he has neglected to implement a technological process'[809] and that such a theory was comparable to the theory that it may be legal to steal from a house because an owner left open the door. The court concluded, 'the authors' explicit, unequivocal and prior permission is required before Google can exploit the articles'.[810] The court also stated, '[t]he reproduction right is exclusive and absolute. The emergence of an information society does not prevent that authors can benefit from a high level of protection'.[811] Consequently, the court ordered Google to

> remove from the Google.be and Google.com sites, more specifically from the "cached" links on "Google Web" and from the "Google News" service, all the articles, photographs and graphic representations from the Belgian publishers of the French and German-speaking daily newspapers, represented by Copiepresse…under penalty of a fine for non-performance of € 25,000.00 per day of delay[812]

Complying with the order, Google removed the Belgian newspaper articles from both Google News and Google Search. Two months later, in July 2011, Google announced that it had received permission from Copiepresse to include articles in Google Search, with the assurance

[808] Ibid 36.
[809] Ibid.
[810] Ibid 37.
[811] The court also found Google's caching was outside of the scope of Directive 2001/19 which excludes from liability copies 'which are transient or incidental and an integral and essential part of a technological process'. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, art 5(1). The court held Google's caching was not functionally necessary to its service, it was not for the purpose of improving processing speeds and it was not a temporary, transient reproduction. Ibid 21-23. Cf the decision in *Field* as discussed in Chapter 4. *Field v Google Inc*, 412 F Supp 2d 1106 (D Nev, 2006).
[812] *Google Inc v Copiepresse* Vol JBC No 2176, 49 (The Court of Appeal of Brussels, 9th Chamber, 2011).

that Copiepresse would not enforce the court-ordered fines.[813] One Belgium publisher described the delisting from Google Search as 'brutal'.[814]

The following year, Google and Copiepresse announced an end to their litigation. The parties confirmed they had in place a private agreement under which Google and Copiepresse would 'partner on a broad range of business initiatives'.[815] Google explained:

> Instead of continuing to argue over legal interpretations, we have agreed on the need to set aside past grievances in favour of collaboration. This is the same message we would like to send to other publishers around the world – it's much more beneficial for us to work together than to fight.[816]

The agreement included an arrangement for Google to assist in the promotion and distribution of Copiepresse content through mobile platforms, AdWords, YouTube and other social media.[817] It also included a commitment by Google to 'advertise its services on the publishers' media',[818] guaranteeing advertising revenue to Copiepresse publishers.[819] However, Google stated explicitly that despite these arrangements it would not be licensing content from Copiepresse for Google News. Google explained, '[w]e continue to believe that our services respect newspaper copyrights and it is important to note that we are not paying the Belgian publishers or authors to include their content in our services.'[820]

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[813] In a statement reported by *PC Mag*, Google stipulated:

> We are delighted that Copiepresse has given us assurances that we can re-include their sites in our Google search index without court-ordered penalties…We never wanted to take their sites out of our index, but we needed to respect a court order until Copiepresse acted. We remain open to working in collaboration with Copiepresse members in the future.

Chloe Albanesius, 'Google to Reindex Belgian Newspapers Amidst 'Boycott' Complaints', *PC Mag* (online), 18 July 2011 <http://www.pcmag.com/article2/0,2817,2388635,00.asp>.

[814] See Francois Le Hodey, 'Google's Brutal Attitude', *La Libre* (online), 15 July 2011 <http://www.lalibre.be/economie/digital/attitude-brutale-de-google-51b8d6e6e4b0de6db9c25135>.

[815] Thierry Geerts, 'Partnering with Belgian News Publishers' on *Google Europe Blog* (12 December 2012) <https://europe.googleblog.com/2012/12/partnering-with-belgian-news-publishers.html>.

[816] Ibid.

[817] Ibid.

[818] Ibid.

[819] Google also agreed to pay for Copiepresse's legal fees and although not confirmed by Google or Copiepresse, it was reported that the advertising revenue amounted to USD 6 million. For example, see Jeff Roberts, 'Did Google Pay Belgian Newspapers a $6M Copyright Fee? Sure Looks Like It', *Gigaom* (online), 13 December 2012 <https://gigaom.com/2012/12/13/did-google-pay-belgian-newspapers-a-6m-copyright-fee-sure-looks-like-it/>.

[820] Geerts, above n 815.

Federazione Italiana Editori Giornale — Italy

In 2009, in response to a complaint from Italian Newspaper Publishers Federation, *Federazione Italiana Editori Giornale* (FIEG), Italy's Antitrust Authority initiated an investigation of Google News. The FIEG complained that Google's policy for automatically excluding from Google Search websites that opt-out of Google News effectively prevented publishers from choosing 'how they allow the use of news published on their websites'.[821] In 2012, the investigation concluded upon Google changing its policy to directly address the FIEG complaint — by retaining articles excluded from Google News in the Google Search index.[822]

In 2016, Google announced that it had in place an agreement with FIEG to promote and distribute FIEG content through Google platforms such as Google Play Newstand and YouTube. As part of the agreement, Google also agreed to establish a €12 million digital innovation fund for FIEG to use to advance the distribution and protection of online content, knowledge transfers and training, a YouTube video strategy, and use of Google Analytics.[823]

Leistungsschutzrecht fur Presseverlege — Germany

In 2013, Germany's copyright laws were amended to introduce a *sui generis* right for press publishers — *Leistungsschutzrecht fur Presseverlege* — granting press publishers an exclusive right to make their articles available to the public for commercial purposes.[824] The right is waivable, expires one year after first publication and does not apply to single words or short snippets.[825] The objective of the law is to require news aggregators to obtain a license to display excerpts of news articles.[826] Google immediately responded to the enactment of the legislation by implementing an 'opt-in' policy for Google News — requiring German publishers to

[821] Competition and Market Authority, *Interventions 2009* <http://www.agcm.it/168-notizie/nascosta/5602-interventi-effettuati-2009.html>. In its investigation, the Antitrust Authority sought to determine whether this policy created 'distortive effects on the online advertising market'.
[822] Uta Kohl, 'Google: The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond (Part 2)' (2013) 21 *International Journal of Law and Information Technology* 187, 226; Eric Pfanner, 'A Google Worry Recedes, for Now, as Italy Ends Investigation Into News Service', *The New York Times* (online), 17 January 2011 <http://www.nytimes.com/2011/01/18/technology/18iht-google18.html>.
[823] Federazione Italiana Editori Giornale, 'Fieg and Google Announce Agreement for the Growth of the Sector in the Digital Publishing' (Press Release, 7 June 2016) <http://www.fieg.it/salastampa_item.asp?sta_id=979>.
[824] Silvia Scalzini, 'Is There Free-Riding? A Comparative Analysis of the Problem of Protecting Publishing Materials Online in Europe' (2015) 10(6) *Journal of Intellectual Property Law & Practice* 454, 461.
[825] Ibid. See also Eleonora Rosati, 'Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?' (2016) 47(5) *IIC* 569, 573.
[826] Rosati, above n 825, 573.

provide Google permission to use their content, free of charge — otherwise Google would exclude articles from Google News.[827]

German publisher organisation, VG Media, opted in on Google's terms, but filed an antitrust complaint claiming Google had forced VG Media to waive its rights.[828] While the German Competition Authority did not open a formal proceeding against Google,[829] in October 2014, Google announced that it would no longer display snippets of news articles or thumbnail images in Google News for websites published by members of VG Media.[830] Google stated:

> We regret this legal process because every publisher has always been able to decide whether and how its content is displayed in our services. Against the background of this complaint, we will no longer display snippets and thumbnails of some well-known websites such as bild.de, bunte.de or hoerzu.de, ie those publishers organized in VG Media. For these pages, we will only show the link to the article and its header.[831]

[827] Gerrit Rabenstein, 'Google News Remains Open Platform for All German Publishers' on *Google Der offizielle Google Produkt-Blog* (21 June 2013) <https://germany.googleblog.com/2013/06/google-news-bleibt-offene-plattform-fuer-verlage.html>.
[828] Greg Sterling, 'German Publishers To Google: We Want Our Snippets Back', *Search Engine Land* (online), 23 October 2014 <http://searchengineland.com/german-publishers-google-want-snippets-back-206520>.
[829] Rosati, above n 825, 573.
[830] Philipp Justus, 'News on News at Google' on *Der offizielle Google Produkt-Blog* (1 October 2014) <https://germany.googleblog.com/2014/10/news-zu-news-bei-google.html>.
[831] Ibid.

After two weeks of not including article snippets in Google News, VG Media announced that reduced website traffic had put 'major economic pressure on members'[832] and VG Media requested Google commence displaying article excerpts without requiring remuneration.[833]

Digital Publishing Innovation Fund — France

In 2012, several French newspapers lobbied the French government for the introduction of legislation similar to Germany's *Leistungsschutzrecht für Presseverleger*.[834] The French government encouraged French publishers to work with Google to come to an agreement, advising that if an agreement was not reached it 'would indeed adopt a law requiring Google to pay royalties on the contents displayed on its News service'.[835] During the negotiations, in a letter to the French government, Google warned that if the legislation was introduced Google would de-index French websites from Google News.[836] Ultimately, an agreement was negotiated and the policy abandoned.[837]

The agreement included 'a €60 million Digital Publishing Innovation Fund to help support transformative digital publishing initiatives for French readers',[838] as well as partnerships 'with

[832] D B Hebbard, 'German Publishers 'Bow to Pressure', Will Allow Google to Display Search Result Snippets', *Talking New Media* (online), 23 October 2014 <http://www.talkingnewmedia.com/2014/10/23/german-publishers-bow-to-pressure-will-allow-google-to-display-search-result-snippets/>.

[833] Harro Ten Wolde and Eric Auchard, 'Germany's Top Publisher Bows to Google in News Licencing Row', *Reuters* (online), 6 November 2014 <http://www.reuters.com/article/2014/11/05/us-google-axel-sprngr-idUSKBN0IP1YT20141105>.

In January 2016, VG Media announced it had filed a civil complaint against Google seeking to 'enforce the ancillary copyright for press publishers' in order to receive payment from Google for the inclusion of VG Media works in Google News. Michelle Martin, 'German Publishers Have Filed Complaint Against Google: VG Media' *Reuters* (online), 6 January 2016 <http://www.reuters.com/article/us-google-media-germany-idUSKBN0UJ1KF20160105>. In May 2017, the Berlin Regional Court suspended VG Media's case and requested a preliminary ruling from the Court of Justice of the European Union on whether Germany had properly notified the European Commission of the introduction of the *Leistungsschutzrecht fur Presseverlege.* Under 'Directive (EU) 2015/1535 Member States must inform the Commission of any draft technical regulation prior to its adoption.' European Commission, The Notification Procedure in Brief <http://ec.europa.eu/growth/tools-databases/tris/en/about-the-20151535/the-notification-procedure-in-brief1/>. See also VG Media, 'Berlin Regional Court Declares Press Publishers' Suit Against Google Inc. to be Justified in Part, Submits to ECJ the Question of Whether Notification Requirement Applies to Ancillary Copyright for Press Publishers' (Press Release, 9 May 2017) <https://www.vg-media.de/en/press/422-berlin-regional-court-declares-press-publishers-suit-against-google-inc-to-be-justified-in-part.html>.

[834] Rosati, above n 825, 572.

[835] Ibid.

[836] Olivier Esper, 'The Facts About Our Position on French Copyright Proposals' on *Google Europe Blog* (18 October 2012) <https://europe.googleblog.com/2012/10/the-facts-about-our-position-on-french.html>.

[837] Eric Schmidt, 'Google Creates €60m Digital Publishing Innovation Fund to Support Transformative French Digital Publishing Initiatives' on *Google Blog* (1 Februrary 2013) <https://blog.google/topics/journalism-news/google-creates-60m-digital-publishing/>.

[838] Rosati, above n 825, 572.

French publishers to help increase their online revenues using [Google] advertising technology'.[839] Eric Schmidt described the agreement as evidence that 'through business and technology partnerships we can help stimulate digital innovation for the benefit of consumers, our partners and the wider web'.[840] Through a financial and technological partnership, along with a €60 million payment, Google once again avoided the application of copyright laws that are antithetical to its interests.

Article 32 of the Ley de Propriedad Intelectual — Spain

In 2014, the Spanish government introduced a copyright law similar to but stronger than Germany's *Leistungsschutzrecht für Presseverleger.* Like the German law, the objective of the Spanish law — *Article 32 of the Ley de Propriedad Intelectual* — is to compel news aggregators to pay news publishers for displaying excerpts of news articles.[841] Unlike the German law, the Spanish right is inalienable, so that Spanish publishers cannot choose to waive their right and opt-in to Google News without compensation.[842] Also unlike the German law, the Spanish law is a copyright exception. It 'introduces a specific statutory limitation for internet service providers and content aggregators, subject to an inalienable equitable compensation.'[843] Professor Silvia Scalzini describes, the law 'establishes the right to obtain an equitable, unwaivable and collectively managed remuneration for publishers and other right holders'[844] and applies to 'non-significant fragments of content'[845] published in newspapers or news websites, for the purposes of 'forming public opinion',[846] information or entertainment.[847]

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[839] Ibid.
[840] Schmidt, 'Google Creates €60m Digital Publishing Innovation Fund to Support Transformative French Digital Publishing Initiatives', above n 837.
[841] See Rosati who explains, the Spanish law

> reformed the quotation exception within Art. 32 of the Ley de Propriedad Intelectual (Intellectual Property Law). Despite relying on a mechanism (that of copyright exceptions) different from the one envisaged under German law, Art. 32 as reformed has introduced a right to ''equitable remuneration'' that, in its substance, is not dissimilar from the German press publishers' right. There is, however, a significant difference, i.e. that – unlike the German right – the Spanish ''right'' cannot be waived. Rosati, above n 825, 573.

See also Raquel Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government — Its Compliance with International and EU Law' (IN3 Working Paper Series WP14-004, Internet Interdisciplinary Institute, 20 October 2014) 1 <http://in3-working-paper-series.uoc.edu/in3/en/index.php/in3-working-paper-series/article/download/2379/2379-8583-1-PB.pdf>.
[842] See Scalzini, above n 824, 462.
[843] Ibid.
[844] Ibid.
[845] Ibid.
[846] Ibid.
[847] Ibid. The Spanish law excludes images and search engines 'when the use is non-commercial, necessary to provide results to a specific user's search and is combined with the display of the link to the original source'.

In December 2014, prior to the law coming into effect, Google announced the closure of Google News in Spain.[848]Google stated:

> This new legislation requires every Spanish publication to charge services like Google News for showing even the smallest snippet from their publications, whether they want to or not. As Google News itself makes no money (we do not show any advertising on the site) this new approach is simply not sustainable. So it's with real sadness that on 16 December (before the new law comes into effect in January) we'll remove Spanish publishers from Google News, and close Google News in Spain.[849]

Google described the situation as 'lose-lose for everyone'[850] and explained that it would continue to talk to 'publisher groups and the government'[851] in the hope that they could restore Google News in Spain.

Digital News Initiative — European Union

In 2015, Google announced the Digital News Initiative (DNI). The DNI includes a €150 million digital innovation fund for 'stimulating and supporting innovation in digital journalism within the news industry in Europe'.[852] The DNI operates in partnership with established European news publishers including: The Guardian (United Kingdom), The BBC (United Kingdom), The

[848] Richard Gingras, 'An Update on Google News in Spain' on *Google Europe Blog* (11 December 2014) <https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html>.
[849] Ibid.
[850] David Drummond, 'Supporting High Quality Journalism' on *Google Europe Blog* (19 June 2015) <https://europe.googleblog.com/2015/06/supporting-high-quality-journalism.html>.
[851] Ibid. A study commissioned by the Spanish Association of Periodical Publications — *Asociación Española de Editoriales de Publicaciones Periódicas* — investigating the impact of the law and delisting in Spain found an overall reduction in traffic to Spanish news sites of 6%, reaching 14% for smaller publications. The study concluded there was no 'theoretical or empirical justification for the introduction of a fee to be paid by news aggregators to publishers for linking to their content' and that the law was harmful for publishers, competition, consumers and innovation. NERA Economic Consulting, above n 784, xv-xvi. Cf a 2017 study which found the law did not significantly impact news media website reach but it did correlate with 'an increase in audience fragmentation, defined as a reduction in the audience overlap of news media sites.' Sílvia Majó-Vázquez, Ana S Cardenal and Sandra González-Bailón, 'Digital News Consumption and Copyright Intervention: Evidence from Spain Before and After the 2015 "Link Tax"' (2017) 22 *Journal of Computer-Mediated Communication* 284, 297.
[852] Biondo, above n 781.

Economist (United Kingdom), La Stampa (Italy), El Pais (Spain), Die Zeit (Germany), Der Spiegel (Germany), FAZ (Germany), Les Echos (France), NRC Media (The Netherlands).[853]

Through the DNI, over a three-year period, organisations and individuals can apply for funding to support projects that use technology in an innovative way to 'support a more sustainable news ecosystem'.[854] David Drummond describes the DNI as an industry collaboration:

> I can't yet tell you what they will achieve, but is great to see some of the greatest practitioners in journalism sitting down for the first time with some of the best brains at Google to figure out how our industries can work more productively together. I've been party to some of those conversations and I can tell you that the level of commitment on both sides is sky high.[855]

In 2017, the DNI announced funding for more than 250 projects from 27 countries in Europe, totalling €50 million. One example of a funded project is the German start-up, Spectrum, which aims to 'build an artificial intelligence engine to help publishers communicate directly with readers--and distribute content--on a 1:1 basis through instant messaging apps.'[856]

Through the DNI, Google has also introduced Player for Publishers, a YouTube player customised for news publishers[857] and the Accelerated Mobile Pages (AMP) project.[858] The

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[853] Digital News Initiative, *The DNI Launched with 11 Founding Partners and Over 1000 Organisations From Across Europe Have Since Expressed Interest in One or Several of Our Programmes* <https://www.digitalnewsinitiative.com/participants/>. See also Ludovic Blecher, 'Digital News Initiative: First Funding Brings €27m to Projects in 23 Countries' on *Google Blog* (24 February 2016) <https://blog.google/topics/google-europe/digital-news-initiative-first-funding_24/>.

[854] Digital News Initiative, *The DNI Innovation Fund* <https://digitalnewsinitiative.com/dni-fund/#faq_faq-1>.

[855] Drummond, above n. Also see Biondo:

> Google recognises and admires high quality journalism. As a strong advocate for the free flow of information we know the crucial role it plays in democratic societies. We recognise that technology companies and news organisations are part of the same information ecosystem. We want to play our part in the common fight to find more sustainable models for news I firmly believe that Google has always wanted to be a friend and partner to the news industry, but I also accept we've made some mistakes along the way. Biondo, above n 781.

[856] Blecher, above n 853.

[857] See Ben McOwen Wilson: '[t]oday, through a unique partnership between YouTube and a number of leading European news publishers, we're launching a new video solution specifically tailored to the needs of news industry; with a goal of reducing complexity and increasing reach and revenue potential'. Ben McOwen Wilson, 'Digital News Initative: Introducing the YouTube Player for Publishers' on *Google Blog* (14 September 2016) <https://blog.google/topics/journalism-news/digital-news-initiative-introducing/>.

[858] See David Besbris:

> Today, after discussions with our DNI partners in Europe and publishers and technology companies around the world, we're announcing a new open source initiative called

AMP is an open source HTML code framework developed to improve the speed of mobile internet, with a particular focus on optimising press publishers' mobile content for speed and usability.[859] According to Google the objective of AMP is to 'protect the free flow of information by ensuring the mobile web works better and faster for everyone, everywhere.'[860]

Through the DNI Google has taken a long-term strategic approach to the issue of news aggregation — effectively acting in the manner of a de facto state — intervening to help resolve an industry-level economic problem. And, of course, at the same time acting to ensure copyright law continues to function in accordance with Google's copyright philosophy and agenda.

European Commission Copyright Directive — European Union

Despite Google's extensive efforts to resist changes to copyright law that would compel it to remunerate news media organisations for the use of their content in Google News, the policy remains under consideration within the European Union. In 2016, in a proposal for a new European Union copyright directive, the European Commission recommended the introduction of an auxiliary copyright for press publishers, akin to the German and Spanish laws.[861] The European Commission stipulated:

> The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry. It is therefore necessary to provide at Union level a harmonised legal protection for press publications in respect of digital uses. Such protection should be effectively guaranteed

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> Accelerated Mobile Pages, which aims to dramatically improve the performance of the mobile web. We want webpages with rich content like video, animations and graphics to work alongside smart ads and to load instantaneously. We also want the same code to work across multiple platforms and devices so that content can appear everywhere in an instant -- no matter what type of phone, tablet or mobile device you are using.

David Bresbris, 'Introducing the Accelerated Mobile Pages Project, For a Faster, Open Mobile Web' on *Google Europe Blog* (7 October 2015) <https://europe.googleblog.com/2015/10/introducing-accelerated-mobile-pages.html>.

[859] Ibid.

[860] Ibid.

[861] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market* (14 September 2016) <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF>.

> through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of press publications in respect of digital uses.[862]

While it is not inalienable, the policy put forward by the European Commission goes further than both the German and Spanish laws in a number of ways. Notably, the proposed European Union law includes both a reproduction and making available right for 'digital uses'.[863] This broad language potentially extends the European Union law beyond remuneration for the display of snippets, capturing Google's scanning and copying of news articles. The European Union proposal is also not limited to news aggregators and it applies for 20 years from publication.[864]

Unsurprisingly, Google responded negatively to the European Union proposal, stating:

> The proposal looks similar to failed laws in Germany and Spain, and represents a backward step for copyright in Europe. It would hurt anyone who writes, reads or shares the news—including the many European startups working with the news sector to build sustainable business models online. As proposed, it could also limit Google's ability to send monetizable traffic, for free, to news publishers via Google News and Search. After all, paying to display snippets is not a viable option for anyone.[865]

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[862] Ibid 19.
[863] The proposed directive states at art 11 (1): 'Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications'. Ibid. (Note, art 2 of Directive 2001/29/EC provides the reproduction right and art 3(2) the making available right in European Union law.)
[864] See art 11(4), ibid.
[865] Caroline Atkinson, 'European Copyright: There's a Better Way' on *The Keyword: Google Blog* (14 September 2016) <https://blog.google/topics/public-policy/european-copyright-theres-better-way/>. In 2017, a similar policy was proposed in Canada. See Dean Beeby, 'Squeeze Cash from Facebook, Google, Say Canadian News Media Leaders', *CBC News* (online), 11 January 2017 <http://www.cbc.ca/beta/news/politics/newspapers-news-media-digital-public-policy-forum-google-facebook-tax-1.3929356>.

Google argued a better approach to supporting European publishers is through innovation: '[i]nnovation and partnership—not subsidies and onerous restrictions—are the key to a successful, diverse and sustainable news sector in the EU'.[866]

2.2 Conclusion: A Multiplicity of Strategies to Secure Google's Copyright Framework

In June 2017, Google announced design changes to Google News.[867] Google claims that in order to 'make news more accessible and easier to navigate, we redesigned the desktop website with a renewed focus on facts, diverse perspectives and more control for users.'[868] Within the new format, Google no longer displays snippets of news articles. This change is a highly significant development in the history of Google News in Europe. Google's display of snippets is central to nearly all of the legal disputes and policy responses to news aggregation. No longer displaying snippets neutralises a critical component of the news media's case against Google. Accordingly, Google's decision appears an attempt by Google to decisively put an end to the issue — before legal or policy decisions over news aggregation encroaches upon Google's business model any further.

In October 2017, Google announced the implementation of several initiatives to support subscription news business models.[869] These initiatives include Google using its algorithms and data to assist publishers to target potential subscribers.[870] Google explains, it will be 'exploring how Google's machine learning capabilities can help publishers recognize potential subscribers and present the right offer to the right audience at the right time'.[871] This decision is also significant. It shows Google is still motivated to support the news media industry —

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[866] Atkinson, above n 865. As at 1 December 2017, the directive remains under consideration by the European Parliament. See European Parliament, *Modernisation of European Copyright Rules: Directive on Copyright in the Digital Single Market* (20 December 2017) Legislative Train Schedule: Connected Digital Single Market <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-directive-on-copyright-in-the-digital-single-market>.

