EXHIBIT 42

PART 2
Q. Then in paragraph 16, you begin your analysis, I guess.
A. Yes.
Q. You say, "Economics often model the introduction of a new good by describing a world in which the new good was always available in theory, but was only available at a prohibitively high price - a price at which no one would be willing to buy the good (often called the choke price)."
A. Correct. So it says "Once a firm is able to offer the new good at a price that's not prohibitively high, (i.e., at a price for which there will be positive demand and which makes sense, on the whole, for the firm), the firm will then introduce that good into the market"; right?
Q. When you're applying that economic principle.
A. The price is set by the firm.
Q. The firm here is Google?
A. Well, again, here I'm describing a general context. When I apply it later, I'm talking about Google.
Q. But I'm talking about theory, the firm is the seller or the provider of the good; correct?
A. Here when I'm talking about the firm, I'm talking about the provider of the good, correct.
Q. Google has never charged for its search tool; right?
A. Google has not charged for its search tool.
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2 Q. Is that the application of this
3 sentence to this case?
4 A. So in this, in this paragraph, I'm
5 explaining how economists model the introduction
6 of a new good.
7 So a convenience that economists use
8 to model or a framework that economists use to
9 model the introduction of a new good is to
10 behave as if the good always existed, but was
11 available at a very high price.
12 And then in our models, we think
13 about, at some point, the product becomes viable
14 in the marketplace. Usually, that may mean when
15 it's invented.
16 So here, for Google, what I'm saying
17 is, you know, at some point, this product was
18 impossible. It could not have produced this
19 product.
20 At some point, it made sense for
21 Google to embark on producing this product, and
22 they produced this product.
23 Q. But there's a price or a cost to
24 Google to producing the product; correct?
25 A. There was definitely a cost to Google

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2 of producing the product.
3 Q. That goes into what the price would
4 be that they have to charge for?
5 A. Well, you know, I guess here we
6 might, you know, you know, in this paragraph
7 since I'm, you know, speaking of the general
8 economic modeling framework, I'm describing the
9 price of the good quite straightforwardly.
10 Of course, for Google, you know, like
11 broadcast television, the consumer doesn't pay
12 to consume it. But, you know, advertising and
13 other things are sold.
14 So what I'm saying is, you know,
15 Google introduced this product when you know,
16 when it probably, A, had the idea; and B, made
17 sense for Google to embark on this project.
18 Q. Well, I mean what it says is that,
19 "Once a firm," meaning here Google, "is able to
20 offer the new good at a price that is not
21 prohibitively high."
22 Now in considering that in this case,
23 don't you think Google would have had to
24 consider the cost of copyright infringement
25 suits?

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2 MR. McGOWAN: Objection. Lacks
3 foundation. Calls for legal conclusion.
4 A. So I am sure, as any firm, when they
5 launch a new project, Google had to consider all
6 of the, you know, potential benefits of the
7 project and the potential costs.
8 And I would imagine that all
9 potential -- all potential costs should, as an
10 economic principle, be included in that
11 analysis.
12 Q. In this particular case, a cost is
13 possible, that engaged in, that they are
14 violating copyrights; correct?
15 MR. McGOWAN: Objection to the extent
16 it calls for legal conclusion, foundation.
17 You may answer.
18 A. So in undertaking this project, I
19 would -- any firm that's undertaking the start
20 of any project, should include all potential
21 costs in, you know, and the probability of
22 paying them, in assessing whether the project
23 makes sense.
24 And so for Google, potential
25 litigation costs of this project should, should

27 (Pages 102 - 105)
1. J.A. Chevalier - CONFIDENTIAL
2. product to the general mission of the company.
3. Q. Would it be your view that the
4. potential benefits to Google, as a firm, would
5. have to substantially outweigh the costs before
6. they would go to market with a new good?
7. A. So, of course, many times when a firm
8. makes a new product launch, you know, after the
9. fact, it may or may not turn out to be, you
10. know, it may not turn out to be valuable for the
11. firm.
12. But at the time of making the launch,
13. the firm would consider whether the benefits on
14. net to the firm, in this case Google, exceed the
15. costs.
16. But the benefits and the costs may
17. be, you know, very widespread. So, you know, it
18. may not just be -- the benefits may be, you
19. know, this product will, you know, further
20. Google's mission or this product will, you
21. know -- the benefits have to be appropriately
22. considered, but the benefits have to exceed the
23. costs for any product to be launched.
24. Q. So as a matter of economics, you
25. would assume here that Google determined that

28 (Pages 106 - 109)

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1. J.A. Chevalier - CONFIDENTIAL
2. provides value to authors, or whether Google
3. Books has superseded a potential market for
4. books or licenses.
5. Well, I may find the question of how
6. Google made the decision to launch the Library
7. Project interesting, it's not germane to the
8. answer to those three questions.
9. Q. You assessed in answering the
10. question whether or not it was a new good,
11. meaning Google Books, you assessed the
12. consumer's side of the equation; correct?
13. A. I did.
14. Q. But you didn't assess the Google side
15. of the equation?
16. A. So in the literature on new goods,
17. and in the literature and in the practice of how
18. to assess whether a good is a new good, the
19. consumer side is the, the consumer -- the
20. important test for whether tests for whether a
21. good is a new good, are on the consumer side.
22. We observe that the product has been
23. introduced. Then we can assess whether that
24. product meets needs that have previously been
25. unmet or poorly met.
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2 copies of all books, whether in copyright or out
3 of copyright, wouldn't that be a benefit to
4 consumers?
5 A. Yes, that would be a benefit to
6 consumers.
7 Q. Would that be a new good?
8 MR. MCGOWAN: Objection, vague.
9 You may answer.
10 A. Yes, it would be a benefit to
11 consumers and, yes, it would be a new good. It
12 would be a, it would certainly be a benefit to
13 the consumers, using the site at that moment.
14 Q. I'm not quite sure I understand the
15 caveat there?
16 A. So the caveat is if Google, if Google
17 or another entity were to do something that
18 actually destroyed the market for books by --
19 well, of course, it wouldn't single handedly
20 destroy the market for books, but if Google were
21 to do something that substantially diminished
22 the market for books, then one might worry as
23 is, you know, the basis for intellectual
24 property law, that the market for books would
25 ultimately shrink.