[867] Paka, above n 780.

[868] Ibid.

[869] Richard Gingras, 'Driving the Future of Digital Subscriptions' on *Google Blog* (2 October 2017) <https://www.blog.google/topics/journalism-news/driving-future-digital-subscriptions/>.

[870] Ibid.

[871] Ibid. *The Financial Times* also reported Google's initiatives include a plan to share revenue with publishers:

> Google plans to share revenues with publishers which benefit from the company's new digital subscription tools, in a scheme comparable to its successful advertising revenue model. The search giant will use its trove of personal user data, combined with machine learning algorithms, to help news publishers identify potential new subscribers and target their current subscribers for renewals.

Madhumita Murgia, 'Google Plans to Share Revenues with News Publishers', *Financial Times* (online), 23 October 2017 <https://www.ft.com/content/5609bbfe-b4cf-11e7-aa26-bb002965bce8>.

again employing its market position and vast resources. Arguably, however, what we also see in Google's support of subscription business models is an attempt by Google to shift the financial burden of funding journalism from Google to consumers.

In Europe, Google has faced extraordinary pressure from news organisations and legislatures over Google News. These efforts have forced Google to implement a number of defensive and offensive strategies to defend its interest and copyright policy agenda. Google has invested substantial financial and technological resources to support the new media industry in Europe and Google continues to make changes to its services and practices — removing snippets altogether from Google News and supporting subscription models the latest among many.

Yet, copyright infringement claims, anti-trust complaints and legislation expanding the scope of copyright have overwhelmingly failed to compel Google to pay news organisations for the use of their works in Google News. Employing its market power, technological and financial capabilities, Google has successfully compelled and enticed news media organisations to work within Google's networks (for advertising, promotion and technological benefits) and largely within Google's copyright framework. Indeed, Google's ability to resist the application of laws not in its interest — and its ability to compel rightsholders to work within its preferred framework — reveal Google as a powerful private actor highly capable of influencing copyright in practice. Google's approach to the issue of Google News in Europe also demonstrates Google's willingness to cooperate and negotiate with rightsholders and, of course, Google's unwavering faith in the capacity for technological innovation to solve any problem.

3. Google's Private Copyright Rules and Practices

Up to this point, the story of Google and copyright appears fairly consistent. Google has a copyright philosophy and agenda that aims to limit the exclusionary rights provided by copyright and Google has sought to see its philosophy and agenda applied — both in the judicial setting and through private means. However, a survey of Google's approach to copyright enforcement across its own platforms casts doubt over the consistency of Google's approach to copyright. Over the past decade, Google has developed a range of policies and technological tools used to deter copyright infringement, enforce copyrights and remunerate

rightsholders. They include automated systems for processing copyright infringement notices on a large scale; signals in Google's search algorithm aimed at removing and demoting websites associated with copyright infringement from search results; policies for preventing websites associated with piracy from receiving advertising revenue; and Content ID on YouTube.[872] Indeed, across its platforms, Google has created an elaborate system of private copyright rules and enforcement practices. In the following sections I examine this system, identifying the priorities and principles that underpin it and discuss the implications for digital copyright governance.

3.1 Large-Scale Algorithmic Notice and Take-Down

Google's approach to copyright enforcement on its platforms sees Google remove content at the request of rightsholders through automated processes and on an exceptionally large scale.[873] Since 2015, the rate of content removal requests due to copyright infringement claims has sharply increased. Between 2001-2012, Google received a total of 531 397 removal requests.[874] In 2015 alone, Google received notices to remove 558 million webpages from Google Search.[875] In 2017, that figure will reach close to 900 million.[876] As Professors Jennifer Urban, Joe Karaganis and Brianna Schofield note, effectively, 'Google's capacity to receive notices grew in parallel to rightsholders' ability to send them'.[877] Increasingly, content industries employ professional rights management companies to carry out large scale copyright enforcement[878] and, at the same time, Google has developed and implemented automated

[872] Google, 'How Google Fights Piracy' (2016) <https://drive.google.com/file/u/1/d/0BwxyRPFduTN2TmpGajJ6TnRLaDA/view?usp=drive_web>.

[873] As discussed elsewhere in this thesis, Google does so in compliance with the requirements for intermediary safe harbour. For example, to qualify for safe harbour under the DMCA in the United States, once an intermediary obtains notice of a specific infringement the service provider must act 'expeditiously to remove, or disable access to, the material'. See, eg, 17 USC § 512 (c)(1)(A)(iii).

[874] Daniel Seng, 'The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices' (2014) 18(369) *Virginia Journal of Law and Technology* 369, 444.

[875] Of the 558 million, Google removed 98%. Google, 'How Google Fights Piracy', above n 872, 19.

[876] Google, *Google Transparency Report: Requests to Remove Content Due to Copyright* <https://www.google.com/transparencyreport/removals/copyright/#glance>.

[877] Jennifer M Urban, Joe Karaganis and Brianna L Schofield, 'Notice and Takedown in Everyday Practice' (UC Berkeley Public Law Research Paper 2755628, 22 March 2017) 71 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628>. Seng notes the drastic increase in takedown requests received by Google commencing from 2012 correlates with the protests against the introduction of the *Stop Online Piracy Act* and the *PROTECT IP Act*, protests in which Google was a high-profile participant. Seng, above n 874, 390.

[878] Urban, Karaganis and Schofield:

> Sophisticated players' rapid adoption of automated systems is closely connected to the growing professionalization of large-scale enforcement, characterized by the emergence of specialized "content protection" teams in major trade associations and media companies,

processes for responding to notices from rightsholders. Together, the automation and professionalisation of notice and take-down processes in copyright enforcement has created 'technological feedback loops',[879] facilitating a rapid rise in copyright infringement notices and content removals from Google's platforms.

The majority of copyright infringement notices received by Google are processed without human review, through 'trusted member' programs.[880] Google offers the Trusted Copyright Removal Program (TCRP) for Google Search and the Content Verification Program (CVP) for YouTube.[881] Both TCRP and CVP provide rightsholders tools for bulk submissions of notices. Google states TCRP is offered to 'copyright owners who have demonstrated a proven track record of submitting accurate notices and who have a consistent need to submit thousands of webpages each day'.[882] There is a similar standard for admission to the CVP.[883] For Google Search, approximately 95 per cent of takedown requests come via trusted member programs[884] and Google claims this system allows Google to process 'copyright removal requests…with an average turnaround time of less than 6 hours.'[885]

A 2016 University of California Berkeley qualitative and quantitative study of notice and take-down systems suggests Google's processes for enforcing the copyright claims of rightsholders without human review suffer problems of inaccuracy and over-inclusiveness.[886] The study found 28.4 per cent of the 108 million takedown requests studied had questionable validity.[887]

> and by the growth of the [rights enforcement organization] sector that sells services to them. There has been very little research on this new tier of commercial players, but it is clear that professionalized enforcement is a crucial source of large-scale noticing.

Urban, Karaganis and Schofield, above n 877, 33.

[879] Ibid 71.

[880] Ibid 54.

[881] Google, 'Letter to The Honourable Maria A. Pallante Register of Copyrights U.S. Copyright Office Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)', above n 405, 4.

[882] Google, 'How Google Fights Piracy', above n 872, 40.

[883] Google, 'Letter to The Honourable Maria A. Pallante Register of Copyrights U.S. Copyright Office Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)', above n 405, 4.

[884] Urban, Karaganis and Schofield, above n 877, 82. Google has also stated that its TCRP participants 'together submit the vast majority of notices every year'. Google, 'How Google Fights Piracy', above n 872, 40.

[885] Google, 'How Google Fights Piracy', above n 872, 16.

[886] Urban, Karaganis and Schofield, above n 877, 3. The qualitative component of the study involved confidential interviews and surveys with online service providers and rightsholders. The quantitative component of the study referred to here examined

> a random sample of takedown notices, taken from a set of over 108 million requests submitted to the Lumen database over a six-month period (most of which relate to Google Web Search). The quantitative analysis is based on manual review and coding of these notices by the Takedown Project lead researchers and a team of graduate legal researchers at the University of California, Berkeley. At 1.

[887] Ibid 88.

These notices 'raised questions about compliance with the statutory requirements (15.4%), potential fair use defenses (7.3%), and subject matter inappropriate for DMCA takedown (2.3%), along with a small handful of other issues.'[888] The authors of the study explain, 'automated systems, even if responsibly deployed, have limited capacity to avoid mistakes…these systems are particularly ill-suited for complex legal decision-making, such as assessments of whether a particular use may be making a fair use of copyrighted content.'[889] Importantly, the study also found very few removals are disputed by targets of the takedown notices.[890] The authors suggest that '[t]argets (other than bad-faith, off-shore pirates) were widely considered to lack sufficient information to respond to mistaken or abusive notices.'[891]

Google posits that overall the notice and takedown regime 'strikes the right balance between the needs of copyright owners, the interest of users, and our efforts to provide a useful Google Search experience.'[892] However, the high rate of notices with questionable validity and the infrequent rate of counter notifications suggest Google's automated system for processing copyright infringement notices on a large scale prioritises enforcing rightsholder claims over accuracy.[893]

[888] Ibid.
[889] Ibid 35.
[890] The study concludes the rates of counternotices are 'extremely infrequent'. Ibid 44.
[891] Ibid 74.
[892] Fred von Lohmann, 'Transparency for Copyright Removals in Search' on *Google Official Blog* (24 May 2012) <https://googleblog.blogspot.com.au/2012/05/transparency-for-copyright-removals-in.html>.
[893] Professors B Depoorter and R K Walker suggest a fear of litigation costs also acts as a deterrent to disputing invalid claims: 'in practice…the litigation costs involved in correcting enforcement errors impose a burden on creative expression and the rightful exercise of public rights and copyright exceptions'. B Depoorter and R K Walker, 'Copyright False Positives' (2013) 89(1) *Notre Dame Law Review* 319, 321-322.
The DMCA provides that if a service provider receives a counter notice from the target of the take-down notice, the service provider must restore the content within 10 to 14 business days, unless the service provider receives notice that the original claimant 'has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity'. See 17 USC § 512(g)(2). Owners of websites removed from Google Search only receive notice of the removal via Google's Search Console. Google, 'How Google Fights Piracy', above n 872, 46.
The University of California Berkeley study reported that '[t]here was almost universal agreement among [online service providers] that a lack of effective disincentives or remedies for erroneous notices amplifies the problem of mistaken or spurious notices.' Urban, Karaganis and Schofield, above n 877, 42.
On YouTube, a user can submit a counter notification if they believe their video is non-infringing. Google provides a web-form for submitting counter notifications, and, once received, in accordance with the *Digital Millennium Copyright Act*, the claimant is then required to commence litigation in order to keep the content off YouTube. Google, 'How Google Fights Piracy', above n 872, 31. However, as I discuss below, Google's private agreements with Content ID participants in some cases remove the counter notification process from YouTube altogether.

3.2 Beyond Notice and Take-Down: Sanitising Search

Google also takes action to remove content from its platforms without notice from rightsholders. Google asserts it 'does not want to include any links to infringing material in our search results and we make significant efforts to prevent infringing webpages from appearing.'[894] These efforts include factoring into its search algorithm undisclosed signals to exclude websites associated with copyright infringement from appearing in search results and a policy for demoting websites associated with copyright infringement in search result rankings.[895] Google explains:

> Thanks to the efforts of Google's engineers, the vast majority of media-related queries that users submit every day return results that include only legitimate sites…Although the vast majority of media-related queries yield clean results, there are some infrequent queries where the results do include problematic links. For these "long-tail" queries, Google collaborates with copyright owners to address the problem in a few ways. First, Google has developed state-of-the-art tools that allow rightsholders and their enforcement agents to submit takedown notices efficiently at high volumes (tens of thousands each day) and process those notices, on average, within six hours. Second, Google then uses those notices to demote sites for which we receive a large number of valid takedown notices, making them less visible in search results.[896]

Effectively, Google uses notices received from rightsholders and processed without human review to determine the 'legitimacy' of websites and consequently that website's position or availability in Google Search results. Google also removes terms associated with piracy from its auto-complete function and provides prominent advertising space to 'legitimate' content providers, to ensure that when a user searches for media and entertainment content, links to rightsholders' sites are visible to internet users.[897]

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[894] Google, 'How Google Fights Piracy', above n 872, 7.
[895] Google's current search algorithm includes over 200 variables used to assess the relevance of a website to a search query. Google, *What We Believe*, above n 106.
[896] Google, 'How Google Fights Piracy', above n 872, 34.
[897] Ibid 43.

Within its advertising network, Google implements policies for denying advertising revenue to websites that infringe intellectual property rights. Google claims it has 'zero tolerance for copyright-infringing ads in Search, and has dedicated considerable human and engineering resources across the company to develop and implement measures to root out infringing ads.'[898] Google prohibits participation in its AdSense, DoubleClick and AdWords programs by websites hosting unauthorised content.[899] Google reports:

> Since 2012, we have blacklisted more than 91,000 sites from our AdSense program for violations of our copyright policy, the vast majority of which were caught by our own proactive screening processes. We have also terminated over 11,000 AdSense accounts for copyright violations in that time.[900]

As noted in Chapter 3, Google also adheres to the *Best Practices and Guidelines for Ad Networks to Address Piracy and Counterfeiting*[901] which aim to deny advertising revenue to websites that sell counterfeit goods or engage in copyright infringement. Google suggests, '[t]hese "follow the money" strategies…play a critical role in the effort to fight piracy online.'[902]

Through the application of these rules, Google is self-regulating and enforcing copyright on behalf of rightsholders. Professor Uta Kohl argues Google's policy for demoting websites associated with copyright infringement in Google Search results is '[t]he clearest sign that Google has started to act as a regulatory gateway for the copyright industry'.[903] Similarly,

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[898] Ibid 59.
[899] See generally Google, 'How Google Fights Piracy' (2013) <https://docs.google.com/file/d/0BwxyRPFduTN2dVFqYml5UENUeUE/edit>.
[900] Google, 'How Google Fights Piracy', above n 872, 9.
[901] Victoria Espinel, 'Coming Together to Combat Online Piracy and Counterfeiting*'* on *The White House, President Barack Obama: Blog* (15 July 2013)<https://www.whitehouse.gov/blog/2013/07/15/coming-together-combat-online-piracy-and-counterfeiting>.
[902] Google, 'Letter to The Honourable Maria A. Pallante Register of Copyrights U.S. Copyright Office Re: Section 512 Study: Notice and Request for Public Comment Docket No. 2015-7 (December 31, 2015)', above n 405, 4. Google also has policies in place to prevent the distribution of 'pirated' content on its cloud service – Google Drive. Reportedly, Google uses hash matching to detect infringing content. See, eg, Ernesto Van de Sar, 'Google Drive Uses Hash Matching to Detect Pirated Content', *Torrent Freak* (online), 11 Februrary 2017 <https://torrentfreak.com/google-drive-uses-hash-matching-detect-pirated-content/>.
[903] Khol also argues,

> Another sign that Google may have jumped the pirate ship is the fact that it has started to restrict the autocomplete functionality for copyright infringing sites and terms, such as ThePirateBay, BitTorrent or RapidShare. The evidence that this is legally necessary under

Professor Julie Cohen suggests that Google's search manipulation 'mimics the results that could have been achieved under the [the Stop Online Piracy Act and the PROTECT IP Act] regime',[904] effectively accomplishing 'via private and wholly nontransparent measures what the combined lobbying might of the content industries could not.'[905] Through these practices, none of which are directly required by legislation, Google acts as a private copyright rule-maker and enforcer, curating the quality of information and content accessed through Google for the benefit of rightsholders. In the following section, I examine in detail what is arguably the most substantial intervention by Google to enforce copyright on behalf of rightsholders — Content ID on YouTube.

3.3 Further Beyond: Content ID on YouTube

In 2007, Google announced it had partnered with Walt Disney Co., Time Warner Inc. and EMI to implement digital fingerprinting technology on YouTube.[906] Google's technology is an automated content identification system, providing music, film and television rightsholders control and monetisation options over content uploaded to YouTube. Rightsholders submit to YouTube reference files of their work, along with metadata identifying the work. When a user uploads a video to YouTube it is scanned against the database of references. If a match is found, the user receives a Content ID claim and the claimant's preselected preferences are applied to the video. The claimant can preselect to block videos, monetise videos, mute the audio or receive viewership statistics. If monetisation is selected, the claimant receives a share of revenue received by YouTube for advertisements run against the video.[907] Google claims Content ID scans over 250 years of video each day,[908] has more than 50 million reference files

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copyright law is ambiguous, much like in relation to the lower ranking initiative—other than in France where the Supreme Court held that Google could be liable for contributory copyright infringement by autocompleting the names of popular singers with the words 'torrent', 'megaupload' or 'rapidshare'. Kohl, above n 822, 220.

[904] Cohen, 'Between Truth and Power', above n 66, 5.

[905] Ibid. See also Eric Goldman, 'Why Did Google Flip-Flop On Cracking Down On "Rogue" Websites? Some Troubling Possibilities', *Forbes* (online), 15 August 2012 <https://www.forbes.com/sites/ericgoldman/2012/08/15/why-did-google-flip-flop-on-cracking-down-on-rogue-websites-some-troubling-possibilities/#4a6a13f214b7>.

[906] See Kevin Delaney, 'YouTube to Test Software To Ease Licensing Fights', *The Wall Street Journal* (online), 12 June 2007 <http://www.wsj.com/articles/SB118161295626932114>; Kenneth Li and Eric Auchard, 'YouTube to Test Video ID with Time Warner, Disney', *Reuters* (online), 12 June 2007 <http://www.reuters.com/article/us-google-youtube-idUSWEN871820070612>; Stefanie Olsen, *YouTube, EMI Sign Breakthrough Licensing Pact* (31 May 2007) c|net <https://www.cnet.com/news/youtube-emi-sign-breakthrough-licensing-pact/>.

[907] Google, *How Content ID works* (n.d.) YouTube Help <https://support.google.com/youtube/answer/2797370>. Google does not disclose exact revenue share arrangements.

[908] Chavez, above n 445, 3.

in its database,[909] amounting to over 600 years of audio and visual content,[910] from more than 8000 participating rightsholders including 'network broadcasters, movie studios, songwriters, and record labels.'[911]

Content ID has become the primary tool for managing copyright on YouTube. Google reports 99.5 per cent of sound recording copyright matters and 98 per cent of all copyright matters on YouTube are 'resolved via Content ID'.[912] Google explains, in practice 'Content ID automatically identifies the work and applies the rightsholder's preferred action without the need for intervention by the rightsholder in all but 0.5% of cases.'[913] Google also reports that over 90 per cent of Content ID participants opt to monetise videos[914] and claims the music industry 'generates 50% of its revenue on YouTube from monetizing fan uploads'.[915] According to Google, since its implementation, Google has paid rightsholders USD 2 billion through Content ID.[916] Google suggests that through Content ID Google has developed a new business model for the content industries, replacing the conventional practice of permission and remuneration with a system of advertising royalties.[917]

In principle, Content ID benefits rightsholders, YouTube users and the public. Content ID benefits rightsholders by providing a system in which they can monetise and earn revenue for use of their work in the digital environment, with low transaction costs.[918] Transaction costs associated with licensing works are eliminated when Content ID automatically matches videos with rightsholders and applies their pre-determined course of action.[919] YouTube users benefit from Content ID through a reduced risk of copyright liability. By incentivising rightsholders to let videos remain publicly available in exchange for advertising royalties, the public benefits from an increased availability of content.

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[909] YouTube, *YouTube Statistics* <https://www.youtube.com/yt/press/en-GB/statistics.html>.
[910] Google, 'How Google Fights Piracy', above n 872, 26.
[911] Ibid 6; YouTube, *YouTube Statistics,* above n 909.
[912] Google, 'How Google Fights Piracy', above n 872, 26.
[913] Ibid 26.
[914] Ibid 6.
[915] Ibid.
[916] YouTube, *YouTube Statistics,* above n 909.
[917] Google stated: '[Content ID] is not just an anti-piracy solution, but also a new business model for copyright owners and YouTube alike.' Google, 'How Google Fights Piracy', above n 899, 10.
[918] The United States television industry has been particularly receptive to Content ID. In 2013, YouTube received an Emmy Award in appreciation of the enforcement technology. See Todd Spangler, 'Despite YouTube's Emmy, Google Still Has a Long Way to Go', *Variety* (online), 24 October 2013 <http://variety.com/2013/biz/news/despite-youtubes-emmy-google-still-has-a-long-way-to-go-1200756170/>.
[919] Benjamin Boroughf, 'The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation and Fair Compensation' (2015) 25(1) *Albany Law Journal of Science & Technology* 95, 106.

In practice, however, the benefits of Content ID accrue mainly to rightsholders. This is because Content ID systematically designates rules of use based on unilateral and unverified claims of ownership by rightsholders, and operates on the presumption that rightsholders have exclusive rights to a work and so copying or sharing for any purpose requires their permission.[920] Professor Nicholas DeLisa suggests that Google has effectively created a compulsory licensing regime under which Content ID ratifies infringement prior to it occurring.[921] Alternatively, Professors Yafit Lev-Aretz and Abigail Simon argue Content ID is best understood as a system of second level copyright agreements; Google has negotiated and executed agreements with rightsholders on behalf of users.[922] According to Simon, 'Content ID creates an express contractual nonexclusive licensing agreement between YouTube and the claimant'[923] and 'an implied, nonexclusive, royalty-free license between the copyright owner and the user-creator, which is limited in scope by YouTube's Terms of Service and the terms of the second level agreement.'[924] Whatever the precise legal form, through Content ID, Google has established a system of copyright enforcement in which infringement is assumed, permission is mandatory and licences are preemptive.

The Content ID algorithm permits rightsholders to overstate the rights held in a work and is not sensitive to exceptions and limitations to copyright. For instance, Content ID removed from YouTube a keynote speech by Professor Lawrence Lessig in which Lessig plays a snippet of the song 'Lisztominia' by the band Phoenix, for which record label Liberation Music held the rights to the sound recording in New Zealand.[925] Professor William Fisher similarly had a video removed — a lecture on the topic of copyright subject matter in which Fisher plays snippets of

[920] Steve Collins similarly notes: '[t]he inability of Content ID to distinguish between fair and infringing uses means every match is initially treated as an infringement of copyright and contributes to a constructin of copyright in which all use must be licensed.' Steve Collins, 'YouTube and Limitations of Fair Use in Remix Videos' (2014) 15(2) *Journal of Media Practice* 92, 99.
[921] Nicholas Thomas DeLisa, 'You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms' (2016) 81(3) Brooklyn Law Review 1318, 1291.
[922] Lev-Aretz Yafit, 'Second Level Agreements' (2012) 45 *Akron Law Review* 137. Abigail R Simon, 'Contracting in the Dark: Casting Light on the Shadows of Second Level Agreements.(YouTube Content ID Copyright License)' (2014) 5(1) *William and Mary Business Law Review* 305.
[923] Simon, above n 922, 316.
[924] Ibid 317.
[925] Lessig ultimately sued Liberation Music claiming fair use. Collins, above n 920, 103. In 2014, the parties settled. Liberation Music agreed to compensate Professor Lessig for harm caused and to amend its DMCA compliance policies to 'respect fair use'. Corynne McSherry, 'Lawrence Lessig Settles Fair Use Lawsuit Over Phoenix Music Snippets' (Press Release, 27 February 2014) <https://www.eff.org/press/releases/lawrence-lessig-settles-fair-use-lawsuit-over-phoenix-music-snippets>.

cover versions of Jimi Hendrix, Joe Cocker, Santana and Stevie Ray Vaughan songs.[926] A video remix critiquing gender stereotypes in the *Twilight* movie series was removed when the creator 'refused, on moral grounds, to allow the copyright owner of Twilight to profit from his work'.[927] In 2015, YouTube user Benjamin Ligeri filed a claim against Google, Viacom, Lions Gate Entertainment and Egeda Pirateria claiming Content ID had incorrectly attributed ownership of his parody of the film *The Girl With the Dragon Tattoo* and his critique of the 2014 *Teenage Mutant Ninja Turtles* remake.[928] Ligeri criticised Content ID for favouring 'the larger copyright holders that make use of its Content ID system over smaller creators.'[929]

The Content ID algorithm can capture uses of works that are *de minimis*. Professors Maayan Petel and Niva Elkin-Koren explain, '[i]t is unclear, and hence unpredictable, what exact portion of copyrighted material must be embedded in an upload to trigger the system. As a result, Content ID may unlawfully flag fair uses of *de minimis* uses of content.'[930] Similarly, Content ID restricts uses that may not fall within an exception but nonetheless an author would typically tolerate. Professor Tim Wu elucidates that an author may tolerate an infringing use for reasons of 'simple laziness or enforcement costs, a desire to create goodwill, or a calculation that the infringement creates an economic complement to the copyrighted work — it actually benefits the owner.'[931] By preemptively licensing works, Content ID removes the possibility for tolerated uses. For example, as Professor Benjamin Boroughf documents, in 2013, hundreds of videos containing video game reviews and playthroughs were subject to Content ID claims.[932] Game reviews and playthroughs are typically tolerated by game developers because they are recognised as important components of the video game economy, serving to market and promote new products. However, when Content ID was applied to the reviews and playthroughs on YouTube, 'its tentacles automatically matched videos, in-game music, and trailers and adhered to the blanketed pre-rendered choices of the alleged copyright holders.'[933]

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[926] Ernesto Van der Sar, 'YouTube Copyright Complaint Kills Harvard Professor's Copyright Lecture', *TorrentFreak* (online), 17 February 2016 <https://torrentfreak.com/youtube-copyright-complaint-kills-harvard-professors-copyright-lecture-160217/>.
[927] Rebecca Tushnet, 'All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing' (2014) 29(3) *Berkeley Technology Law Journal* 1447, 1461.
[928] *Complaint for Unjust Enrichment, Violations of US Copyright Law, and for Injunctive Relief and Declartory Relief Benjamin Ligeri v Google et al* 1:15-cv-00188-M-LDA 4(DC RI, 2015).
[929] Ibid 5.
[930] P Maayan and N Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' (2016) 19 *Stanford Technology Law Review* 473, 513-514.
[931] Wu Tim, 'Tolerated Use' (2008) 31 *Columbia Journal of Law & the Arts* 617, 619.
[932] Boroughf, above n 919, 97.
[933] Ibid 98.

Game developers, seeking to have the videos restored, were required to ask YouTube users to dispute the Content ID claims, in order to establish to which rightsholder Content ID had attributed ownership of the video.[934]

Devised around 'traditional notions of discrete authorship and ownership,'[935] Content ID is inept at dealing with complex structures of production and ownership common in the digital environment. As Professors Michael Soha and Zachary McDowell document, Content ID's treatment of the Harlem Shake dance meme that achieved global popularity in 2013 exemplifies this attribute.[936] The dance meme emerged from an amateur video of several friends dancing to an electronic dance music (EDM) song by the artist Baauer. The video inspired thousands of reenactments, at one point reaching close to 4000 uploads to YouTube per day.[937] As the Content ID database contained a reference file of the audio track, the Content ID algorithm attributed ownership of *all* Harlem Shake videos to Baauer, permitting his record label to monetise over one billion streams.[938] Further complicating matters was the fact that Baauer's EDM song contained music samples, including two used without permission.[939] Content ID effectively permitted one rightsholder to monetise the work of thousands of different people based on an unverified unilateral ownership claim. Soha and McDowell suggest that the traditional concept of authorship in copyright law, which is 'already on shaky ground with EDM music, seems to fall short when attempting to encapsulate the large collections of digital labor that go into Internet memes…[which] are rapid, ethereal, produced by often anonymous nodes through networked practices that transform as they replicate.'[940] Content ID is wholly insensitive to the complexities of social digital production.

Google has itself acknowledged that Content ID may be used to unilaterally overstate or incorrectly declare ownership,[941] that it has the potential to dilute established limitations and exceptions to copyright[942] and can 'never address all of copyright's complexities and

[934] Ibid 111.
[935] Michael Soha and Zachary J. McDowell, 'Monetizing a Meme: YouTube, Content ID, and the Harlem Shake' (2016) 2(1) *Social Media + Society*, 6 <http://journals.sagepub.com/doi/abs/10.1177/2056305115623801>.
[936] Ibid.
[937] Ibid 1.
[938] Ibid.
[939] Ibid 5.
[940] Ibid 6.
[941] Google, 'Public Consultation on the Review of the EU Copyright Rules', above n 61, 12.
[942] Ibid 24.

subtleties'.[943] In particular, Google has argued Content ID should be considered 'a supplement to, not a substitute for, fair use'.[944] In 2015, Google announced it would offer 'legal support'[945] to a set of YouTube videos that it deemed represented 'clear fair uses which have been subject to DMCA takedowns.'[946] Google explained it was motivated to do so because the notice and take-down process and potential for litigation can be intimidating for creators. Google expressed that it hoped by defending a selection of fair use videos it will create a 'demo reel'[947] of best practice fair use videos. Google said it sought to have a 'positive impact on the entire YouTube ecosystem, ensuring YouTube remains a place where creativity and expression can be rewarded.'[948] It is so far unclear what impact this intervention may have or how it can affect the Content ID algorithm.

Furthermore, the recourse available to users who are subject to a Content ID claim is limited by more than the intimidating nature of litigation. Formally, Google's policy is that a user may dispute a Content ID claim if they believe it is invalid. On receipt of a dispute, a copyright owner has 30 days to respond, either by releasing the claim, upholding the claim, or submitting a takedown request. If the complaint is upheld, the user can appeal. If a user appeals, the copyright owner may release the claim or submit a DMCA compliant takedown request via Google's web form. While there is an active dispute, monetisation will continue if both the user and claimant have opted to monetise and YouTube retains the revenue until the dispute is resolved.[949] Yet, Google reports that less than 1 per cent of copyright claims via Content ID are disputed[950] and, in practice, Google's private agreements with Content ID participants can negate the counter notification policy altogether. For example, as documented by Professor Rebecca Tushnet, a video analysing 'remix culture' which featured snippets from John Hughes' films was removed from YouTube via Content ID and the counter notification and

[943] Ibid.
[944] Chavez, above n 445, 4.
[945] Fred von Lohmann, 'A Step Toward Protecting Fair Use on YouTube ' on *Google Public Policy Blog* (19 November 2015) <http://googlepublicpolicy.blogspot.com.au/2015/11/a-step-toward-protecting-fair-use-on.html?m=1>.
[946] Ibid.
[947] Ibid.
[948] Ibid.
[949] As Simon documents, the process for disputing a Content ID claim was amended in 2012. Previously, copyright owners could unilaterally confirm a claim. Under the current policy, 'YouTube defers to user disputes, giving the claimant two options: release the Content ID claim or file an official DMCA notification to override the dispute.' Simon, above n 922, 325.
[950] Google, 'How Google Fights Piracy', above n 872, 28.

appeal were rejected, without the claimant commencing legal proceedings in accordance with Digital Millennium Copyright Act requirements.[951] Google revealed:

> YouTube enters into agreements with certain music copyright owners to allow use of their sound recordings and musical compositions. In exchange for this, some of these music copyright owners require us to handle videos containing their sound recordings and/or musical works in ways that differ from the usual processes on YouTube…In some instances, this may mean the Content ID appeals and/or counter notification processes will not be available.[952]

Similarly, in a dispute between Universal Music and Megaupload — regarding a video promoting Megaupload that Universal Music had removed from YouTube on copyright grounds — it was revealed that a private agreement between Universal Music and YouTube granted Universal Music access to a Content Management System that allows Universal Music to remove content on YouTube 'based on a number of contractually specified criteria.'[953] In practice, through private agreements Google permits rightsholders to 'override DMCA counter notifications, lifting from copyright owners the burden of filing suit to challenge uses that uploaders would be willing to litigate to defend.'[954] Effectively, as Professor Diane

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[951] Tushnet, 'All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing', above n 927, 1461.

[952] Google, *Videos Removed or Blocked Due to YouTube's Contractual Obligations* <https://support.google.com/youtube/answer/3045545/>.
The extent to which Google licenses content for YouTube is unclear but as this comment reveals Google does have in place agreements with righsholders providing Google permission to use their works. (Google licenses works for its subscription music service Google Play. See Paul Resnikoff, 'F*&K It: Here's the Entire YouTube Contract for Indies…', *Digital Music News* (online), 23 June 2014 <https://www.digitalmusicnews.com/2014/06/23/fk-heres-entire-youtube-contract-indies/>.)

[953] Yafit, 'Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering', above n 45, 254; Eriq Gardner, 'Universal Music May Have Inadvertently Exposed a Flaw in the YouTube Takedown Process', *The Hollywood Reporter* (online) 27 January 2012 <http://www.hollywoodreporter.com/thr-esq/megaupload-youtube-lawsuit-universal-music-285298 >. The full terms of the agreement are not made public.

[954] Tushnet, 'All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing', above n 927, 1461. Even where recourse is available and utilised, it can be complex and ineffective. For example, in 2012 Content ID removed a promotional video created by the Lansdowne Public Library in Pennsylvania which parodied a Michael Jackson song, substituting the lyrics 'beat it' with 'read it'. After negative press coverage of the incident, Sony/ATV allowed the video to be restored, however, once restored the Content ID algorithm again determined the video to be infringing and the video's audio was muted. When the library brought the issue to Sony/ATV's attention, Sony advised the library that it did not have the capacity to override Content ID and stated the video was caught in the 'YouTube Vortex'. See Mike Zajko, 'The Copyright Surveillance Industry' (2015) 3(2) *Media and Communication* 42, 46-47. New Media Rights, *Teens Make Parody Video, but Sony Tells Them to Beat It ... Just Beat It!* (15 October 2013) New Media Rights <http://www.newmediarights.org/teens_make_parody_video_sony_tells_them_beat_it%E2%80%A6_just_beat_it>.

Zimmerman argues, this renders Google's system of copyright enforcement on YouTube 'uninhibited by the notions of due process that a legally imposed system would need to require: which is to say, you are presumed guilty of infringement and your defenses are adjudicated by your opponent.'[955]

On YouTube, unilateral claims of ownership are pre-emptively enforced, without meaningful recourse for users[956] and the scope of copyright is expanded through an algorithmic insensitivity to exceptions to copyright, the complexities of social digital production, *de minimis* and tolerated uses. Devised through negotiations between Google and dominant media and entertainment industry companies, Content ID operates to enforce the values and interests of powerful rightsholders — often at the expense of independent or less politically and economically powerful creators. Content ID also supports private property claims at the expense of public rights to access and use content. While informed by the law, Google's system of copyright enforcement on YouTube goes beyond Google's obligations under existing law or treaty and is symptomatic of a broader tendency for private copyright rule-making and enforcement in digital copyright governance.

3.4 Google and Digital Copyright Governance

A decade ago, Google resisted claims that it had a responsibility to enforce copyright, declaring, 'Google does not want to be a gatekeeper.'[957] Contrastingly, in 2016, Google stipulated,

> Google takes the challenge of online piracy seriously—we continue to invest significant resources in the development of tools to report and manage copyrighted content and we work with other industry leaders to set the standard for how tech companies fight piracy.[958]

[955] Diane Leenheer Zimmerman, 'Copyright and Social Media: A Tale of Legislative Abdication' (2014) 35(1) *Pace Law Review* 260, 273.
[956] Niva Elkin-Koren, 'Copyrights In Cyberspace - Rights Without Laws?' (1998) 73(4) *Chicago-Kent Law Review* 1155, 1180.
[957] Rachel Whestone, 'Free Expression and Controversial Content on the Web' on *Google Official Blog* (14 November 2007) <https://googleblog.blogspot.com.au/2007/11/free-expression-and-controversial.html>.
[958] Google, 'How Google Fights Piracy', above n 872, 34.

The range of policies and procedures for enforcing copyright on behalf of rightsholders identified in this chapter confirm Google's rhetoric. Today, Google's gatekeeper status is irrefutable. But why has Google's position evolved? Multiple convergent reasons account for Google's enthusiasm for private copyright rule-making and enforcement.

Over the past several years, to acquire control over works in the digital environment, the content industries have supported 'a strategic shift away from public law and litigation, toward partnerships with internet service providers'.[959] Partnering with internet intermediaries to enforce copyrights became an attractive tactic when suing individual customers proved unpopular and ineffective, legislative efforts such as the Stop Online Piracy Act, the PROTECT IP Act and the Anti-Counterfeiting Trade Agreement[960] failed, and bilateral trade agreements had a limited effect on internet user behaviour.[961] Changing their approach, the content industries now support a copyright enforcement system that is executed by internet intermediaries and 'operates on Internet users through a combination of technology and private law mechanisms'[962].

The content industries' strategic shift has also been accompanied by hostility towards Google. For example, in December 2014, a presentation detailing the findings of a study undertaken on behalf of Warner Brothers and Sony Pictures Entertainment was leaked and published.[963] The study concluded that the introduction of Google Fiber would cause drastic increases in illegal

[959] Annemarie Bridy, 'Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement' (2010) 89(1) *Oregon Law Review* 81, 83. See also Zimmerman, above n 955.
[960] *Stop Online Piracy Act* HR 3261, 112th Cong (2011) and *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act*, S 968, 112th Cong (2011). *Anti-Counterfeiting Trade Agreement*, signed 1 October 2011 (not yet in force).
[961] See, eg, Zimmerman, above n 955.
[962] Bridy, above n 959, 84. See also Cohen: '[i]n an effort to control flows of unauthorized information, the major content industries are pursuing a range of strategies designed to distribute copyright enforcement functions across a wide range of actors and to embed those functions within communications networks, protocols, and devices.' Julie E Cohen, 'Pervasively Distributed Copyright Enforcement' (2006) 95(1) *Georgetown Law Journal* 1, 2. See also Zimmerman, above n 955; Laura DeNardis, *The Global War for Internet Governance* (Yale University Press, 2014) 173-174.
And, with this amended strategy, the focus of the content industries has also changed 'from policies and practices aimed at denying access to content to methods that seek to *normalize* control and the exercise of power in cyberspace through a variety of means.' Ronald Deibert and Rafal Rohozinski, 'Beyond Denial Introducing Next-Generation Information Access Controls' in John Palfrey Ronald Deibert, Rafal Rohozinski and Jonathan Zittrain (ed), *Access Controlled The Shaping of Power, Rights, and Rules in Cyberspace* (The MIT Press, 2010), 3, 6.
[963] Ernesto Van der Sar, 'Movie Studios Fear A Google Fiber Piracy Surge', *Torrent Freak* (online), 29 December 2014 <https://torrentfreak.com/movie-studios-fear-piracy-surge-due-google-fiber-141229/>.

downloading, costing Hollywood over one billion dollars per year.[964] Several months later, in 2015, several technology-news websites reported Google sends copyright infringement notices to Google Fiber users, on behalf of copyright owners, including demands for payment for amounts ranging from $20 to $300 in the form of an automated settlement.[965] In a response to the media reports, Google conceded it was not obliged to forward settlement demands to users and stated Google's position was that directly targeting users is not an effective anti-piracy policy.[966] Google's deviation from its stated position suggests Google's actions were a response to Hollywood's examination of and disdain for Google Fiber. In this way, self-interest must also motivate Google to privately devise and enforce copyright rules; cooperation with the content industries minimises the risk of litigation and other hostile actions.[967]

In my view, the most critical factor driving private copyright rule-making and enforcement is the active encouragement of industry negotiations and self-regulation by lawmakers. As

[964] Note, the billion-dollar figure is highly contestable. As *TorrentFreak* observed at the time, this figure was calculated using a Motion Picture Association of America promoted method that counts every unauthorised download or stream as a direct loss of revenue and does not offset from the total loss any increases in revenue from other sources such as subscription services and online purchases and rentals, which the same study concluded would increase with the introduction of Google Fiber. Indeed, multiple studies have cast doubt on the direct impact of illegal downloading on sales. For example, a 2007 empirical study of the effect of file sharing on record sales found the effect to be statistically indistinguishable from zero. Felix Oberholzer Gee and Koleman Strumpf, 'The Effect of File Sharing on Record Sales: An Empirical Analysis' (2007) 115(1) *Journal of Political Economy* 1. See also the 2012 study by Colombia University's American Assembly that found 18-29-year olds, the age group with the largest music file collections, owned both the largest amount of purchased music and music downloaded illegally, when compared to any other age group. Joe Karaganis, 'Where do Music Collections Come From' on The American Assembly (Columbia University), *The Piracy Years* (15 October 2012) <http://piracy.americanassembly.org/where-do-music-collections-come-from/>.

[965] Ernesto Van der Sar, 'Google Fiber Sends Automated Piracy 'Fines' to Subscribers', *TorrentFreak* (online), 20 May 2015 <https://torrentfreak.com/google-fiber-sends-automated-piracy-fines-to-subscribers-150520/>; Charlie Osborne, 'Google Fiber pushes automatic piracy fines to subscribers', *ZD Net* (online), 21 May 2015 <http://www.zdnet.com/article/google-fiber-pushes-automatic-piracy-fines-to-subscribers/>; Anu Passary, 'Got Google Fiber And Downloaded Illegal Content? You Might Be Receiving Notice For Piracy Fines', *Tech Times* (online), 21 May 2015 <http://www.techtimes.com/articles/54512/20150521/got-google-fiber-and-downloaded-illegal-content-you-might-be-receiving-notice-for-piracy-fines.htm>. The notices also provided a 'warning that repeat violations may result in a permanent disconnection'. Van der Sar, 'Google Fiber Sends Automated Piracy 'Fines' to Subscribers', above n 965. As reported, Google's willingness to send contracts of adhesion, including settlement demands, to its users was out of step with other major United States internet service providers, like Comcast, AT&T and Verizon, who had refused to do the same (at the time of the dispute).

[966] Google specified it did so in the interest of transparency. According to Google it is in the best interest of users that they know the full extent of claims made against them by rightsholders. Ernesto Van der Sar, 'Google: Targeting Downloaders Not the Best Solution to Fight Piracy', *TorrentFreak* (online), 22 May 2015 <https://torrentfreak.com/google-targeting-downloaders-not-the-best-solution-to-fight-piracy-150522/>.

[967] In addition, with the introduction of its services such as Google Play and YouTube Red, which sell access to content, Google's interests are aligned with the interests of the content industry; both benefit from controlling access to content and strong copyright enforcement. Kohl argues:

> [t]he media industry used to be the bottleneck and gatekeeper of speech, has found itself marginalized on the Internet and now seeks to regain that control with the cooperation of the new online bottlenecks, such as search engines. And this cooperation is and will be forthcoming, the more search engines share the interests of the traditional media industry

Kohl, above n 822, 220.

discussed in Chapter 1, since the 1980s, neoliberal ideology has supported a political preference for self-regulation and private agreements over public regulation. In the copyright setting in particular, as Zimmerman describes, there has been an 'explicit official encouragement of private agreements'[968] by Western governments, often under an 'implicit threat to enact more legislation if "voluntary" efforts do not satisfy the content owners' needs.'[969]

In a recent example, in 2017, the United Kingdom's Intellectual Property Office directly negotiated a private anti-piracy agreement between Google, Bing and the British Phonographic Industry, Motion Picture Association of Europe, Middle East and Africa, and the Alliance for Intellectual Property.[970] The agreement included a Voluntary Code of Practice requiring Google and Bing to demote websites linking to infringing content in search results and to remove terms associated with piracy from auto-complete functions.[971] In line with Zimmerman's assessment, the United Kingdom agreement was negotiated under the threat of a legislative solution, which the United Kingdom government indicated it would implement if voluntary negotiations were unsuccessful.[972] In 2017, Google also negotiated an anti-piracy agreement with France's audiovisual industry under which rightsholders in that jurisdiction gained increased access to YouTube's rights management systems.[973] Also, as detailed in the first half of this Chapter, the history of Google News in Europe is replete with private agreements between Google and rightsholders, often devised under the threat of or in avoidance of government intervention.

[968] Zimmerman, above n 955, 269.
[969] Ibid. Zimmerman documents explicit encouragement of self-regulation throughout United States Congressional hearings, copyright policy documents and legislation such as ACTA. At 269-270.
[970] Intellectual Property Office, 'Search Engines and Creative Industries Sign Anti-Piracy Agreement' (Press release, 20 February 2017) <https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement>.
[971] Ibid.
[972] Ernesto Van der Sar, 'Search Engines and Rightsholders Sign Landmark Anti-Piracy Deal' *TorrentFreak* (online) 20 Februrary 2017 <https://torrentfreak.com/search-engines-and-rightsholders-sign-landmark-anti-piracy-deal-170220/>.
[973] Marc Rees, 'Piratage: ce que dit l'accord signé entre Google et l'ALPA sous l'égide du CNC', *Next Inpact* (online), 20 September 2017 <https://www.nextinpact.com/news/105211-piratage-ce-que-dit-laccord-signe-entre-google-et-lalpa-sous-legide-cnc.htm>.

Through a convergence of economic and political factors, Google and other private actors have been empowered to privately regulate copyright in practice.[974] Importantly, the consequences of Google's private rule-making and enforcement are not limited to its own platforms and users: Google's approach to copyright in practice can have the effect of 'norm-setting'.[975] Urban, Karaganis and Schofield explain:

> Google's size, its prominence in the politics of notice and takedown, and its role in litigation, combined with its early adoption of DMCA Plus measures like content filtering on YouTube, trusted sender programs, autocomplete restrictions, and search result demotion, make it a dangerous elephant in the room. It is capable of adopting practices that could move collective perceptions of what is required for good practice, or even for safe harbor protection.[976]

Google's approach to copyright in practice has far-reaching consequences. Google is a powerful decision-maker in digital copyright governance, capable of setting rules, norms and standards that determine the scope and application of copyright law across large portions of the digital environment.

4. Conclusion

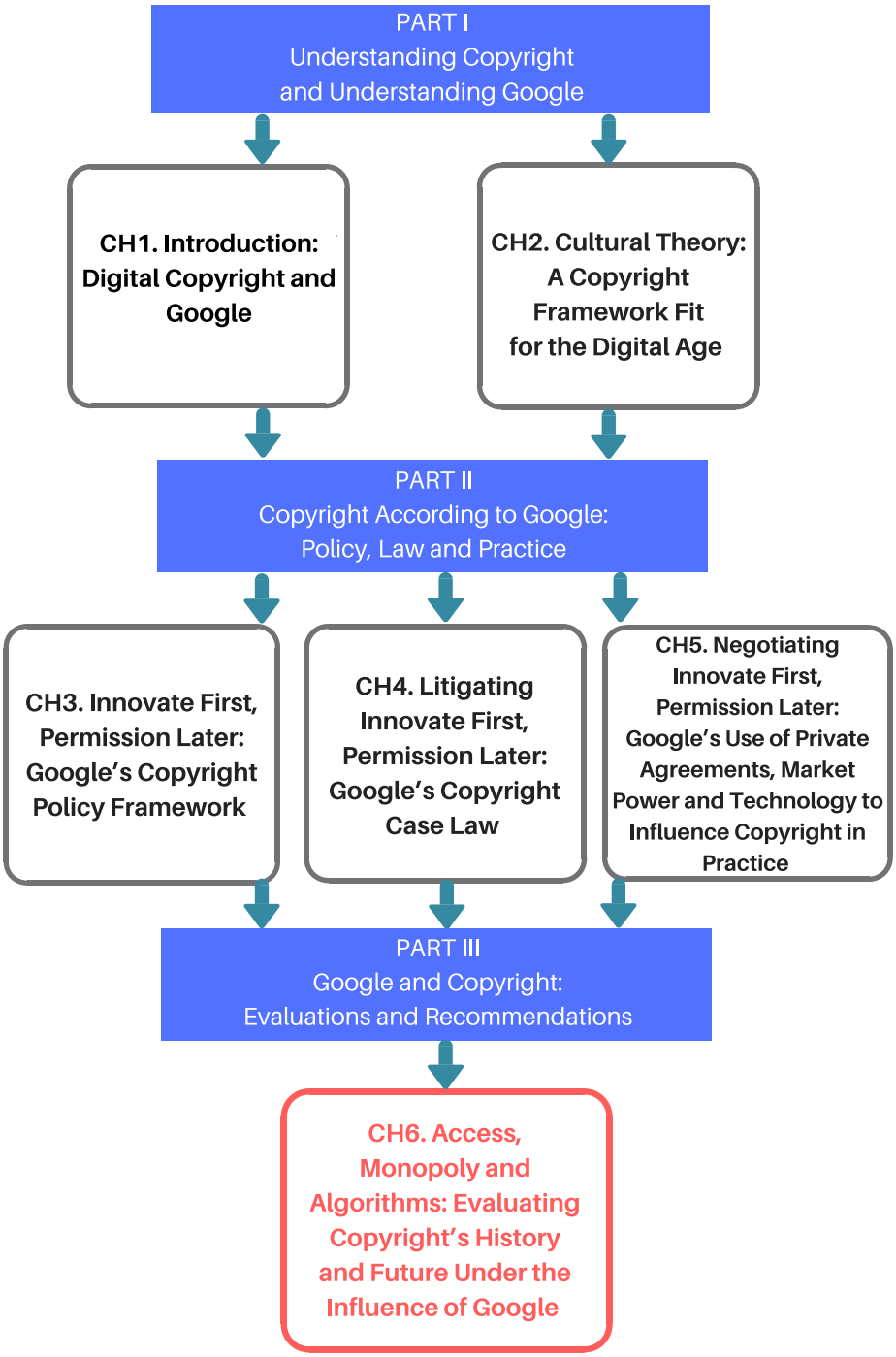
In this chapter, I have examined multiple aspects of Google's approach to copyright in practice. In the case of Google News in Europe, we see Google using its market power, including its financial and technological resources, to push back against the demands of rightsholders and to shape copyright according to Google's philosophy and agenda. As well, across its platforms, Google implements copyright rules devised through processes of self-regulation and private

[974] Professor Benjamin Farrand explains: 'the regulation of copyright in the online environment has moved from state-centered, public enforcement to decentered, private enforcement through networks of actors.' Farrand, above n 79, 413. Professor Fabrizio Cafaggi suggests these conditions are best characterised as transnational private regulation. Transnational private regulation describes a 'body of practices, and processes, created primarily by private actors, firms, independent experts like technical standard setters and epistemic communities either exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation.' Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38(1) *Journal of Law and Society* 20, 20-21. Cafaggi suggests the growth in transnational private regulation has produced 'a reallocation of regulatory power from the domestic to the global sphere and, second, a redistribution between public and private regulators'.
[975] Urban, Karaganis and Schofield, above n 877, 71.
[976] Ibid.

negotiation — practices that are supported by an abiding political preference for private regulatory solutions over public regulatory solutions. Importantly, this chapter shows that when Google's innovate first, permission later approach to copyright fails, Google employs private power to obtain outcomes in its interest. Google uses private power to ensure copyright law functions in a manner that supports its business model. And, in doing so, Google has established a largely unaccountable private governance framework. In the following chapter, I argue the level of power that Google possesses, and the system of private copyright governance over which Google presides, presents critical problems for the public interest.

PART III

Google and Copyright:
Evaluation and Recommendations


PART I
Understanding Copyright
and Understanding Google
CH1. Introduction: Digital Copyright and Google
CH2. Cultural Theory: A Copyright Framework Fit for the Digital Age
PART II
Copyright According to Google:
Policy, Law and Practice
CH3. Innovate First, Permission Later: Google's Copyright Policy Framework
CH4. Litigating Innovate First, Permission Later: Google's Copyright Case Law
CH5. Negotiating Innovate First, Permission Later: Google's Use of Private Agreements, Market Power and Technology to Influence Copyright in Practice
PART III
Google and Copyright:
Evaluations and Recommendations
CH6. Access, Monopoly and Algorithms: Evaluating Copyright's History and Future Under the Influence of Google

CHAPTER 6

Access, Monopoly and Algorithms: Evaluating Copyright's History and Future Under the Influence of Google

In this chapter, I evaluate Google's influence on copyright law and practice. I use cultural theory to determine the implications for the public interest. I conclude Google's influence has both positive and negative consequences, facilitating and hindering a cultural democracy. I also conclude Google's influence raises critical questions concerning concentrated private power in the digital environment. As a powerful private actor, Google's position in digital copyright governance diminishes transparency and accountability and threatens public rights and values. When private actors negotiate and enforce copyright rules that determine the scope and application of copyright across large portions of the digital environment, do they have a responsibility to act in the public interest? I argue they do and I enumerate strategies aimed at ensuring copyright under the influence of Google operates in the interest of a broad range of stakeholders.

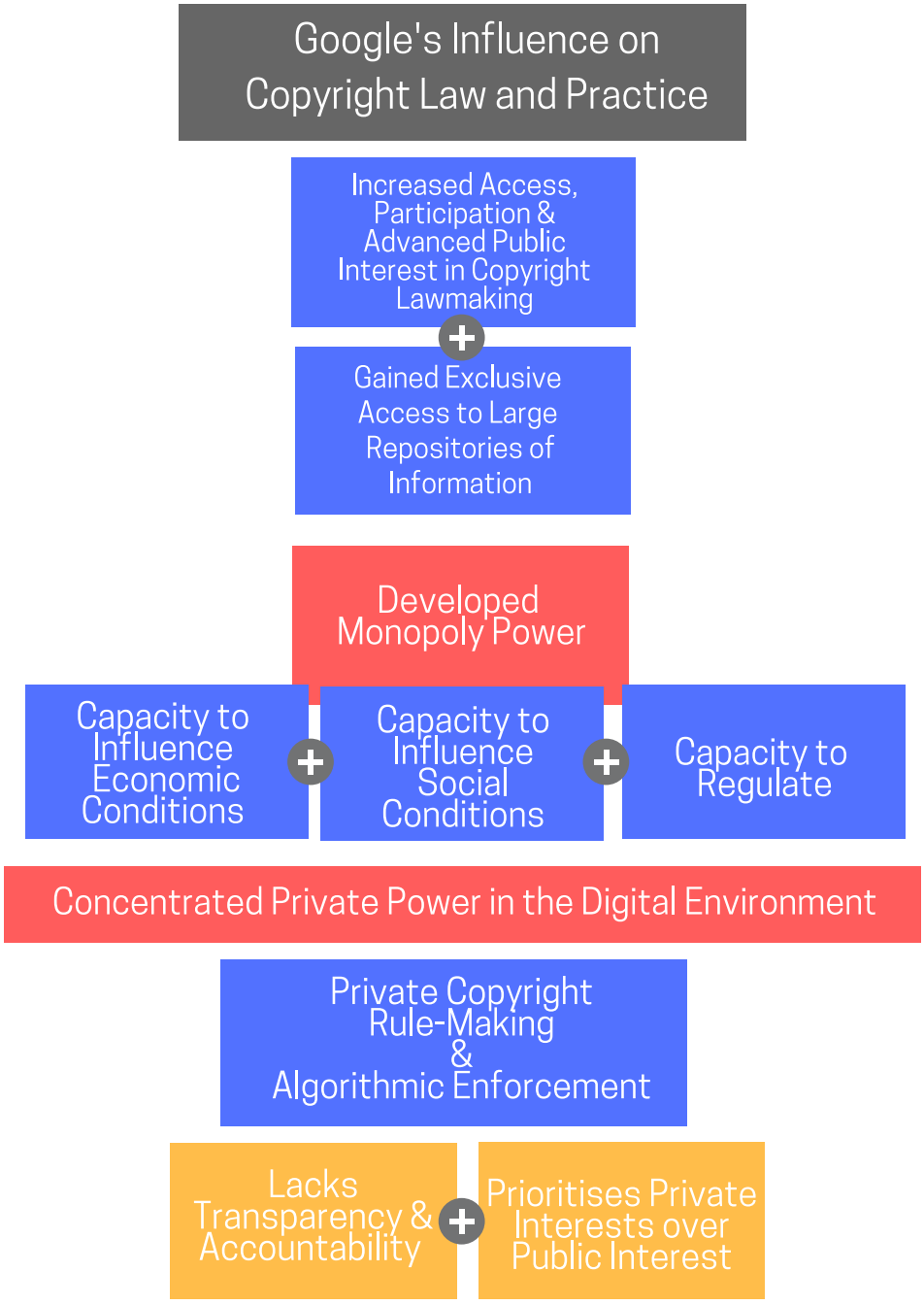
1. Introduction

In this thesis, I have presented Google's vision for copyright law and I have shown how Google has used its vast wealth and market dominance to implement this vision, employing legal, negotiated and technological solutions. In this chapter, I evaluate Google's influence on copyright law and practice. The theoretical starting point for my evaluation is that a cultural democracy is in the public interest. As discussed in Chapter 2, a cultural democracy is a society in which there exists a diversity of information and ideas and all individuals are empowered to participate in their generation and circulation. Pursuant to the cultural theory framework cultural conditions have both social and political implications — information and ideas can

empower or constrain, affecting opportunities for human flourishing and the quality of democratic political systems. From this theoretical perspective, achieving a cultural democracy requires providing economic opportunity for creators and sufficient public access to resources that are necessary for cultural participation. With this framework in mind, I evaluate Google's influence and the consequences for the public interest. Has Google's influence improved or hindered expressive diversity and opportunities for participation? This question underpins and guides my evaluation. I conclude Google's influence has enhanced expressive diversity and cultural participation. At the same time, however, Google has become a monopoly power in the digital environment and this presents problems for the public interest, problems that are worsened by a tendency for private copyright rule-making and algorithmic enforcement. In this chapter, I consider what may be done to address these problems through policy and lawmaking, but also what may be done to convince Google to take action that is in the public interest.

The following diagram depicts my evaluation of Google's influence on copyright law and practice and maps parts 2, 3 and 4 of this Chapter. In part 5, I propose possible interventions for addressing the issues raised in my evaluation.

Figure 6.1 **Evaluation of Google's Influence on Copyright Law and Practice Overview**



2. The Results and Complexities of Google's Copyright Logic: From Access to Monopoly

As examined in Chapter 3, Google offers two principal justifications for a copyright framework that priorities innovation and public rights to access and use works. Google argues its framework will ensure the continuation of socially beneficial technological innovation. According to Google, copyright's 'permission first' structure is not appropriate in the digital environment because digital technologies copy constantly and on a large scale. Seeking permission is either impossible or will impose prohibitive financial and administrative burdens upon innovators. Google claims exceptions to copyright and limitations on copyright liability are necessary to ensure innovation and technological progress. Google submits the United States fair use doctrine in particular, offers a principled framework for legitimising socially and economically beneficial innovations that may access and copy expressive works without prior permission. This technological determinism results from Google's own history and agenda as a technology company.

Google's second justification for its view of copyright is also a public interest argument. Google argues the exclusive rights of authors must be limited to ensure the internet and digital technologies continue to expand public access to and participation in the creation of information and content. Google has a vested interest in this justification.[977] Fundamentally, Google's core commercial activity, internet search, is the facilitation of access to information on the internet. Google's founders built their business on the recognition that if the vast amount of information on the internet was to be useful to people, it must somehow be sorted. With this in mind, they developed an algorithm for indexing websites on the internet and presenting portions of the indexed information to internet users. From there, they developed a system for targeting those internet users with advertisements. Accordingly, Google's access justification for its copyright agenda serves its interests as a company that facilitates and profits from people accessing information and content on the internet.

As detailed in Chapters 4 and 5, this business model has led Google into confrontations with rightsholders. Typically, the information and content to which Google facilitates access —

[977] Of course, as Google continues to innovate and acquire companies that develop new technologies Google also has a considerable vested interest in the first justification.

websites, images, books, news, videos and so forth — are subject to copyright protection. Rightsholders have argued Google's use of their work, without permission or remuneration, is copyright infringement and harms the value of their works. Certainly, as Google's litigation history shows, many of Google's activities have raised legitimate questions of copyright infringement. Other rightsholders, however, have tolerated Google's use of their works, possibly untroubled by copyright concerns or calculating they will benefit from inclusion in Google's services. Professor Clark Asay argues Google and other intermediaries have functioned as technological patrons to creators, providing 'tools and services that (1) assist would-be authors in producing a wide range of creative works, and (2) promote public access to such works'.[978] Asay concludes Google's technologies have 'helped spawn diverse creative activity and enhanced access thereto in a way that copyright, on its own, could not.'[979]

Indeed, if viewed through the cultural theory framework, by directly increasing public access to information and content through its digital indexes of websites, images, books, videos, news and so forth, and by providing technological tools for people to create and distribute expressive works, Google has assisted in the advancement of a cultural democracy. Google has increased opportunities for participation in meaning-making and has increased the availability of information and ideas to which the public has access.

In defence against the many challenges to its activities, Google's legal efforts have simultaneously legitimised Google's practices and shaped United States copyright doctrine.[980] In particular, Google's copyright litigation has shaped important aspects of fair use and intermediary safe harbour, in line with Google's argument that in the digital setting some copying without permission is acceptable. In *Field*, the court set aside copyright's permission orthodoxy, relying on intermediary safe harbour, fair use and an implied licence to rule Google had not infringed Field's copyright when it did not obtain Field's permission to include his work in the Google cache. In *Perfect 10*, the court held Google was not liable for copyright

[978] Asay, above n 740, 202.
[979] Ibid 204.
[980] This is a simplification of a complex history, but, as I have documented in this thesis, it is broadly true. Professor James Grimmelman similarly observed a normative progression regarding copyright and digital technologies evident in Google's litigation history. For example, of the Google Books fair use decision Grimmelman remarked: '[w]hat seemed insanely ambitious and this huge effort that seemed very dangerous in 2004 now seems ordinary'. Claire Miller and Julie Bosman, 'Siding With Google, Judge Says Book Search Does Not Infringe Copyright', *The New York Times* (online) 14 November 2013 <http://www.nytimes.com/2013/11/15/business/media/judge-sides-with-google-on-book-scanning-suit.html?_r=1&>.

infringement for the creation of exact copies of Perfect 10's images, without permission, for use in Google Images. When the United States Supreme Court declined to review the Google Books decision, it left in place the ruling that Google was not liable for copyright infringement for not obtaining the permission of rightsholders to make full copies and display excerpts of books in Google Books. Google's activities, and the legal decisions that have legitimised them, have necessitated a view of copyright in which rightsholders' exclusive rights in the digital environment must be limited.

In these decisions, United States courts have evaluated the public benefits of Google's services and embraced public interest arguments over private property claims. In *Field* and *Perfect 10,* the courts held the purpose of Google's search index was to improve access to information and that copying for this purpose is a fair use. In *Authors Guild* the Second Circuit stated explicitly that copyright seeks to advance 'access to knowledge…by providing rewards for authorship'[981] and that while authors are direct beneficiaries of copyright, the public is the ultimate beneficiary.[982] Overall, Google's litigation efforts indicate 'that at least some courts are amenable to permitting use of copyrighted materials in new technological contexts that provide society significant benefits.'[983] Indeed, one could posit that the true significance of Google's copyright litigation history is the illumination of a path to public interest outcomes in contemporary copyright lawmaking.[984]

Embedded in these decisions is cultural theory's normative proposal: lawmakers should craft copyright laws that ensure levels of public access to information that is facilitative of a cultural democracy. For example, in *Authors Guild*, the Second Circuit explained the critical question in a fair use analysis is 'how to define the boundary limit of the original author's exclusive rights in order to best serve the overall objectives of the copyright law to expand public learning'.[985] Repeatedly, Google's activities and related legal disputes have confronted the question of where the boundaries of a rightsholder's exclusive rights should be drawn.

[981] *Authors Guild v Google Inc*, 804 F 3d 202, 212 (2nd Cir, 2015).
[982] Ibid.
[983] Asay, above n 740, 221.
[984] Professor Frank Pasquale notes '[l]andmark cases like Sony v Universal have set a precedent for taking such broad public interests into account in the course of copyright litigation.' Frank A Pasquale, 'Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines' (Seton Hall Public Law Research Paper No 1134159, 1 May 2008) 29 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134159>. Through Google's case law, this precedent has been extended and expanded.
[985] *Authors Guild v Google Inc*, 804 F 3d 202, 213 (2nd Cir, 2015).

Repeatedly, the line has been drawn to limit exclusionary rights in favour of public access rights. Redrawing the line is significant, but so too are the rhetorical and ideological implications. Posing the question of where the boundary of exclusive rights exists pushes back against rhetoric and ideology presented by the content industries that have sought to frame digital copyright as an issue of private property rights and infringement.[986]

Yet, Google's influence on copyright is far more complex than a straightforward victory for the public interest. Indeed, there is an intrinsic inconsistency to Google's copyright logic. On the one hand, Google claims that if the public is to benefit from digital technologies, exclusionary rights must be limited and public access rights expanded. On the other hand, Google has exclusive access to large repositories of information and content derived in significant part from copyrighted works. Google has generated databases of information by copying content owned by third parties — individuals, corporations and the public in the case of public domain works — and fair use decisions have in effect granted Google exclusive access to these databases, to enormous private benefit. Google privately benefits from its own exclusive access to information and content.

In fact, Google's technological advantages depend upon this exclusive access. In 2011, Google's Chief Scientist Peter Norvig elucidated, '[w]e don't have better algorithms than anyone else; we just have more data.'[987] Algorithms, 'from the simplest to the most complex, follow sets of instructions or learn to accomplish a goal'[988] and the more data an algorithm can be applied to, the more that algorithm can accomplish.[989] Google's indexes of websites, images and even books are exclusive resources Google can use to conduct research to improve the

[986] As I noted in Chapter 1, while the content industries' success in terms of the implementation of individual policies has varied, they have had success in setting the terms of the political debate. By framing digital copyright as primarily an issue of private property and infringement, the public interest objective of copyright law is to some degree marginalised. See Cohen, 'Between Truth and Power', above n 66, 13. Boyle, above n 65, 211.

[987] Scott Cleland, 'Google's "Infringenovation" Secrets' (3 October 2011) *Forbes* (online) 3 October 2011 <https://www.forbes.com/sites/scottcleland/2011/10/03/googles-infringenovation-secrets/#2be856ae30a6>. See also Frank Pasquale, 'Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias' (2013) *Harvard Journal of Law & Technology Occasional Paper Series* 1, 7.

[988] 'More Accountability for Big-Data Algorithms', *Nature News* (online), 22 September 2016 <https://www.nature.com/polopoly_fs/1.20653!/menu/main/topColumns/topLeftColumn/pdf/537449a.pdf>.

[989] See, eg, Professor Mehmed Kantardzic: '[l]arge data sets have the potential to yield more valuable information. If data mining is a search through a space of possibilities, then large data sets suggest many more possibilities to enumerate and evaluate.' Mehmed Kantardzic, *Data Mining: Concepts, Models, Methods, and Algorithms* (IEEE Press, 2011) 11. See also A Halevy, P Norvig and F Pereira, 'The Unreasonable Effectiveness of Data' (2009) 24(2) *IEEE Intelligent Systems* 8; Chen Sun et al, 'Revisiting Unreasonable Effectiveness of Data in Deep Learning Era' (Paper presented at the 2017 IEEE International Conference on Computer Vision (ICCV), October 2017) <https://arxiv.org/pdf/1707.02968.pdf>.

capabilities of its algorithms.[990] Furthermore, each time a Google service is used, Google receives information regarding user behaviour, further information that can be used to improve the effectiveness of its search and advertising service.[991] Professor Frank Pasquale explains:

> Innovation in search depends on access to a user base that "trains" algorithms to be more responsive. But the user base belongs to Google. Innovation in analysis depends on access to large quantities of data. But the data belongs to Google. And Google isn't sharing. As long as Google's search data store remains secret, outside innovation is dead in the water. Robert Merton called this the "Matthew Effect": to those who have much, more is given.[992]

Google has a data advantage because it has exclusive access to large repositories of information largely derived from copyrighted content and user information. While most information regarding the size and number of Google's data servers is protected by trade secret, in 2011 it was reported that the energy used by Google's data centres globally equated with the energy used by 200,000 homes.[993] It has also been reported that the company has over one million computers running its search engine index.[994] Given the size of these resources, and substantial barriers to entry they represent, it is 'hard to imagine how an alternative could be brewing in

[990] According to historian George Dyson, when speaking to a Google engineer about Google Books the engineer said to him, '[w]e are not scanning all those books to be read by people. We are scanning them to be read by AI.' George Dyson, *Turing's Cathedral: The Origins of the Digital Universe* (Pantheon, 2012) 312.
[991] Bracha and Pasquale, above n 304, 1181. According to some reports, Google updates its algorithm hundreds of times each year. See Moz, above n 107. See also Nathan Newman: 'control of user data creates a clear barrier to entry for new competition since without that data new entrants have little chance of creating a financially viable alternative.' Nathan Newman, 'Search, Antitrust, and the Economics of the Control of User Data' (2014) 31(2) *Yale Journal on Regulation* 401, 404. Essentially, for Google Search 'each additional user decreases the cost of a better-quality service for all subsequent users by contributing activity that helps the search engine differentiate between high and low quality organizational strategies'. Bracha and Pasquale, above n 304, 1181.
[992] Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Harvard University Press, 2015) 82.
[993] Jarad Newman, '6 Things You'd Never Guess About Google's Energy Use', *Time* (online) 9 September 2011 <http://techland.time.com/2011/09/09/6-things-youd-never-guess-about-googles-energy-use/>. See also, James Glanz, 'Google Details, and Defends, Its Use of Electricity', *The New York Times* (online), 8 September 2011 <http://www.nytimes.com/2011/09/09/technology/google-details-and-defends-its-use-of-electricity.html>.
[994] Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information*, above n 992, 82.

somebody's garage.'[995] For potential competitors to Google, the current scale of Google's operations — which includes exclusive access to unrivalled and self-perpetuating repositories of information — represents a prohibitively high barrier to entry, securing Google's global dominance in the search engine market.

As Professor Julie Cohen notes, 'economists have recognized for nearly one hundred years that where technology creates significant economies of scale, markets tend toward dominance by a few large players.'[996] This is true for many of the markets in which Google operates: search, video hosting and online advertising in particular. In these markets, Google has an economies of scale advantage and competitors face high financial and informational barriers to entry.[997] While Google may not be a pure monopoly (there are competing services available globally), Google's position in these markets provides Google considerable monopoly power.[998] In this context, Google's innovate first, permission second framework requires qualifying. Limiting rightsholders' exclusionary rights in the digital environment may provide legal room for socially beneficial technological innovation, but that technological innovation will now occur within the parameters of a digital environment featuring a monopolistic technology firm.[999]

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[995] Ibid. See also Siva Vaidhyanathan, *The Googlization of Everything: And Why We Should Worry* (University of California Press, 2012) 19. Google's Content ID system on YouTube similarly imposes substantial financial and non-financial barriers to entry in the video hosting market. In 2016, Google reported that it had invested more than 60 million USD in Content ID. Google, 'How Google Fights Piracy', above n 877, 6. Even if a competitor was able to match this investment they would still face the legal and administrative costs of negotiating agreements with rightsholders. The costs involved to develop the technology and the licensing agreements Google has in place impose financial, administrative and legal barriers to entry for potential competitors. Of course, Google's technology is also protected by intellectual property laws – predominantly trade secrets and patents – providing Google an additional layer of protection from competition. Bracha and Pasquale, above n 304, 1181.

[996] Cohen, 'Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"', above n 77, 522.

[997] Digital technologies like Google's search engine are expensive to develop, however, costs do not increase substantially with additional users. In economic theory, this is expressed as high fixed costs and low variable costs. A firm that produces under these conditions enjoys economies of scale and potential competitors face high barriers to entry. See Bracha and Pasquale, above n 304, 1181.

[998] In the simplest of terms, monopoly power is an immunity from the forces of competition. Monopoly power is derived from market concentration; with a large market share, firms with monopoly power have the ability to manipulate market conditions, for example, by setting prices or excluding competitors. See Keith Dowding, 'Monopoly Power' in Keith Dowding (ed), *Encyclopedia of Power* (Sage, 2011) 424, 424-425. This analysis also aligns with the Herfindahl Index (HHI), which is 'a measure of market concentration, which can be defined as the percentage of total industry sales that are contributed by the largest firms in an industry. The HHI is a measure of the size of firms in a given industry and an indicator of the degree of competition in that industry.' Rogene A Buchholz, 'Herfindahl Index' in Robert W Kolb (ed), *Encyclopedia of Business Ethics and Society* (SAGE Publications, Inc, 2008) 1066, 1066. With regard to Google's market position specifically, see, eg, Bracha and Pasqaule who argue that '[w]hile competition certainly exists, the search engine market has features that make robust and dynamic competition unlikely. It is unclear whether search engines fall under the strict definition of a natural monopoly, but they exhibit very similar characteristics.' Bracha and Pasquale, above n 304, 1180.

[999] If we consider the status of Facebook, Apple and Amazon it may be more accurate to say it is a digital environment owned and controlled in large part by monopolistic firms.

Figure 6.2 **Summary: Google's Monopoly Power**

3. Concentrated Private Power in the Digital Environment

3.1 The Economic, Social and Political Consequences of Google's Monopoly Power

Google's monopoly power manifests in multiple ways: economically, socially and politically. It provides Google with the capacity to influence markets, to inform and to regulate. This combination makes Google an exceptionally powerful actor in contemporary society.

Economic Consequences: The Capacity for Anticompetitive Practices

Microeconomic theory posits that in a competitive market, selling to price-sensitive consumers, competing firms will produce and sell at the lowest possible cost in an attempt to increase their market share.[1000] Monopoly power, or market concentration, signals a lack of competition, allowing a firm to act in an anticompetitive manner — increasing prices or directing production in a manner not dictated by competition for consumers. These conditions are considered to

[1000] See, eg, John Burgess and Paul Kniest, *Introduction to Microeconomics* (Macmillan, 2000).

produce an inefficient allocation of resources and harm to consumers.[1001] Seeking to prohibit anticompetitive practices and to support competitive market conditions, competition laws deem specific business practices illegal, for example, misuse of market power, predatory pricing, price gouging and cartels.[1002]

In multiple jurisdictions, Google has faced allegations that it undertakes anti-competitive business practices, practices enabled by its market dominance. Google faced accusations that it used its market power to force record labels to accept undesirable terms offered for inclusion in Google's subscription music service, Google Play Music; by suggesting it would exclude from YouTube labels who did not agree to the terms offered for Google Play Music.[1003] Similarly, as discussed in Chapter 5, in Italy Google faced an antitrust investigation regarding its policy for excluding from Google Search websites that opted out of Google News.[1004] As I will discuss in further detail below, in the United States and in Europe, Google has also faced

[1001] Dowding, above n 998, 425.

[1002] See, eg, the United States *Sherman Antitrust Act* 15 USC or for Australian law see the *Competition and Consumer Act 2010* (CCA).

[1003] In 2014, a group of independent record labels spoke out against the terms they were offered for Google's subscription music service, Google Play Music. The group of labels complained that they were offered less favourable terms than what was offered to the major record labels. A central component of the complaint was that the contracts included a 'negative' most favoured nation clause, applying to the revenue share paid to record labels. The independent record labels feared that with this term in place, if the major record labels negotiated a lower share of revenue in return for some other benefit (such as a non-recoupable advance on earnings), the independent record labels would be forced to accept the lower rate without the guarantee of a supplementary benefit. With a smaller market share, the independent labels feared they did not have the leverage necessary to negotiate a supplementary benefit. In response to the independent record label's objections, Google declared all content from independent labels who had not agreed to Google's terms would be excluded from the subscription service and their content would be remove from YouTube. Independent music association, Impala, responded by lodging an antitrust complaint with the European Commission. The independent record labels argued Google sought to use its monopoly power in the video hosting market to compel the labels to agree to its preferred terms. In 2014, Google reached an agreement with the labels; their works were not removed from YouTube and they were included in the launch of Google Play.
See Steve Knopper, 'YouTube's New Subscription Service: Indie Labels Speak Out', *Rolling Stone* (online), 1 July 2014 <http://www.rollingstone.com/music/news/youtubes-new-subscription-service-indie-labels-speak-out-20140701 >; Ed Christman, 'Inside YouTube's Controversial Contract with Indies', *Billboard* (online), 20 June 2014 <http://www.billboard.com/biz/articles/news/digital-and-mobile/6128540/analysis-youtube-indie-labels-contract-subscription-service>; Resnikoff, above n 952; Impala, *Dispute Between YouTube and Independent Music Companies - Formal Process Starts in Brussels* <http://www.impalamusic.org/content/dispute-between-youtube-and-independent-music-companies-%E2%80%93-formal-process-starts-brussels>; Stuart Dredge and Dominic Rushe, 'YouTube to Block Indie Labels Who Don't Sign Up to New Music Service', *The Guardian* (online), 18 June 2014 <https://www.theguardian.com/technology/2014/jun/17/youtube-indie-labels-music-subscription>; Steve Knopper, 'YouTube's New Paid Streaming Music Service Rankles Some Indie Labels', *Rolling Stone* (online), 17 June 2014 <http://www.rollingstone.com/music/news/youtubes-new-paid-streaming-music-service-rankles-some-indie-labels-20140617>; Robert Cookson, 'YouTube Signs with Indie Labels for Music Streaming Service', *Financial Times* (online) <https://www.ft.com/content/ff6bf816-699a-11e4-8f4f-00144feabdc0>.

[1004] Competition and Market Authority, above n 821.

allegations that it acts in an anticompetitive manner when it promotes its own shopping (and other services) over competitor services in its search results.[1005]

An assessment of each of these cases to determine if they are indeed breaches of specific competition laws is beyond the scope of this thesis. However, each incident is useful for illuminating the economic dimensions of Google's monopoly power. Underlying each accusation is concern about Google's capacity to manipulate market conditions and to compel other market participants to act in accordance with Google's interests. In other words, Google's monopoly power has economic consequences — it gives Google the *capacity* to act in an anticompetitive manner. It gives Google the capacity to function without pressure from competitors and to compel consumers and other market participants to accept conditions at Google's discretion.

The Social Consequences of Monopoly Power in an Information Market

As Professor Tim Wu suggests, 'information industries, enterprises that traffic in forms of individual expression, can never be properly understood as "normal" industries'.[1006] This is because, according to cultural theory, information and ideas have social and political consequences. The information and ideas that circulate in society shape our understanding of the world — they influence social, political and cultural conditions. Entities that produce information and content, and entities that control access to information and content, can exert influence in society by determining the quality of information and ideas that circulate. For this reason, cultural theory advises we should strive for a culture comprised of a diversity of cultural representations produced by a diversity of voices — in order to avoid a centralisation of power derived from the capacity to influence society through control over the information and ideas to which we have access.

In contemporary society, Google is a critical information provider. As a global, monopolistic search engine, Google has become a leading source for distributing information and this 'puts

[1005] As well, in 2016, Getty Images submitted an antitrust complaint against Google to the European Commission, claiming Google's image search service is anti-competitive because it creates 'captivating galleries of high-resolution, copyrighted content', which permits Google 'to reinforce its role as the internet's dominant search engine, maintaining monopoly over site traffic, engagement data and advertising spend.' Getty Images, above n 512.
[1006] Wu, *The Master Switch*, above n 4, 302.

Google in an unparalleled position of dominance, increasing its power to shape lives as well as knowledge.'[1007] Professors Oren Bracha and Frank Pasquale suggest, if it has not done so already, as an information provider, Google's influence 'on our culture, economy, and politics may eventually dwarf that of broadcast networks, radio stations, and newspapers.'[1008] Indeed, Professor Sheila Jasanoff argues, 'Google now behaves in some respects like a state, bringing information and advertising to a population of more than a billion searchers each month, thus acting on a scale comparable to that of a large national government'.[1009]

Importantly, Google does not neutrally provide technical access to information, the information Google provides its users is curated by Google. As I outlined in Chapter 5, Google curates its search results according to numerous factors and principles — in particular, taking substantial action to enforce the copyright claims of rightsholders. Operating as a private company, Google privately makes decisions to remove or preference certain types of information and content. Operating as a private company with monopoly power, Google's discretionary capacities are broadened. Google has the *capacity* to curate its provision of information in a manner that suits its interests.[1010]

Google's antitrust history, discussed briefly above and in further detail below, along with Google's private copyright enforcement policies discussed in Chapter 5, suggest that Google does indeed curate its search results to its own benefit and to the benefit of the content industries. These actions reflect a distribution of power:

[1007] J C Plantin et al, 'Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook' (2016) *New Media & Society* 1, 19 <http://eprints.lse.ac.uk/67571/>. See also Bracha and Pasquale, above n 304, 1165.
[1008] Bracha and Pasquale, above n 304, 1150.
[1009] Jasanoff, above n 280, 167. Relatedly, Professor Theo Röhle argues Google exercises a type of governmental power through it advertising practices:

> By inserting itself deeply into the users' information environment, Google can collect and analyze unprecedented amounts of user data. Google plans to use this data in increasingly sophisticated advertising schemes. It is argued that the modeling of segmented consumption behavior that these schemes are based upon involves a governmental form of power. It is a kind of power that aims at controlling differential behavior patterns by gaining an intimate statistical knowledge of a population and using this knowledge as a means of predictive risk management.

Theo Röhle, 'Dissecting the Gatekeepers: Relational Perspectives on the Power of Search Engines' in Konrad Becker and Felix Stalder (ed), *Deep Search: The Politics of Search Beyond Google* (Innsbruck, Wien, Bozen, 2009) 117, 118.
[1010] As I have shown in this thesis, at times Google's interests align with the public interest, but at other times they align with the content industries, but at all times they align with the interest of the company's shareholders. See Perel and Elkin-Koren who warn, '[a]s private, profit-maximizing entities, intermediaries may potentially abuse their enforcement power due to commercial bias: they may favor their business partners and other powerful repeat players over weak Internet users.' Maayan and Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement', above n 930, 429.

> When a search engine specifically decides to intervene, for whatever reason, to enhance or reduce the visibility of a specific website or a group of websites…Instead of reflecting the synthesized results of a bottom-up filtering process, the search engine imposes its own preferences or the preferences of those who are powerful enough to induce it to act.[1011]

As I outlined in Chapter 5, Google acts to enforce copyright on behalf of the content industries, often at the expense of less economically powerful creators who rely on public rights to access and engage with works such as those provided by a copyright exception.

As a monopolistic search engine, Google has the capacity to determine social and cultural conditions, including conditions of access and participation in cultural life. This centralisation of power threatens cultural diversity and is directly at odds with the ideals of a cultural democracy.[1012] A cultural democracy avoids centralising the social power that information businesses may wield.

Political Consequences: Private Regulatory Power

Beyond its economic and social consequences, Google's monopoly power has a political dimension: Google's monopoly power represents a concentration of private regulatory power. Google is a powerful decision-maker in digital copyright governance, capable of setting rules,

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[1011] Bracha and Pasquale, above n 304, 1173. Wagner argues Google has the capacity to bias search results 'towards certain types of content or content providers, thereby risking to affect related values such as media pluralism and diversity'. Ben Wagner, 'Study on the Human Rights Dimensions of Algorithms' (Second Draft Report, Committee of Experts on Internet Intermediaries (MSI-NET), 20 February 2017) 11 <https://rm.coe.int/16806fe644>.

[1012] Journalist Franklin Foer submits:

> In the realm of knowledge, monopoly and conformism are inseparable perils. Monopoly is the danger that a powerful firm will use its dominance to squash the diversity of competition. Conformism is the danger that one of those monopolistic firms, intentionally or inadvertently, will use its dominance to squash diversity of opinion and taste. Concentration is followed by homogenization.

Franklin Foer, *World Without Mind* (Penguin Press, 2017) 5.

I note that in December 2017 the Australian Government commenced an inquiry into the 'effect that digital search engines, social media platforms and other digital content aggregation platforms are having on competition in media and advertising services markets' and the question of 'whether platforms are exercising market power in commercial dealings to the detriment of consumers, media content creators and advertisers.' Australian Competition & Consumer Commission, 'ACCC Commences Inquiry into Digital Platforms' (Media Release, MR 232/17, 4 December 2017) <https://www.accc.gov.au/media-release/accc-commences-inquiry-into-digital-platforms>.

norms and standards that determine the scope and application of copyright law across large portions of the digital environment.

Google's capacity to regulate stems in significant part from the neoliberal self-regulatory model. The policies of privatisation and deregulation common in Western democracies since the 1980s, and the preference for engaging the private sector to own and administer the development of the digital environment, as discussed in Chapter 1, has shifted regulatory responsibilities from public to private modes.[1013] Effectively, it has shifted regulatory responsibilities to private actors — to the 'commercial players that dominate the market.'[1014] In this political setting, as a powerful private actor that dominates the online search, advertising and video hosting markets in particular, through self-regulation and private agreements, Google participates in the regulation of large portions of the digital environment.[1015]

In previous chapters I noted specific examples of Google's voluntary and privately negotiated regulation in the copyright context, including the United States *Best Practices and Guidelines for Ad Networks to Address Piracy and Counterfeiting*,[1016] the anti-piracy agreement negotiated between Google, Bing and British Phonographic Industry, Motion Picture Association of Europe, Middle East and Africa, and the Alliance for Intellectual Property,[1017] and the 2017 anti-piracy agreement negotiated with France's audio-visual industry.[1018] These are examples of negotiated or self-regulation activities undertaken with government oversight.

[1013] Farrand, above n 79, 407. William Patry posits '[t]he purpose of the economic freedom myth is to launder self-interest as enlightened conduct, and to thereby ensure that the government does not intervene through regulation to benefit the public good.' Patry, above n 26, 102.

[1014] Elkin-Koren, 'Copyrights In Cyberspace - Rights Without Laws?', above n 956, 1185.

[1015] Farrand explains, 'the regulation of copyright in the online environment has moved from state-centered, public enforcement to decentered, private enforcement through networks of actors.' Farrand, above n 79, 413. Professor Fabrizio Cafaggi suggests these conditions are best characterised as 'transnational private regulation', which describes a

> body of practices, and processes, created primarily by private actors, firms, independent experts like technical standard setters and epistemic communities either exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation.

Cafaggi, above n 974, 20-21. Cafaggi suggests the growth in transnational private regulation has produced 'a reallocation of regulatory power from the domestic to the global sphere and, second, a redistribution between public and private regulators'. At 21. See also DeNardis, above n 962, 172. ('Whether mediating freedom of expression or determining the conditions of privacy and reputation, private intermediaries are enacting transnational governance in spaces that previously were resolved by the state.')

[1016] Espinel, above n 901.

[1017] Intellectual Property Office, above n 970.

[1018] Andy, 'Google Signs Agreement to Tackle YouTube Piracy', *TorrentFreak* (online), 21 September 2017 <https://torrentfreak.com/google-signs-unprecedented-agreement-to-tackle-youtube-piracy-170921/>; Rees, above n 973.

In less transparent processes, Google also privately devises copyright rules, often in negotiation with rightsholders. This is evident from the history of Google News in Europe, where Google has sought and obtained private agreements with news publishers; and it is evident in Google's approach to enforcing copyright across its own platforms. From trusted member programs, to search manipulation and Content ID, Google has privately devised rules and implemented policies and programs for enforcing copyright. Google undertakes private copyright rule-making and enforcement.[1019]

Beyond direct rule-making and enforcement activities, Google uses other modes to exercise its regulatory power. Professor Lawrence Lessig describes how regulation, understood broadly as constraint on behaviour, occurs through four modalities: law, norms, the market and architecture (existing physical conditions).[1020] My research suggests Google regulates through all four modalities. We see in Google's copyright litigation history Google's capacity to mould copyright doctrine. The 'party-driven nature of the judicial process'[1021] permits Google to elect to pursue particular cases which, when won, produce precedents in Google's interest.[1022] Google also regulates through norms: for example, Google has fostered an opt-out standard and the robots.txt protocol. Moreover, as discussed in Chapter 5, other intermediaries recognise Google as an influential norm-setter, setting benchmarks for what is considered good practice in copyright enforcement.[1023] Google also uses its market power and financial capacities to influence or induce other entities to act according to Google's interests — this is particularly evident in Google's approach to the news media industry in Europe. Finally, Google regulates through architecture: the decisions Google makes with regards to the functioning and structure of its platforms and algorithms set the parameters for behaviour across large sections of the

[1019] This issue of Google's private copyright rule-making and enforcement activities is discussed further below.
[1020] Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) *Harvard Law Review* 501, 506-507. See also Christine Parker, 'The Pluralization of Regulation' (2008) 9(2) *Theoretical Inquiries in Law* 2.
[1021] Glynn S Lunney Jr, 'Trademark Law's De-Evolution: Why Courts Get Trademark Cases Wrong Repeatedly' (Research Paper No 17-03, Texas A&M University School of Law Legal Studies, 21 December 2016) 2 <https://ssrn.com/abstract=2888455>. Professor Glynn Lunney explains:

> Faced with a given legal rule, parties decide whether to comply or violate the rule; they decide whether to litigate or settle any resulting dispute; and they decide what arguments and theories to advance and then provide the information the court uses to resolve the dispute. Parties thus set the judicial agenda, and they control the information available for judicial decision-making. Moreover, in doing all of this, parties act in their own self-interest. To the extent that a party is rational and self-interested, they will not care whether an existing legal rule is efficient or inefficient, nor will they care about the costs or benefits that an existing legal rule imposes on, or generates for, others. They will care only how the existing legal rule affects them. Ibid.

[1022] Google's own financial wealth affords it the capacity to select cases that may shape and progress copyright law in its interests.
[1023] Urban, Karaganis and Schofield, above n 877, 71.

digital environment. Viewed through four modalities of regulation, Google has a strong regulatory effect in the digital environment.[1024] Google, as part of a new generation of monopolistic information companies, is 'embedded in our existence in a way unprecedented in industrial history, involving every dimension of our national and personal lives — economic, yes, but also expressive and cultural, social and political'.[1025]

Concentrated Private Power in the Digital Environment and Democratic Governance

Taken together, the combination of economic, social, and regulatory power that Google enjoys is an issue of concentrated private power in the digital environment with critical implications for democratic governance. Democratic political systems are purposefully constructed to avoid a concentration of power. Typically, regulatory power is separated into multiple institutions 'to ensure that no one body can accumulate sufficient power to violate the individual rights and liberties of citizens.'[1026] The principal example of institutional separation in a democratic system is the separation of the legislature, judiciary and executive branches of government. Each branch performs separate functions and their separation is aimed at limiting the capacity for an abuse of power.[1027] Montesquieu famously provides a foundational rationale for the separation of powers doctrine:

> When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from

[1024] Lessig explains: '[t]hese four modalities regulate together. The "net regulation" of any particular policy is the sum of the regulatory effects of the four modalities together.' Lessig, above n 1020, 507.

[1025] Wu, *The Master Switch*, above n 4, 302. See also John Herman who suggests,

> While to authoritarian regimes, the threat of social media is obvious, in the United States, Facebook, Twitter and Google have for years talked about themselves freely in the language of democracy, participation and connectivity. The emerging tension between internet platforms and democratic governments, however, seems to stem less from their obvious rhetorical differences than from their similarities.

John Herrman, 'What if Platforms Like Facebook Are Too Big to Regulate?', *The New York Times Magazine* (online), 4 October 2017 <https://www.nytimes.com/2017/10/04/magazine/what-if-platforms-like-facebook-are-too-big-to-regulate.html>.

[1026] Louis Fisher, 'Separation of Powers' in Bertrand Badie, Dirk Berg-Schlosser and Leonardo Morlino (eds), *International Encyclopedia of Political Science* (Sage Publications, Inc, 2011) 2403, 2403 <http://sk.sagepub.com/reference/intlpoliticalscience>.

[1027] Ibid. See also Wu who states, '[s]eparations are an effort to prevent any single element of society from gaining dominance over the whole, and by such dominance becoming tyrannical'. Wu, *The Master Switch,* above n 4, 300.

> legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator…All would be lost if the same man or the same body…exercised these three powers: that of making the law, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.[1028]

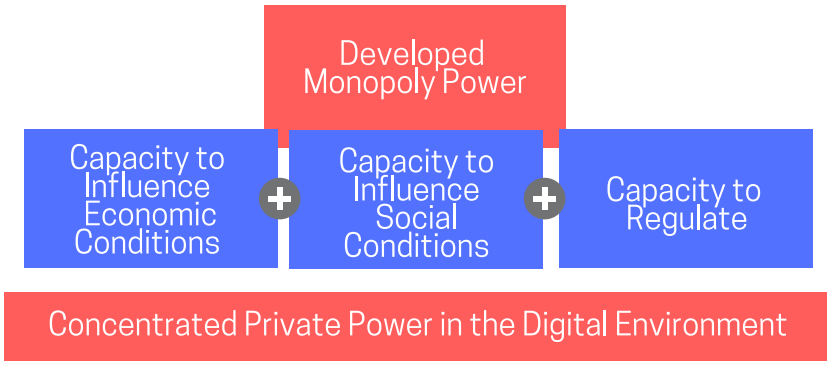
In the domains that Google resides over, power is concentrated rather than separated. One entity has the power to make the law, execute the law and judge disputes. Indeed, Wu warns, '[w]e like to believe our safeguards against concentrated political power will ultimately protect us from the consequences of accumulated economic power. But this hasn't always been so.'[1029] As a monopolistic search engine, Google's accumulated economic power has produced a concentration of social and regulatory power that is at odds with democratic ideals.

The concentration of private power in the digital environment also poses problems for transparency and accountability — values central to democratic systems of governance. Indeed, '[f]or many rendering regulation accountable means democratizing it'.[1030] In a representative democracy, power is accountable through elections, in elections, 'leaders present themselves to the voters and seek a renewal of their mandate to govern. Elections compel elected politicians to explain and justify their actions and give the citizens the opportunity to listen and impose a verdict.'[1031] In democratic political systems, the separation of powers doctrine also provides a layer of horizontal accountability, that is, 'executive governments [are] accountable (horizontally) to other coequal institutions, such as courts, legislatures, and auditors.'[1032] Accountability is central to democratic systems of governance because 'external scrutiny and sanctions, the core of accountability, are so central to checking abuses of power'.[1033]

[1028] Anne M Cohler, Basia C Miller and Harold S Stone, *Cambridge Texts in the History of Political Thought Montesquieu: The Spirit of the Laws* (Cambridge University Press, 1989).
[1029] Wu, *The Master Switch*, above n 4, 300.
[1030] Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54(1) *Current Legal Problems* 103, 143.
[1031] Richard Mulgan, 'Accountability' (2011) *International Encyclopedia of Political Science*, 5 <http://sk.sagepub.com/reference/intlpoliticalscience>.
[1032] Professor Richard Mulgan explains, '[h]orizontal accountability has become equated with the rule of law and constitutional government, seen as prerequisites for successful representative democracy'. Ibid 4.
[1033] Ibid.

In a digital environment featuring powerful private actors, copyright governance has become increasingly opaque and unaccountable. Professor Julia Black explains, '[t]he problem of accountability is enhanced at the supranational level, again at the transnational level, and reaches its zenith in decentred or polycentric regulatory regimes at any level which are characterized by a strong, but not necessarily exclusive, presence of non-state regulators'.[1034] A central reason for the escalating problem depicted by Black is that private institutions are less transparent than state institutions. Accountability requires performance information and access to performance information requires transparency;[1035] '[t]o be accountable is to agree to subject oneself to relationships of external scrutiny which can have consequences.'[1036] As a private actor, Google produces limited performance information and confronts limited vertical and horizontal accountability mechanisms.

Figure 6.3 **Summary: Concentrated Private Power in the Digital Environment**



[1034] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation & Governance* 137, 141.
[1035] Professor Barbara Romzek describes, 'accountability without performance information is a hollow concept.' Barbara Romzek, 'Living Accountability: Hot Rhetoric, Cool Theory, and Uneven Practice' (2015) 48(1) *Political Science & Politics* 27, 28.
[1036] Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', above n 1034, 150.

4. Governed by Google: Private Copyright Rule-Making, Algorithmic Enforcement and the Public Interest

Google's position in copyright governance produces critical problems for the public interest. Operating as a private actor with monopoly power, Google undertakes copyright rule-making and enforcement, self-regulating and negotiating with rightsholders policies and practices for enforcing copyright. Private rule-making and enforcement poses problems for the public interest for several reasons. First, as discussed in the preceding section, private rule-making and enforcement can lack meaningful transparency and accountability. Professor Lev-Aretz Yafit summarises: 'private enforcement through cross-industry partnerships between dominant players in the copyright market keeps the initiation and execution of far-reaching policy decisions away from the public eye'.[1037] Negotiated and implemented away from the public eye, it is difficult to assess the function and impact of Google's copyright enforcement system and to hold Google accountable for it.[1038]

Second, private copyright rule-making and enforcement also threatens the public interest because it tends to prioritise private interests and values over public interests and values.[1039] Black explains, 'in democratic countries, at least, governments are elected in the expectation that they will act to resolve collective problems…There is an expectation that the state will perform its public responsibility as guardian of the 'public interest' (however that may be defined).'[1040] In a privately ordered system, however, private actors self-regulate and negotiate agreements seeking outcomes in their interest. For example, as I discussed in Chapter 5, Google's trusted member programs for processing copyright infringement notices and Content ID on YouTube tend toward enforcing the private property claims of rightsholders, at the expense of copyright exceptions, accountability and due process. Powerful private actors have

[1037] Yafit, 'Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering', above n 45, 248. Elkin-Koren argues even if algorithms were to include 'case-by-case applications of legal standards' accountability remains a problem 'when algorithms execute discretion-based decisions whose processing is a "black box."' Maayan and Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement', above n 930, 488.

[1038] Pasquale asserts: 'we cannot assess when it is acting in good faith to help users, and when it is biasing results to favor its own commercial interests.' Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information*, above n 992, 9.

[1039] As Lessig posits, when privatised law displace systems of public law public values are also displaced. Lessig, above n 1020, 528.

[1040] Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World', above n 1030, 145.

negotiated and devised a system of copyright enforcement that privileges their rights and values over the public rights and values.

Of course, concern for regulation by powerful private actors is not new. In 1943, Frederick Kessler warned that standardised contracts inherently reflect and embody an imbalance of power:

> Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.[1041]

Indeed, there is a long history of inquiring into the dynamics of private ordering — including in the digital setting — scholars expressing concern for the distribution of power, transparency, accountability and the underlying rights and values in private regulatory modes.[1042]

What is novel, however, is the development and deployment of algorithmic regulatory systems by private actors. The use of algorithmic technologies in private copyright rule-making and enforcement, such as Content ID, significantly worsen the problems of transparency and accountability inherent to private regulatory systems. Algorithms are opaque by design — complex technical instruments knowable only to a handful of engineers — and they are opaque

[1041] Friedrick Kessler, 'Contracts of Adhesion - Some Thoughts About Freedom of Contract' (1943) 43 *Columbia Law Review* 629, 632.
[1042] See, eg, Bridy, above n 959; Yochai Benkler, 'An Unhurried View of Private Ordering in Information Transactions' (2000) 53(6) *Vanderbilt Law Review* 2063; Jennifer Rothman, 'Copyright's Private Ordering and the Next Great Copyright Act' (2014) 29(3) *Berkeley Technology Law Journal* 1595; Aaron Perzanowski and Jason M Schultz, *The End of Ownership: Personal Property in the Digital Economy* (The MIT Press, 2016).

because of intellectual property laws, such as trade secrets.[1043] Furthermore, insomuch as litigation imposes transparency and accountability, algorithmic regulatory tools diminish transparency and accountability when they automatically resolve matters that otherwise may have been litigated.[1044] Overall, when the decisions of private actors are applied algorithmically, transparency and accountability suffers.

Critically, algorithms are not apolitical. They embody 'a multi-layered battleground of existing struggles'.[1045] Ben Wagner suggests, today, algorithmic technologies represent the 'key loci of control where power is distributed and redistributed'.[1046] This is because, while all technologies embody political and economic struggles to some degree, it is particularly true for 'connected digital technologies that can be and are being constantly changed, updated and modified. This malleability makes them particularly attractive for numerous actors who wish to govern through them.'[1047] Certainly, the values and principles embedded in Google's Content ID algorithm reflect the political and economic struggles between Google and powerful rightsholders.[1048] So too does the demotion signal Google includes in its search algorithm for sites associated with copyright infringement.

So far, the evolution of algorithmic technologies, and their constituting power struggles, have played out largely absent a public interest advocate. Wagner explains: '[h]istorically, private companies in line with the economic, legal and ethical frameworks they deemed appropriate decided on how to develop software. There is no normative framework for the development of

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[1043] See, eg, Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information*, above n 992; Maayan Perel and Niva Elkin-Koren, 'Black Box Tinkering: Beyond Transparency in Algorithmic Enforcement' (2017) *Florida Law Review* <https://ssrn.com/abstract=2741513>.>; J A Kroll et al, 'Accountable Algorithms' (2017) 165(3) *University Of Pennsylvania Law Review* 633; C Barabas et al, 'An Open Letter to the Members of the Massachusetts Legislature Regarding the Adoption of Actuarial Risk Assessment Tools in the Criminal Justice System', 9 November 2017 in *Berkman Klein Center for Internet & Society* <https://dash.harvard.edu/handle/1/34372582>; Natalie Ram, 'Innovating Criminal Justice' (2017) *Northwestern University Law Review* (forthcoming) <https://ssrn.com/abstract=3012162>; DeNardis, above n 962. Professor Niva Elkin-Koren concludes:

> One of the greatest risks to users' rights and the free flow of information is caused by the manner in which these non-transparent enforcement measures shape the architecture of the Internet, and, consequently, affect our ongoing exchanges and access to expression.

N Elkin-Koren, 'After Twenty Years: Revisiting Copyright Liability of Online Intermediaries' in Susy Frankel and Daniel J Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press, 2014), 47.

[1044] For example, when the decisions of the Content ID algorithm are applied with the counter notification process removed.

[1045] Ben Wagner, 'Algorithmic Regulation and the Global Default: Shifting Norms in Internet Technology' (2016) 10(1) *Etikk i Praksis-Nordic Journal of Applied Ethics* 5, 10.

[1046] Ibid.

[1047] Ibid 9.

[1048] Essentially, Google encodes 'copyright values in its automated processes'. Kohl, above n 822, 220.

systems and processes that lead to algorithmic decision-making.'[1049] This is why, '[l]argely absent from the widespread use of such algorithms are the rules and safeguards that govern almost every other aspect of life in a democracy: adequate oversight, checks and balances, appeals, due process'.[1050] Content ID encapsulates this dynamic: private actors have been permitted to develop and apply algorithmic tools according to private values, with limited user recourse, accountability and transparency.

The problems presented by algorithmic technologies are likely to worsen with the introduction of more complex artificial intelligence (AI) technologies, such as deep learning systems, in which the machine's decision-making process is to some extent unknowable, even to the engineers who developed it. Will Knight explains:

> The workings of any machine-learning technology are inherently more opaque, even to computer scientists, than a hand-coded system. This is not to say that all future AI techniques will be equally unknowable. But by its nature, deep learning is a particularly dark black box…You can't just look inside a deep neural network to see how it works. A network's reasoning is embedded in the behavior of thousands of simulated neurons, arranged into dozens or even hundreds of intricately interconnected layers.[1051]

As autonomous technological systems continue to advance in the absence of a framework of public interest principles and at the discretion of powerful private actors, securing democratic, public interest outcomes will only increase in difficulty.

With the application of algorithmic regulatory technologies to more areas of society — including healthcare, finance, education, employment and law enforcement — scholars and policy-makers are increasingly expressing concern for their social, economic and political impact. For instance, Cohen warns of their impact upon public regulatory processes:

[1049] Wagner, 'Study on the Human Rights Dimensions of Algorithms', above n 1011, 3.
[1050] 'More Accountability for Big-Data Algorithms', above n 988.
[1051] Will Knight, 'The Dark Secret at the Heart of AI', *MIT Technology Review* (online), 11 April 2017 <https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai/>. Knight further explains:

> The neurons in the first layer each receive an input, like the intensity of a pixel in an image, and then perform a calculation before outputting a new signal. These outputs are fed, in a complex web, to the neurons in the next layer, and so on, until an overall output is produced. Plus, there is a process known as back-propagation that tweaks the calculations of individual neurons in a way that lets the network learn to produce a desired output.

> If regulation of automotive emissions — and thousands of other activities ranging from loan pricing to derivatives trading to gene therapy to insurance risk pooling to electronic voting — is to be effective, policymakers must devise ways of enabling regulators to evaluate algorithmically-embedded controls that may themselves have been designed to detect and evade oversight.[1052]

Cohen calls for an evolution of public regulatory processes to match the evolution of the political economy from 'an industrial mode of development to an informational one'.[1053] Alternatively, in the United States, the Obama administration called for private sector action, stating it is important to '[e]ncourage market participants to design the best algorithmic systems, including transparency and accountability mechanisms such as the ability for subjects to correct inaccurate data and appeal algorithmic-based decisions.'[1054]

Recently, multiple organisations have produced guidelines and principles for the application of algorithmic regulatory technologies. In 2014, a group of civil rights, human rights, media justice and good governance organisations produced a set of 'Civil Rights Principles for the Era of Big Data'.[1055] The principles include ensuring fairness in automated decisions and preserving constitutional principles.[1056] Similarly, an organisation titled *Fairness, Accountability, and Transparency in Machine Learning* produced a set of 'Principles for Accountable Algorithms'.[1057] The principles include: making available 'externally visible avenues of redress for adverse individual or societal effects of an algorithmic decision system';[1058] ensuring 'algorithmic decisions...can be explained to end-users and other

[1052] Julie E Cohen, 'The Regulatory State in the Information Age' (2016) 17(2) *Theoretical Inquiries in Law* 369, 372-373.
[1053] Ibid 370.
[1054] Cecilia Muñoz, Megan Smith and DJ Patil, 'Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights' (Executive Office of the President, The White House, May 2016), 23 <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf>. The Obama administration has also acknowledged, 'algorithmic systems that turn data into information…can easily hardwire discrimination, reinforce bias, and mask opportunity.' J Patil Megan Smith, Cecilia Munoz, *Big Risks, Big Opportunities: The Intersection of Big Data and Civil Rights* <https://obamawhitehouse.archives.gov/blog/2016/05/04/big-risks-big-opportunities-intersection-big-data-and-civil-rights>.
[1055] *Civil Rights Principles for the Era of Big Data* (February 2014) <https://www.law.berkeley.edu/files/Civil_Rights_Principles_for_the_Era_of_Big_Data_FINAL(1).pdf>.
[1056] Ibid.
[1057] Nicholas Diakopoulos et al, *Principles for Accountable Algorithms and a Social Impact Statement for Algorithms*, Fairness, Accountability, and Transparency in Machine Learning (FAT/ML) <https://www.fatml.org/resources/principles-for-accountable-algorithms>.
[1058] Ibid.

stakeholders in non-technical terms';[1059] and enabling 'interested third parties to probe, understand, and review the behavior of the algorithm through disclosure of information that enables monitoring, checking, or criticism'.[1060] Overall, in the context of rapidly advancing algorithmic technological systems, accountability, transparency and the preservation of public power, rights and values are central concerns for scholars, lawmakers and other stakeholders.

Importantly, the future of automated technologies is closely linked to the issue of Google's monopoly power. In particular, Google is alert to the future significance of AI technologies and actively seeks to have its own AI platforms widely utilised. For example, Google makes its machine learning software library 'TensorFlow' open source and offers free online tutorials and 'boot camps' to assist people and companies to understand how to use it.[1061] Google is far from asleep at the wheel: if AI is the future, Google is doing what it can to be the dominant service provider.[1062]

[1059] Ibid.

[1060] Ibid. In another example, in 2017, the Association for Computing Machinery United States Public Policy Council released a *Statement on Algorithmic Transparency and Accountability*. The statement specified there is 'growing evidence that some algorithms and analytics can be opaque, making it impossible to determine when their outputs may be biased or erroneous' and included a set of principles for algorithmic transparency and accountability. The principles were closely aligned with the others already mentioned. Association for Computing Machinery (ACM) US Public Policy Council, *Statement on Algorithmic Transparency and Accountability* (12 January 2017) <https://www.acm.org/binaries/content/assets/public-policy/2017_usacm_statement_algorithms.pdf>.

A concept that has emerged from deliberations over the lack of transparency and accountability of algorithmic processes is 'auditability'. Nicholas Diakopoulos and Sorelle Friedler explain:

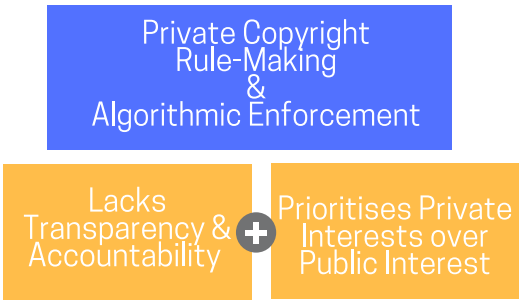
> The principle of *auditability* states that algorithms should be developed to enable third parties to probe and review the behavior of an algorithm. Enabling algorithms to be monitored, checked, and criticized would lead to more conscious design and course correction in the event of failure. While there may be *technical challenges* in allowing public auditing while protecting proprietary information, private auditing (as in accounting) could provide some public assurance. Where possible, even limited access (e.g., via an API) would allow the public a valuable chance to *audit these socially significant* algorithms.

Nicholas Diakopoulos and Sorelle Friedler, 'How to Hold Algorithms Accountable', *MIT Technology Review* (online), 17 November 2016 <https://www.technologyreview.com/s/602933/how-to-hold-algorithms-accountable/>. Pasquale calls for 'qualified transparency' and suggests the development of complex algorithmic systems should occur with oversight where 'a dedicated governmental entity should be privy to their development and should serve as an arbiter capable of providing guidance to courts that would otherwise be unable to assess complaints about the results algorithms generate.' Frank Pasquale, 'Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries' (2010) 104(1) *Northwestern University Law Review* 105, 164.

[1061] Mark Bergen notes, 'Google benefits if other companies use its AI tools and guidelines because they'll be more likely to pay to run their new programs on Google's cloud-computing service.' Mark Bergen, 'Google Wants to Train Other Companies to Use Its AI Tools', *Bloomberg* (online), 19 October 2017 <https://www.bloomberg.com/news/articles/2017-10-19/google-wants-to-train-other-companies-to-use-its-ai-tools>.

[1062] Indeed, Steven Levy asserts Google is in the process of 'remaking itself as a "machine learning first" company'. See Steven Levy, 'How Google is Remaking Itself as a "Machine Learning First" Company', *Wired* (online), 22 June 2016.

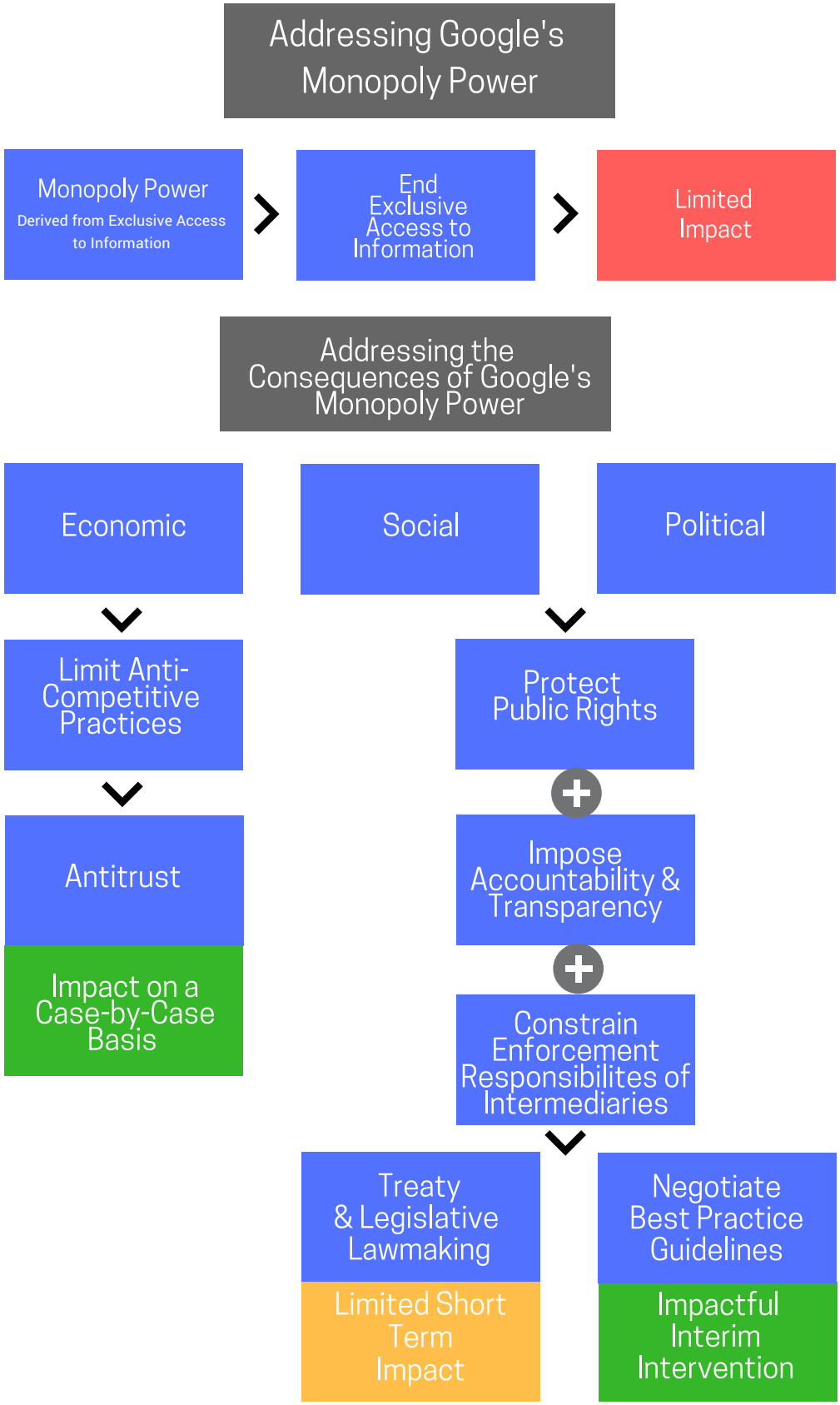
Figure 6.4 **Summary: Private Copyright Rule-Making, Algorithmic Enforcement and the Public Interest**



5. Policy Interventions: Regulate or Negotiate?

In a digital environment featuring concentrated private power and complex technological regulatory systems, how can we ensure copyright regimes function in the public interest — supporting diversity, participation and democratic values? In the following section, I review three approaches: directly addressing Google's monopoly power; changing the laws that specify Google's responsibilities as an intermediary; and, finally, negotiating directly with Google in order to compel Google to act in the public interest. The following diagram depicts my proposed interventions and potential outcomes.

Figure 6.5 **Policy Interventions Overview**



5.1 Regulate: Directly Addressing Google's Monopoly Power

For many lawmakers and scholars, the most intuitive approach to addressing Google's monopoly power is through antitrust. Indeed, Google has operated under the shadow of antitrust clouds for many years; as I discussed above, in multiple jurisdictions, Google has faced allegations of anti-competitive business practices enabled by its market dominance. Yet, overall, despite multiple actions, attempts at regulating Google through antitrust have not impacted upon Google's monopoly power. In this section, I argue because Google's monopoly power is in significant part derived from its exclusive access to information, the economic parameters of antitrust limit its utility. I argue addressing the issue of Google's monopoly power ultimately requires addressing the issue of Google's exclusive access to information, which either renders antitrust ineffective or necessitates a novel approach.

So far, antitrust actions against Google have tended to focus upon Google biasing its search results to favour its own services. In the United States, in 2013, the Federal Trade Commission (FTC) concluded Google's preferencing of its own shopping and other services over competitors' in search results was undertaken to 'improve the quality of its search product and the overall user experience'[1063] rather than to inhibit competition. However, subsequent to the conclusion of the investigation, the Wall Street Journal obtained a copy of the internal investigation report which revealed that the FTC had in fact concluded Google did undertake anticompetitive practices and was using its monopoly power in a manner that caused harm to 'consumers and to innovation in the online search and advertising markets.'[1064]

The report obtained by the *The Wall Street Journal* indicated the FTC found Google biased its search results to favour its own services, that it 'illegally took content from rival websites such as Yelp, TripAdvisor Inc. and Amazon.com Inc. to improve its own websites',[1065] and that 'when competitors asked Google to stop taking their content, it threatened to remove them from its search engine.'[1066] The report also found Google violated antitrust law 'by placing

[1063] Federal Trade Commission, *Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc. FTC File Number 111-0163* (3 January 2013) 2 <https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf>.
[1064] Brody Mullins, Rolfe Winkler and Brent Kendall, 'Inside the U.S. Antitrust Probe of Google; Key FTC Staff Wanted to Sue Internet Giant After Finding 'Real Harm to Consumers and to Innovation'', *The Wall Street Journal* (online), 19 March 2015 <https://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274>.
[1065] Ibid.
[1066] Ibid.

restrictions on websites that publish its search results from also working with rivals such as Microsoft's Bing and Yahoo Inc'[1067] and by 'restricting advertisers' ability to use data garnered from Google ad campaigns in advertising run on rival platforms'.[1068] The report recommended that the FTC take legal action against Google, but a conflicting report from the FTC's economic bureau recommended against legal action and the FTC's commissioners ultimately voted against doing so. By the conclusion of the investigation, Google had agreed to implement changes to its policies to allow 'websites to opt out of having their content included in its competing search products'[1069] and to allow advertisers to use data collected from Google advertising campaigns on competitor platforms.[1070]

In Europe, Google has faced numerous antitrust complaints submitted to the European Commission, including by companies such as Ciao, Ejustice, Foundem, 1plusV, VfT, Microsoft, Elfvoetbal, Hotmaps, Interactive Labs, nnpt.it, Deal du Jour, Eguides.fr, DG Comp, E-Musicpro.com, BDZV, VDZ, Euro-Cities, Hot-Map.com, NNTP.it, Twenga, Odigeo, Expedia, Trip Advisor, Streetmap, Nextag, Visual Meta, Contaxe, Deutsche Telekom, Yelp, Aptoide and HolidayCheck.[1071] In 2010, the European Commission commenced formal proceedings against Google to investigate Google's search bias. In 2013, Google submitted a settlement proposal to the European Commission, in which Google agreed to make several changes to its search service, including prominently displaying in search results links from competitors websites, clearly marking in search results which links are to Google's own services, agreeing that competition search services 'will be able to have their results removed from Google's vertical search results without hurting their overall page rank for non-specialized searches'[1072] and changes to 'AdSense contracts that make it easier for sites that use the advertising service to include other ads on their pages from competing alternatives.'[1073]

[1067] Ibid.
[1068] Ibid.
[1069] Ibid.
[1070] Ibid.
[1071] Fair Search Europe, *Chronology The European Commission Google Case* (19 April 2015) <http://www.fairsearch.org/media/fse-chronology.pdf>.
[1072] Jeff Blagdon, 'EU Reportedly Accepts Google Antitrust Settlement, Requiring Prominent Links to Competitors', *The Verge* (online), 14 April 2013 <https://www.theverge.com/2013/4/14/4225164/eu-reportedly-accepts-google-antitrust-settlement-requires-prominent-linking>.
[1073] Ibid.

The European Commission rejected Google's settlement proposal stating, 'they are not proposals that can eliminate our concerns regarding competition'.[1074] In 2014, the European Parliament voted for the 'break-up of Google'[1075] by separating Google Search from the company's other commercial services.[1076] While the European Parliament has no authority to force the break up of Google, in 2015, the European Commission sent Google a Statement of Objections alleging Google 'abused its dominant position in the markets for general internet search services in the European Economic Area (EEA) by systematically favouring its own comparison shopping product in its general search results pages.'[1077] In 2017, Google was fined €2.4 billion by the European Commission for search bias.[1078]

Google has always refuted claims that its search results are illegally biased and harmful to consumers. Indeed, Google maintains that it curates its search results with the objective of providing the most accurate and relevant information to its users[1079] and that 'if you don't like the answer that Google search provides, you can switch to another engine in literally one click.'[1080] In addition, Google argues that there exists substantial competition in online search, particularly for shopping services, pointing to the continued dominance of Amazon and

[1074] Aaron Souppouris, 'Google's Antitrust Settlement Proposal "Not Acceptable" to European Commission', *The Verge* (online), 20 December 2013, <https://www.theverge.com/2013/12/20/5229760/googles-antitrust-settlement-proposal-unacceptable-to-european-commission>.
[1075] Henry Mance, Alex Barker and Murad Ahmed, 'Google Break-Up Plan Emerges From Brussels', *The Financial Times* (online), 22 November 2014 <https://www.ft.com/content/617568ea-71a1-11e4-9048-00144feabdc0?mhq5j=e7>. Samuel Gibbs, 'European Parliament Votes Yes on 'Google Breakup' Motion', *The Guardian* (online), 28 November 2014 <https://www.theguardian.com/technology/2014/nov/27/european-parliament-votes-yes-google-breakup-motion>.
[1076] Mance, Barker and Ahmed, above n 1075.
[1077] European Commission, 'Antitrust: Commission Sends Statement of Objections to Google on Comparison Shopping Service; Opens Separate Formal Investigation on Android' (Press Release, IP/15/4780, 15 April 2015) <http://europa.eu/rapid/press-release_IP-15-4780_en.htm>.
[1078] European Commission, 'Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service' (Press Release, IP/17/1784, 27 June 2017) <http://europa.eu/rapid/press-release_IP-17-1784_en.htm>.
[1079] [1079] Zoya Sheftalovich and Nicholas Hirst, 'Google's European Mea Culpa', *Politico* (online), 5 June 2015 <https://www.politico.eu/article/googles-european-mea-culpa/>; *Google and Shopping* (Created by Google, YouTube, 27 August 2017) <https://www.youtube.com/watch?v=HCtcNBcmPZc&feature=youtu.be>.
[1080] Eric Schmidt, 'Testimony of Eric Schmidt to the United States Senate Judiciary Subcommittee' on *C-Span* (21 September 2011) <https://www.c-span.org/video/?301681-1/oversight-google>.

eBay.[1081] Google also posits that its search service is free and so there is no 'trading relationship' necessary for a finding of abuse of dominance.[1082]

A comprehensive analysis of Google's antitrust allegations is beyond the scope of this thesis.[1083] For my purposes here, what is important to note is that despite numerous investigations and allegations thus far, antitrust actions have failed to curb Google's monopoly power. In my view, even the historically large European Commission fine is unlikely to severely impact Google's market position: Google has the capacity to pay the fine and to make adjustments to its search algorithm to address the practices deemed anticompetitive, without diminishing its search engine dominance. Google's ability to preference its own shopping services in its search results may harm consumers and competitors, but it does not underpin Google's monopoly power. It is a use of monopoly power, but it is not a cause of it.

As a tool for addressing Google's monopoly power, I posit that antitrust is ultimately limited by its economic parameters.[1084] Antitrust is suitable for addressing specific anticompetitive business practices and for regulating Google's behaviour on an issue-by-issue basis. However,

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[1081] Mark Scott, 'Google Rebuts Europe on Antitrust Charges', *The New York Times* (online), 27 August 2015 <https://www.nytimes.com/2015/08/28/technology/google-eu-competition.html>.

[1082] Google asserts the European Commission's 'statement of objections fails to take proper account of the fact that search is provided for free. A finding of abuse of dominance requires a 'trading relationship' as confirmed by consistent case law. No trading relationship exists between Google and its users.' Foo Yun Chee, 'Google Says an EU Antitrust Fine Would Be 'Inappropriate'', *Reuters* (online), 4 November 2015 <http://www.reuters.com/article/us-eu-google-antitrust-alphabet/google-says-an-eu-antitrust-fine-would-be-inappropriate-idUSKCN0SS25W20151103?utm_campaign=trueAnthem:+Trending+Content&utm_content=56393e1b04d3015337c8f2dd&utm_medium=trueAnthem&utm_source=twitter>.

[1083] For a detailed assessment of the antitrust case against Google in Europe see Ioannis Kokkoris who concludes,

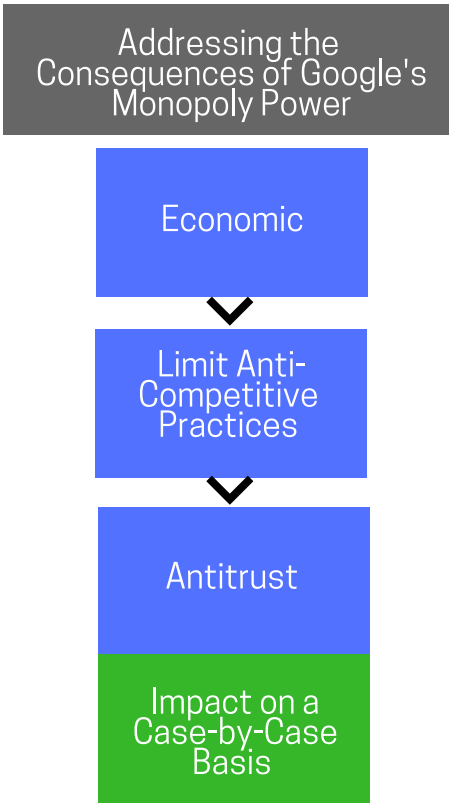
> Google's conduct cannot be sanctioned for any potential harm incurred to inefficient competitors. It further demonstrates that consumer harm is needed in order to substantiate an abuse of dominance. A mere finding of harm on competitors alone does not suffice, especially when the allegedly anticompetitive conduct constitutes and induces innovation.

Ioannis Kokkoris, 'The Google Case in the EU:Is There a Case?' (2017) 62(2) *The Antitrust Bulletin* 313, 327. See also G. A. Manne and J. D. Wright, 'Google and the Limits of Antitrust: The Case Against the Case Against Google' (2011) 34(1) *Harvard Journal of Law and Public Policy* 171.

[1084] Here, I follow Pasquale who argues that framing Google's monopoly as an antitrust issue requires reducing 'a wide variety of social concerns about search engines into the economic language of antitrust policy'. Frank Pasquale, 'Dominant Search Engines: An Essential Cultural & Political Facility' in Berin Szoka and Adam Marcus (ed), *In The Next Digital Decade: Essays on the Future of the Internet 401* (TechFreedom, 2011) 399, 402. See also Tim Wu who argues, 'by their nature, those particular laws alone are inadequate for the regulation of information industries. One reason is fairly simple: historically the application of those statutes has been triggered by manipulation of consumer prices and certain other very particular abuses of market power'. Wu, *The Master Switch,* above n 4, 303. Pasquale similarly suggests: '[g]iven antitrust doctrine's pronounced tendency to suppress or elide the cultural and political consequences of concentrated corporate power, the Bureau of Competition and the Bureau of Economics within the FTC are ill equipped to respond to the most compelling issues raised by search engines'. At 408.

given its economic parameters, it has a limited capacity to respond to complex issues that do not involve market transactions, such as Google's collection and use of information about its users. This is a significant limitation given that my evaluation of Google's monopoly power suggests it is derived from exclusive access to large repositories of information acquired without a classical market transaction.

Figure 6.6 Summary: Addressing Economic Consequences of Monopoly Power through Antitrust



Public Access to Google's Databases?

The data in Google's search indexes, including the information it collects about its users, directly sustains Google's monopoly power and so it follows that limiting Google's exclusive access to that data is a direct approach to addressing Google's monopoly power. The critical question is, can Google be compelled to provide public access to its databases of information? Does the public have a rightful claim to access them? And, if so, is it an appropriate intervention? Is it feasible?

Arguably, this claim may be justified in multiple ways. It may be conceived of as a *sui generis* public interest proposal. As cultural theory highlights, information is an increasingly important source of power in society and a government could nationalise Google or mandate public access to Google's databases on the claim that they are acting in the public interest by ensuring an equitable distribution of power derived from society's key informational resources.

A public claim to Google's databases derived from copyrighted works might also be justified through a copyright analysis.[1085] The limited duration of copyright ensures all copyrighted works will, at some point, fall into the public domain. When Google creates its databases of information, it draws upon copyrighted works, works that will, eventually, fall into the public domain. One could argue therefore the public has a future claim to the indexes[1086] and, for instance, policy-makers could act to ensure public access to the databases after a period of exclusive access by Google — along the lines of copyright or even patent duration. Alternatively, policy-makers could require fair use determinations regarding large repositories of information derived from copyrighted works trigger a requirement to provide public access. For example, Pasquale suggests a public access requirement could be inserted into a fair use

[1085] Notably, WIPO Director General, Francis Gurry recently conjectured:

> While some redefinition of property rights in relation to classes of data that fall outside classical IP categories appears inevitable, any recasting of existing IP rights will depend on what policymakers want to achieve. For example, if the goal is to encourage the collection and exploitation of data to enhance understanding of human health, policymakers will need to consider a range of questions. Do existing IP arrangements provide the right set of incentives to encourage this? Are additional incentives required? Or are there sufficient incentives in the market? Does the behavior of "data collectors" need to be regulated? Laws governing trade secrets cover some of these questions, but our thinking really needs to develop around these evolving issues.

'Francis Gurry on the Future of Intellectual Property: Opportunities and Challenges', *WIPO Magazine* (online), October 2017 <http://www.wipo.int/wipo_magazine/en/2017/05/article_0001.html>.

[1086] However, through fair use, Google has been granted perpetual exclusive access to this database of works. When Google and the Authors Guild proposed a settlement to their dispute, scholars raised similar concerns. For example, Samuelson commented that the '[u]se of a class action settlement to restructure markets and to reallocate intellectual property rights, particularly when it would give one firm a de facto monopoly to commercialize millions of books, is arguably corrosive of fundamental tenets of our democratic society'. Pamela Samuelson, 'Google Book Search and the Future of Books in Cyberspace' (2009) 94 *Minnesota Law Review* 1308, 1358. See also Siva Vaidhyanathan raising concern for an uncertain public benefit of a private book digitisation project:

> The real risk of privatization is simple: companies fail. Libraries and universities last. Companies wither and crash. Should we entrust our heritage and collective knowledge to a company that has been around for less than a decade? What if stockholders decide that Google Library is a money loser or too much of a copyright liability? What if they decide that the infrastructure costs of keeping all those files on all those servers do not justify the expense? What then?

Siva Vaidhyanathan, 'The Googlization of Everything and the Future of Copyright' (2006) 40 *U.C. Davis Law Review* 1207, 1220-1221.

analysis, that is, universal access would be necessary for a favourable fair use determination.[1087]

To establish a public access claim to the databases of information about Google's users, Nathan Newman suggests antitrust may be useful. Employing a novel approach, Newman argues antitrust investigations should be reoriented towards 'the issue of how control over user data can entrench monopoly power and harm consumer welfare'.[1088] Newman argues Google's databases of user information entrenches Google's monopoly[1089] and raises tangible consumer welfare issues.[1090] The essential facilities doctrine might also provide an avenue for establishing a public access claim to Google's databases — the essential facilities doctrine provides that a 'monopolist in control of a facility essential to other competitors must provide reasonable access to that facility if it is feasible to do so.'[1091]

These provocative proposals may provide starting points for policy-makers and scholars interested in directly addressing the issue of Google's monopoly power derived from its exclusive access to databases of information. Ultimately, however, any intervention to compel Google to provide public access to its critical private assets must confront the question of whether, on balance, this is a reasonable intervention. An answer to that question is beyond the scope and intention of this thesis, but it is fair to say such a proposal would face considerable ideological, legal, political and economic resistance.

[1087] Pasquale, 'Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines', above n 984, 29-30. Pasquale contends that had the *Authors Guild* decision required Google to provide the Library of Congress a digital copy of each scanned book, 'the problematic possibility of a Google monopoly here would be much less troubling'. Pasquale, 'Dominant Search Engines: An Essential Cultural & Political Facility', above n 1084, 416.

[1088] Newman, above n 991, 404.

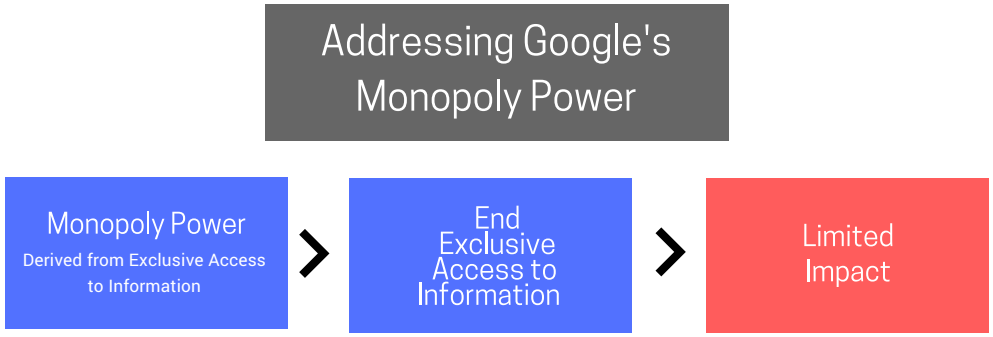
[1089] Ibid 441.

[1090] For example, Newman suggests Google's collection of user data involves users selling their data to Google 'at too low a price because of the lack of other options' and that Google facilitates 'price discrimination by advertisers by allowing them to target Google's users using the wealth of information Google has about them' and Google enables 'use of that data for illegal and more generally exploitive uses by unethical businesses'. Ibid 442.

[1091] Abbott B Lipsky and J Gregory Sidak, 'Essential Facilities' (1999) 51(5) *Stanford Law Review* 1187, 1190-1191. In the United States, the essential facilities doctrine is a remedy against abuses of monopoly power under Section 2 of the *Sherman Antitrust Act* 15 USC. Lisa Mays argues 'antitrust agencies should more strictly enforce search neutrality and should regulate Google under the essential facilities doctrine for using its market power to harm competition.' L Mays, 'The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe' (2015) 83(2) *George Washington Law Review* 721, 724.

In the United States, Google enjoys the political support that comes with being an entity that makes a substantial contribution to the United States economy. When Eric Schmidt testified to the United States Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights in 2011, he opened with a statement that specified, 'while others had given up on the American economy, Google is certainly doubling down, we're investing in people, in 2002 we had fewer than 1000 employees…now we have more than 24,000 and we're hiring.'[1092] In the United States, and in the short to medium term at least, it is rational to assume policy-makers will remain unwilling to take such an extreme measure to address Google's monopoly power.[1093]

Figure 6.7 Summary: Directly Addressing Google's Monopoly Power through Public Access to Google's Databases



5.2 Regulate: Google the Intermediary

In the context of a vast digital environment featuring powerful private actors and algorithmic regulatory tools, policy-makers may seek to amend the laws that specify Google's responsibilities as an intermediary, with the objective of diluting Google's regulatory capacities, imposing transparency and accountability, and protecting public rights and values in the digital environment.

[1092] Schmidt, 'Testimony of Eric Schmidt to the United States Senate Judiciary Subcommittee', above n 1080.
[1093] See also Jonathan T Taplin, *Move Fast and Break Things: How Facebook, Google, and Amazon Cornered Culture and Undermined Democracy* (Little, Brown and Company, 2017) 125-142. Taplin argues Google has escaped regulation that would address its monopoly power because of regulatory capture — Google dominates or heavily influences regulators in the United States.

For example, policy-makers could act to limit the scope of private copyright rule-making and enforcement, including algorithmic technologies, so that private entities may only identify infringing content[1094] and action beyond identification falls to a public enforcer and arbitrator.[1095] This policy would directly limit the regulatory power of Google, and other private actors, by separating regulatory functions among multiple institutions. It would ensure that one entity is not acting as lawmaker, enforcer and adjudicator. It would also ensure that a public entity is undertaking copyright enforcement; a public entity that is, in principle, publicly accountable, transparent and operating according to public rather than private objectives.

As well, a policy that explicitly compels intermediaries to account for copyright exceptions when enforcing copyright may assist in supporting expressive diversity and participation.[1096] Under contemporary copyright regimes, copyright exceptions are critical for ensuring public access to existing information and content. Ensuring their continued application in the digital environment is critical for achieving the conditions of a cultural democracy and the foundational public access objective of copyright law. Professor Jennifer Rothman argues the United States Congress should 'add an explicit fair use zone'[1097] to the United States Copyright Act preventing contracts, technical prevention measures and content identification systems from restricting fair uses of copyrighted works.[1098] Similarly, Laura Zapata-Kim proposes 'the

[1094] Michael S. Sawyer, 'Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA' (Pt University of California Press) (2009) 24(1) *Berkeley Technology Law Journal* 363, 400.
[1095] This proposal aligns with what is sometimes called a 'notice and notice' system of copyright enforcement under intermediary liability regimes, as an alternative to a 'notice and takedown' systems. See, eg, Michael Geist, *The Effectiveness of Notice and Notice* <http://www.michaelgeist.ca/2007/02/notice-and-notice-in-canada/>.
[1096] Wagner argues an important question for policy-makers is 'how the results that search engines provide should respond to the wishes of its users and to what extend such responses should promote media pluralism and promote diversity.' Wagner, 'Study on the Human Rights Dimensions of Algorithms', above n 1011, 11.
[1097] Rothman, above n 1042, 1640.
[1098] Ibid 1640.

DMCA's safe harbor provisions should be amended to require websites utilizing internal automated systems to consider fair use.'[1099]

Policy-makers might act to alter the conditions necessary for intermediary safe harbour to embed principles of transparency, accountability and due process in digital copyright governance. For example, Pasquale proposes: '[t]he bevy of immunities Congress has granted to information location tools…might be conditioned on platforms adopting internal processes designed to give those entirely de-indexed some right to a fair hearing and explanation for the action.'[1100] In 2018, the European Union will introduce, through a data protection regulation, a 'right to explanation'.[1101] Under this regulation users will have the right to 'ask for an explanation of an algorithmic decision that was made about them.'[1102] This proposal or a variation of it could be incorporated as a condition for intermediary safe harbour.

[1099] Laura Zapata-Kim, 'Should YouTube's Content ID be Liable for Misrepresentation Under the Digital Millennium Copyright Act?' (2016) 57(5) *Boston College Law Review* 1847.
In 2017, the Australian government announced its in principle support for changes to the Australian Copyright Act that would 'make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception'. Department of Industry, Innovation and Science, *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (Commonwealth of Australia, August 2017) 4 <https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf>. In the United States, currently the DMCA at § 512(f) specifies that '[a]ny person who knowingly materially misrepresents under this section — (1)that material or activity is infringing, or (2)that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages'. However, as my analysis in Chapter 5 indicates, this provision has failed to protect fair uses from Google's automated content removal and monetisation practices. This issue was brought to light by *Lenz v Universal Music Corp*, 815 3d 1145 (9th Cir, 2015). In *Lenz v Universal Music,* the Ninth Circuit held that 'the statute requires copyright holders to consider fair use before sending a takedown notification'. At 1148. However, as Marc Randazza explains,

> Ultimately, the Ninth Circuit Court of Appeals ruled that copyright owners need not make the right call on fair use…When we consider that the DMCA notice-and-takedown provision can be used as a tool for censorship and that fair use is free expression's safety value in the copyright regime, this decision is a hardly confidence-building holding. Copyright owners must *consider* fair use, but if they do not make the right call, is there no consequence?

Marc J Randazza, 'Lenz v Universal: A Call to Reform Section 512 of the DMCA and to Strengthen Fair Use' (2016) 18(4) *Vanderbilt Journal of Entertainment and Technology Law* 743, 745. Notably, in *Lenz v Universal Music* the Ninth Circuit also stated:

> We note, without passing judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use. *Cf. Hotfile,* 2013 WL 6336286, at *47 ("The Court... is unaware of any decision to date that actually addressed the need for human review, and the statute does not specify how belief of infringement may be formed or what knowledge may be chargeable to the notifying entity.").

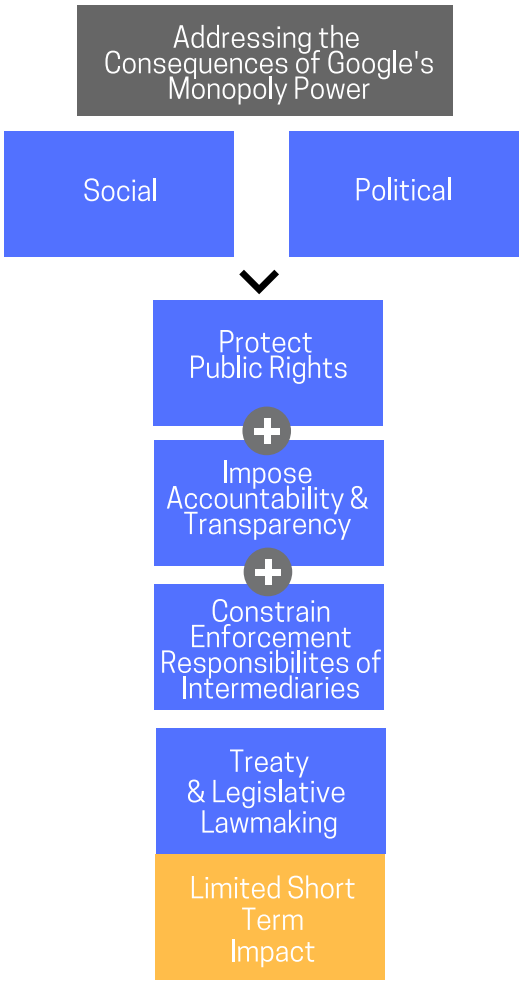
Lenz v Universal Music Corp, 801 F 3d 1126, 1135 (9th Cir, 2015).
[1100] Frank Pasquale, 'Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power' (2016) 17(2) *Theoretical Inquiries in Law* 487, 501-502.
[1101] Bryce Goodman and Seth Flaxman, *European Union Regulations on Algorithmic Decision-Making and a 'Right to Explanation'* (n.d.) Cornell University Library 1 <https://arxiv.org/pdf/1606.08813.pdf>.
[1102] Ibid.

Ultimately, any policy that alters the responsibilities of intermediaries must intersect with established intermediary safe harbour laws that have been propagated throughout the world through multilateral and bilateral agreements for two decades. This means broad and effective implementation of substantial amendments to intermediary liability is likely to require both treaty and legislative lawmaking.[1103] In my view, it is warranted.[1104] Digital copyright governance is a transnational phenomenon, one that has grown in scope and complexity since the negotiation of the Internet Treaties in the 1990s and the issue of concentrated private power and the use of algorithmic regulatory tools in digital copyright governance merits a new international undertaking.

[1103] As I discussed in Chapter 1, Google purposefully operates as a United States company to remain under United States jurisdiction. Accordingly, at the very least, any policy intervention aimed at regulating Google is likely to require legislative action within the United States. Jurisdictions outside of the United States have had varying degrees of success at regulating Google. In Europe in 2014, lawmakers successfully compelled Google to implement policies accommodating 'a right to be forgotten', whereby in certain circumstances individuals can 'ask search engines to remove links with personal information about them'. In its ruling on the matter, the Court of Justice for the European Union decided that 'even if the physical server of a company processing data is located outside of Europe, EU rules apply to search engine operators if they have a branch or a subsidiary in a Member State which promotes the selling of advertising space offered by the search engine.' See European Commission, *Factsheet on the "Right to be Forgotten" Ruling (C-131/12)* <http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf>.
By comparison, in November 2017, a United States court sided with Google and issued a preliminary injunction effectively rendering ineffective a decision by Canada's Supreme Court that Google must remove from its search results worldwide (and not simply from Google Search in Canada) content subject to a to removal request in Canada. See *Equustek Solutions Inc. v. Google Inc*, 265 (BCCA, 2015); *Google LLC v Equustek Solutions Inc* No 5 17-cv-04207 (ND Cal, 2017).

[1104] Evidently, the European Commission shares the view that the current obligations and responsibilities of intermediaries should be amended. See, eg, the 2016 *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market* which includes at art 13 an obligation for internet platforms that host user content to scan and filter for copyright infringement. European Commission, *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, above n 861.

Figure 6.8 **Summary: Regulate Google the Intermediary**



5.3 Negotiate: A Pragmatic Approach

While it is my position that public lawmaking by accountable public institutions is preferable to private modes of regulation, I acknowledge that public lawmaking in the copyright setting is often complex and protracted, one that infrequently produces tangible outcomes over short to medium timeframes. Treaty and legislative lawmaking proposals must inevitably confront complex political processes, including an abiding political preference for private solutions. Accordingly, an interim approach may be appropriate. One that focuses upon critical problems affecting copyright law and practice that Google itself may be able to address. I submit that a pragmatic approach to addressing the issues of accountability, transparency and the threat to public rights that result from a concentration of private power in the digital environment is to

develop, in negotiation with Google, *Best Practice Guidelines for Private Intermediaries Using Algorithmic Technologies to Enforce Copyright.*

This approach takes into account existing political conditions, acknowledging that private actors are powerful participants in digital copyright governance and their cooperation may be necessary for effective reform. Wu advises, '[i]f legal scholarship over the past few decades has proved anything, it is that we have little choice. The better part of compliance with rules of all sorts actually depends on the power of self-regulation, not the threat of force, though of course that threat can help.'[1105] As I have shown in this thesis, Google has proven capable of pushing back against policies that are not in its interest and undoubtedly any copyright policy proposal aimed at regulating Google will benefit from Google's cooperation.

Public Interest Responsibilities of Online Intermediaries

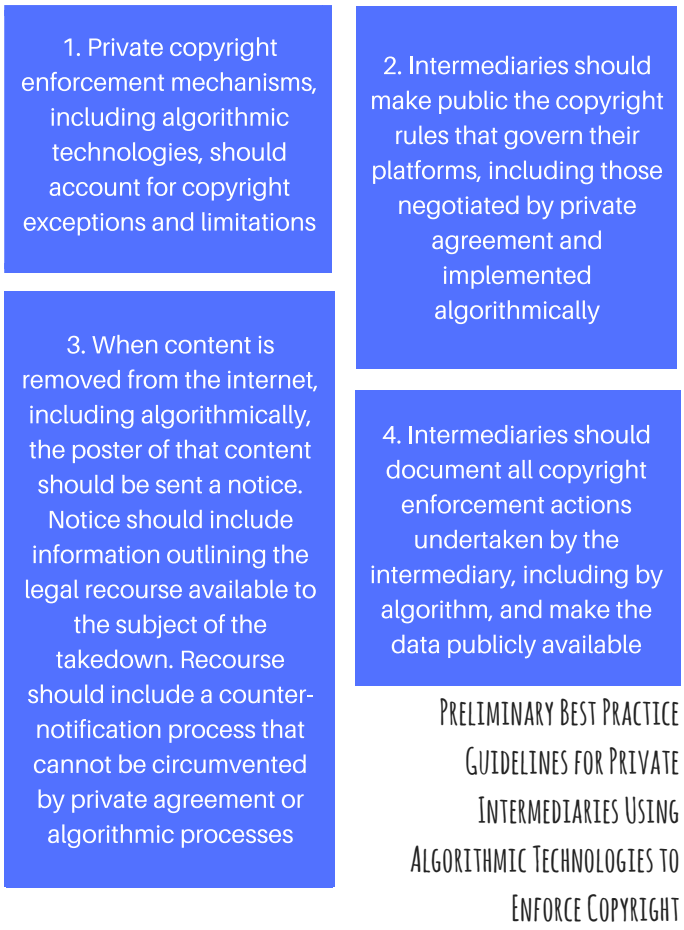
This approach assumes that the power of private actors in the digital environment raises legitimate questions of responsibility. It assumes that private entities that possess economic, social and regulatory power bear some responsibility to act in the public interest.[1106] Evidently, this is an assumption increasingly accepted by lawmakers, as the following examples attest: in 2016, the European Commission negotiated a Code of Conduct on illegal online hate speech, signed by Facebook, Google, Twitter and Microsoft';[1107] in 2017, the United Kingdom government announced a proposal for a voluntary levy on internet companies to be used to 'combat and raise awareness about online bullying and other web dangers'[1108] and to 'to help pay for the policing of online offences';[1109] and in 2017, Google, Facebook and Twitter were required to testify to the United States Congress regarding the use of digital platforms by Russia to spread information in order to influence the outcome of the United States 2016 Presidential

[1105] Wu, *The Master Switch,* above n 4, 313.
[1106] Professor Laura DeNardis proposes we must ask what are 'the appropriate bounds of restrictions on information flows and the types of procedures and transparency necessary to bolster the legitimacy of these organizations to carry out governmental or voluntary action.' Laura DeNardis, 'Hidden Levers of Internet Control: An Infrastructure-Based Theory of Internet Governance' (2012) 15(5) *Information, Communication & Society* 720, 734.
[1107] European Commission, 'Code of Conduct on Countering Illegal Online Hate Speech 2nd Monitoring' (Press Release, IP/17/1471, 1 June 2017) <http://europa.eu/rapid/press-release_MEMO-17-1472_en.htm>.
[1108] Peter Walker, 'Google and Facebook to be Asked to Pay to Help UK Tackle Cyberbullying', *The Guardian* (online), 11 October 2017 <https://www.theguardian.com/technology/2017/oct/11/google-and-facebook-to-be-asked-to-pay-to-help-tackle-cyberbullying>.
[1109] Owen Bowcott and Samuel Gibbs, 'UK Considers Internet Ombudsman to Deal with Abuse Complaints', ibid., 22 August 2017 <https://www.theguardian.com/technology/2017/aug/22/uk-considers-internet-ombudsman-to-deal-with-abuse-complaints>.

election.[1110] In these examples we see lawmakers cognizant of the social influence and regulatory capacities of corporations that dominate the digital environment and at least some willingness to compel these private actors to act in the public interest.

The guidelines proposed here assume that when private companies negotiate and enforce copyright rules that determine the scope and application of copyright across large portions of the digital environment, they have a responsibility to act in the public interest. I submit these guidelines as a preliminary set of policies that may be a starting point for negotiations with Google and other intermediaries regarding their responsibility to ensure public interest outcomes in copyright governance.[1111]

Figure 6.9 **Best Practice Guidelines for Private Intermediaries Using Algorithmic Technologies to Enforce Copyright**



[1110] Tony Romm, 'Watch: Facebook, Google and Twitter Testify to Congress About Russia and the 2016 Election', *Recode* (online), 31 October 2017 <https://www.recode.net/2017/10/31/16570988/watch-live-stream-facebook-google-twitter-russia-trump-2016-presidential-election-senate>.

[1111] These guidelines are informed by the copyright policy proposals discussed in section 5.2 and civil rights principles and guidelines discussed in section 4 of this chapter.

The first guideline — *private copyright enforcement mechanisms, including algorithmic technologies, should account for copyright exceptions and limitations* — assumes intermediaries have a responsibility to act in the public interest by ensuring public access rights in the digital environment are not diminished by private agreements and algorithmic enforcement. It calls for intermediaries to avoid copyright enforcement practices that unfairly privilege private property claims over public access rights.

The second guideline — *intermediaries should make public the copyright rules that govern their platforms, including those negotiated by private agreement and implemented algorithmically*[1112] — assumes intermediaries have a responsibility to act transparently; transparency in copyright regulation is critical for fair and accountable copyright goverance.[1113]

The third guideline — *when content is removed from the internet, including algorithmically, the poster of that content should be sent a notice. Notice should include information outlining the legal recourse available to the subject of the takedown. Recourse should include a counter-notification process that cannot be circumvented by private agreement or algorithmic processes* — assumes intermediaries have a responsibility to inform and empower their users.

The fourth guideline — *intermediaries should document all copyright enforcement actions undertaken by the intermediary, including by algorithm, and make the data publicly available* — assumes intermediaries have a responsibilty to provide performance information to facilitate accountability and improve public understanding of digital copyright goverance.

[1112] Professors Lucas Introna and Helen Nissenbaum make a similar proposal in, 'Sustaining the Public Good Vision of the Internet: The Politics of Search Engines' (1999) 9 *Center for the Arts and Cultural Policy Studies, Working Paper* 1999, 34. Although Perel and Elkin-Koren warn,

> algorithmic decision-making is essentially concealed behind a veil of a code, which is often protected under trade secrecy law, and even when it is not, its mathematical complexity and learning capacities make it impenetrable. Second, algorithmic enforcement is becoming so pervasive that transparency about the inputs and outputs of the algorithmic decision-making criteria may produce immense volumes of unintelligible data. Without proper tools to analyze massive amounts of data, these overwhelming disclosures are mostly pointless.

Elkin-Koren, above n 1043, 5.

[1113] Wagner suggests,

> Provision of entire algorithms to the public is unlikely, as private companies regard their algorithm as their key trade secret. However, there is also a debate around the possibility of providing key subsets of information about the algorithms to the public, for example which variables are in use, the average values and standard deviations of the results produced or the amount and type of data being processed by the algorithm.

Wagner, 'Study on the Human Rights Dimensions of Algorithms', above n 1011, 22.

The Question of Google's Participation

What would motivate Google to participate in the development of best practice guidelines that impose public interest responsibilities upon Google? There are several reasons for optimism. First, there is an alignment of interests. Both Google and the public benefit from a regulatory environment that provides freedom to access and engage with information and content in order to innovate and create. Google continues to have a vested interest in public rights to access and use information. Google continues to rely on and seeks to ensure copyright regimes include robust copyright exceptions and limitations. These principles underpin the proposed guidelines. Accordingly, Google may be motivated to participate in the negotiation of best practice guidelines that seek to protect the public interest in the digital environment because the proposed guidelines align with Google's copyright agenda.

Moreover, Google has publicly supported and in some cases already implements aspects of the policies I put forth in these guidelines. For example, Google has supported law reforms to ensure copyright exceptions are not disabled by private agreement. In 2012, Google submitted to the Australia government:

> Copyright laws contain a complex balance between the rights of copyright owners to protect their works and the public interest in ensuring access to knowledge and the creation of new works. This balance is sensitively and carefully constructed, which should not be able to be altered or replaced by private arrangements. Google would support an amendment to the Copyright Act that prevented the contractual override of copyright exceptions[1114]

Additionally, Google makes publicly available the number of removal requests it receives from rightsholders through its Transparency Report.[1115] It also submits the notices it receives to the Luman archive — a research project of the Berkman Klein Center for Internet and Society at Harvard University — and makes the data available for download by the public.[1116] Google

[1114] Google, 'Letter from Matt Dawes Public Policy and Government Affairs Google Australia to Professor Jill McKeough ALRC 'ALRC Review - Copyright and the Digital Economy'', above n 306, 52.
[1115] Google, *Google Transparency Report: Requests to Remove Content Due to Copyright*, above n 876.
[1116] Von Lohmann, 'Transparency for Copyright Removals in Search', above n 892.

claims to do so in order to 'promote transparency'.[1117] Accordingly, not only does Google continue to have a vested interest in copyright exceptions, but in its rhetoric and actions we see evidence that Google considers itself to bears some responsibility to act transparently. My guidelines reassert the importance of and call for higher standards of transparency.

In this way, the preliminary guidelines are not groundbreaking. Instead, they are intended as an assertion of the public interest in digital copyright governance. As we move deeper into the digital age and automated regulatory systems continue to advance, the guidelines are an assertion of expectations regarding intermediaries and their responsibilities to act not only in the interest of rightsholders but in the interest of a broad range of stakeholders.

If developed in partnership with Google and other intermediaries, best practice guidelines provide an opportunity for public discourse and norm-setting in the public interest. As I noted in Chapter 5, Google's copyright enforcement practices have industry-wide influence. Accordingly, Google's participation in the development and implementation of best practice guidelines has the potential to 'move collective perceptions'[1118] regarding public interest obligations in private copyright rule-making and algorithmic enforcement.

Finally, I note that Google has publicly recognised that the recent pace of developments in automated technologies has potentially far-reaching social consequences, and that technology companies bear some responsibility in this regard. In 2016, Google, Amazon, Facebook, IBM and Microsoft founded the organisation *Partnership on Artificial Intelligence to Benefit People and Society*.[1119] The organisation describes its purpose is to 'study and formulate best practices on AI technologies, to advance the public's understanding of AI, and to serve as an open

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[1117] Google asserts: 'we want to be transparent about the process so that users and researchers alike understand what kinds of materials have been removed from our search results and why'. Ibid. Yet, I also note that a 2014 UNESCO study concluded intermediary transparency reports tend to be limited to requests made through legally required processes and do not typically include self-regulatory activities:

> For those intermediaries that publish 'transparency reports', disclosure has been largely limited to government or other demands made through legal processes, and the companies' handling of such demands. Few efforts have been made thus far by intermediaries to be more transparent about extra-legal content restrictions, as well as content removal and account deactivation and other actions taken to enforce intermediaries' own self-regulatory terms of service. Corporate transparency around collective self-regulatory efforts was also found to lag behind transparency related to direct government requests.

Rebecca MacKinnon et al, 'Fostering Freedom Online: The Role of Internet Intermediaries' *UNESCO Series on Internet Freedom* (Report for UNESCO's Division for Freedom of Expression and Media Development, UNESCO Publishing, 2014)10 <http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>.

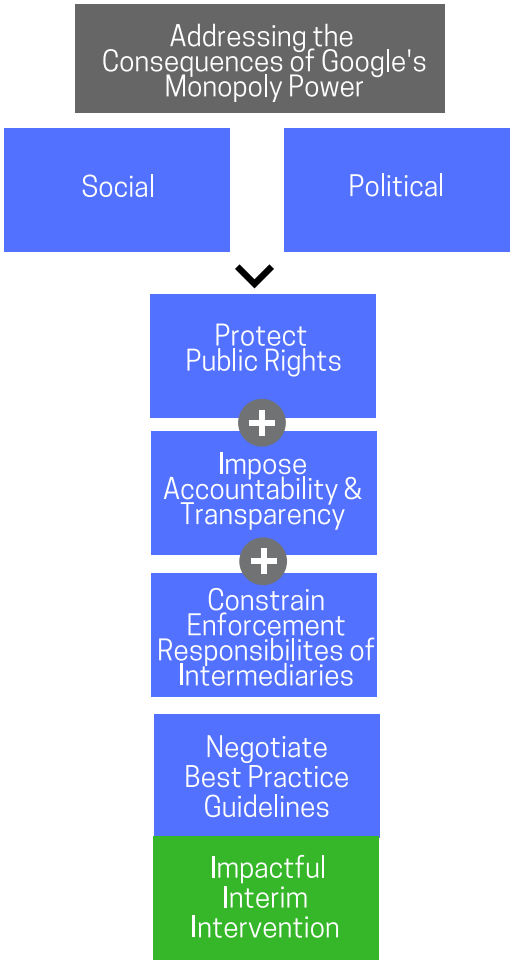
[1118] Urban, Karaganis and Schofield, above n 877, 71.

[1119] Partnership on AI to Benefit People and Society, <https://www.partnershiponai.org/>.

platform for discussion and engagement about AI.'[1120] Given these objectives, this organisation may in fact be the appropriate forum for negotiating and implementing best practice guidelines.[1121]

Google has invested heavily in its copyright agenda — including in litigation, lobbying and direct investments of financial and technological resources. In the right circumstances, Google could prove a powerful private actor taking action in the public interest. Overall, the negotiation of best practice guidelines for intermediaries who enforce copyright represents a viable, albeit initial, step towards addressing some of the problematic dynamics of private power and algorithmic technologies in digital copyright governance.

Figure 6.10 **Summary: Negotiate — A Pragmatic Policy Intervention**



[1120] Ibid.
[1121] Additional evidence of Google's awareness of this issue is Google's sponsorship of the 2016 Fairness, Accountability and Transparency in Machine Learning workshop. See Fairness Accountability and Transparency in Machine Learning, *2016 Schedule* <https://www.fatml.org/schedule/2016>.

6. Conclusion

In this chapter, I argue Google's influence on copyright law and practice has positive features, advancing the conditions of a cultural democracy — increasing public access to information and cultural participation. Furthermore, Google has moulded copyright doctrine as it applies to digital technologies and has established the viability of public interest claims in copyright lawmaking. Yet, in this chapter, I also argue Google's influence and Google's current position in the digital environment produce conditions antithetical to a cultural democracy. Primarily, Google's monopoly power, derived from Google's own exclusive access to information, has economic, social and political consequences that threaten democratic political and cultural conditions. In particular, I argue Google's private copyright rule-making and algorithmic enforcement threatens public rights and diminishes transparency and accountability in digital copyright governance. Finally, in this chapter, I provide policies and other strategies aimed at addressing these issues. In my view, engaging with Google to promote the public interest in digital copyright governance should be considered a viable preliminary step towards ensuring digital copyright functions in the interest of a broad range of stakeholders.

CHAPTER 7

Conclusion

Two decades ago, when Google was but a research project at Stanford University, a central question for copyright scholars concerned with the emerging digital environment was how to ensure remuneration for rightsholders while also encouraging the development of new communication and information networks. Rightsholders demanded maximum control. Others argued the digital environment should be free to flourish without burdensome regulation and in order to realise the internet's democratic potential. Bolstered by an ideological position that markets can more efficiently organise society than can governments, policy-makers supported private sector investment and models of self-regulation. Over the past two decades, in this political and ideological setting, private entities such as Google have become very powerful and the scope for privately negotiating copyright in practice broad — today, powerful private actors negotiate copyright rules, determine standards for using information and content, and assign responsibility for copyright enforcement.

In the Introduction to this thesis, I stated that the purpose of this research project was to investigate and evaluate the influence of Google on copyright law and practice through two principal questions. First, I sought to understand Google's influence on copyright law, including Google's response to legal, commercial and political conflicts. Secondly, I sought to understand Google's position in digital copyright governance, including its role in copyright rule-making and enforcement, and the consequences for the public interest**.** In the following Chapter, I argued that copyright should be examined through a cultural theory framework. Understanding Google's influence upon copyright law and the implications for the public interest requires a framework that extends beyond abstract concepts of authors' rights and market transactions — it requires consideration of the social, economic and political consequences of copyright.

In this thesis, I have shown that when Google's activities have caused disputes with rightsholders, Google has deftly navigated its way to outcomes suitable to its interests, employing legal, technological and economic strategies. These strategies have left their mark

on the copyright tradition. From Google's United States copyright litigation history through to its efforts over Google News in Europe, Google has influenced the shape and application of copyright law, advancing public interest arguments and limiting the scope of exclusive rights granted to rightsholders in the digital setting. In doing so, Google has increased access to information and opportunities for cultural participation the likes of which we have never seen before.

Yet, a cultural theory evaluation of Google and copyright also highlights potential harms produced by Google's influence. Through exclusive access to informational resources, Google has acquired monopoly power that produces for Google social, political and regulatory influence. Google's use of its monopoly power — including Google's participation in private copyright rule-making and algorithmic enforcement — can undermine public access to information and opportunities for cultural participation. Google self-regulates and negotiates with rightsholders to privately devise copyright rules and enforcement measures that impede transparency and accountability and often privilege private interest and values over public interests and values. Fundamentally, in this thesis, I have established that Google occupies a powerful position in digital copyright governance with serious consequences for the public interest.

Given the current distribution of power in the digital environment, Google's 'innovate first, permission second' mantra feels almost quaint. Pushing back against the copyright agenda of the content industries, Google pursues copyright regimes that support innovation, arguing for the social and economic benefits of the internet and digital technologies. Over the past two decades, innovation has indeed flourished. But to who do the benefits accrue? Today, technological innovation plays out in a digital environment owned and controlled by monopolistic technology firms. And, in the domains over which Google resides, public rights that facilitate cultural diversity and participation frequently lose out to the private property claims of rightsholders. Today, copyright is far more complicated than a permission versus innovation framework might suggest.

Furthermore, as technology advances, our relationship to it becomes increasingly complex. Not only must we consider how best to regulate new technologies but we must also consider how new technologies regulate us. In a digital environment dominated by powerful private actors,

the use of algorithmic regulatory systems poses a critical problem for public rights and democratic, accountable systems of governance.

In some ways, this thesis is an historical document. I have traced the rise of a powerful technology company through its legal, commercial and political negotiations and analysed the wider consequences of that ascendancy. As my research shows, Google, whether an agent for or against the public good, now reigns over a new technological and economic order that features empowered private actors and rapidly changing technological conditions. How to effectively regulate these actors — in a changing technological environment and in order to achieve public interest outcomes — is a major challenge for law and policy-makers. In copyright governance, how to respond to the domination of digital spaces and information access by Google specifically is perhaps the most pressing challenge of all.

In this thesis, I provide several recommendations for taking up this challenge. I submit that the most direct approach is government intervention to end Google's exclusive access to informational resources**.** As well, I outline legal and legislative interventions for addressing the economic, social and political consequences of Google's monopoly power. But I also recommend an interim intervention — negotiating with Google to develop guidelines to ensure that when Google and other private actors undertake copyright rule-making and algorithmic enforcement they respect the public interest. Effectively, this proposal is for Google to self-regulate in the public interest. It is a strategic proposal — one that is accepting of the continuing influence of neoliberal ideology and of the current distribution of regulatory power in the digital environment. Taken together, my recommendations provide a pathway for infusing public interest outcomes in digital copyright governance, now and into the future.

APPENDIX

Publications and Presentations on Matters Relevant to the Thesis

Early work on Chapter One and Chapter Three is to be published in the book chapter:

- J Gray 'Copyright According to Google' in B Fitzgerald and J Gilchrist (eds) *Copyright, Property and the Social Contract — The Reconceptualisation of Copyright* Springer [Forthcoming]

Papers including work on Chapter Five and Chapter Six were presented at:

- Third Annual Texas A&M Intellectual Property Scholars Roundtable
  Governed by Google: Private Copyright Rule-Making and Algorithmic Enforcement
  Fort Worth, USA, 2017

- Allens Hub for Technology, Law & Innovation Junior Scholars Forum
  Governed by Google: Algorithmic Enforcement and Private Copyright Regulation
  University of New South Wales, Sydney, Australia, 2017

Early work on this thesis was presented at the following forums:

- Visiting Researcher Seminar, University of California, Berkeley, School of Law
  The Role of Google in Copyright Law and Politics
  Berkeley, USA, 2016

- International Copyright Seminar, Australian Catholic University
  Google and Copyright Policy
  Brisbane, Australia, 2016

- CCi IP Research Program Seminar
  The Influence of Google on Copyright Politics
  Sydney, Australia, 2014

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