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1 J.A. Chevalier - CONFIDENTIAL
2 In this case, as I discuss in my
3 later section, I believe that the functionality
4 that Google provides is a compliment for the
5 market for books, rather than a substitute. So
6 no such concern arises.
7 Q. Can't a new good benefit consumers
8 and also destroy a different market?
9 A. I think the concern is that if you --
10 it depends, you know, I think the time horizon
11 is an issue here.
12 If Google were to display entire
13 copies of books, the consumers who, without you
14 know, entire copies of books for which there was
15 otherwise a market, and that led consumers to
16 buy fewer books, then that would lead to fewer
17 books being produced, which would ultimately
18 harm consumers.
19 Q. Since the price that consumers pay
20 for Google Books search is zero, is there any
21 reason why they wouldn't be benefited by Google
22 Books?
23 A. So since the price that consumers pay
24 is zero -- well, I described one scenario where
25 consumers could ultimately be harmed. That's

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2 not the case at hand.
3 But in general, you know, given that
4 consumers don't pay to use the search
5 functionality, they can't, you know, they can't
6 be -- they would, in general, not be worse off
7 from the existence of the search functionality.
8 But the extent to which they benefit
9 is a function of the quality of the search
10 functionality and the comprehensiveness of the
11 works included.
12 Q. Well, in order for something to be a
13 new good, do consumers have to benefit?
14 A. Yes. So in order for something to
15 be -- well, as I explained in the thing, in
16 order for something to be a new good, consumers
17 have to have a willing -- consumers have to have
18 -- it has to meet a need that was previously
19 unmet. So the need implies consumers have to
20 benefit.
21 Q. So if we think of a new good that
22 consumers don't have to pay for because it's
23 given away free, but it was a neutral on
24 benefit --
25 MS. ZACK: Withdraw that.

29 (Pages 110 - 113)
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<th>Page 115</th>
<th>Page 116</th>
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<td>J.A. Chevalier - CONFIDENTIAL</td>
<td>J.A. Chevalier - CONFIDENTIAL</td>
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<tr>
<td>Q. Now the input or in the output,</td>
<td>Q. Now the Google Books allows search of</td>
<td>Q. So as I've said before, it is my</td>
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<td>includes digital copies to the libraries; right?</td>
<td>entire books; correct?</td>
<td>understanding that Google has provided the</td>
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<td>MR. McGOWAN: Objection, vague.</td>
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<td>functionality of two libraries for libraries to</td>
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<td>You may answer.</td>
<td></td>
<td>make their own digital copy.</td>
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<td>A. So as I've said before, it is my</td>
<td>A. So it allows, it searches the book in</td>
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<td>understanding that Google has provided the</td>
<td>its entirety.</td>
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<td>functionality of two libraries for libraries to</td>
<td>Q. And that it also allows consumers</td>
<td></td>
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<tr>
<td>make their own digital copy.</td>
<td></td>
<td>access to virtually the entirety of the book;</td>
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<td>I am not, you know, clearly here, I</td>
<td>right?</td>
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<tr>
<td>am describing the Google Books, I'm describing</td>
<td>MR. McGOWAN: Objection, vague.</td>
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<td>the Google Books website.</td>
<td>Q. Or employs, you used the word</td>
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<td>Q. Well, when you talk about input to</td>
<td>employs?</td>
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<td>Google Books, and output -- all right, so an</td>
<td>A. I see. So is your objection to the</td>
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<td>input to Google Books, do you consider the scan,</td>
<td>use of the word employs?</td>
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<td>library scan, to be an input to Google Books?</td>
<td>Q. It's not an objection. I mean Google</td>
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<tr>
<td>MR. McGOWAN: Objection, vague.</td>
<td>employs more than small portions of the book;</td>
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<td>You may answer.</td>
<td>doesn't it?</td>
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<td>A. So as I say here, &quot;Therefore, while</td>
<td>MR. McGOWAN: Objection, vague.</td>
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<td>it is true that an input to Google books is the</td>
<td>You may answer.</td>
<td></td>
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<td>scanned, digitized book,&quot; yes.</td>
<td>A. Okay, so I use the term input and</td>
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<td>Q. Then you're talking about the output</td>
<td>output. And by employs, I mean that the output</td>
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<td>being the Google Books itself?</td>
<td>consists of only a small portion of the book.</td>
<td></td>
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<tr>
<td>A. Yes.</td>
<td>I believe that your question is, by</td>
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<td>Q. You say it &quot;employs only small</td>
<td></td>
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<td>Portions of book, at most&quot;?</td>
<td></td>
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<td>You previously testified that the,</td>
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<td>even for the Google Library Project, the entire</td>
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<td>book was available for search; right?</td>
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<td>A. So for the Google Library Project,</td>
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<td>yes, the entire book is searched, but the output</td>
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<td>is the search result that the consumer receives.</td>
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<td>And the output is only a small</td>
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<td>portion of the book.</td>
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<td>Q. That's for one consumer you're</td>
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<td>saying. What about all consumers?</td>
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<td>MR. McGOWAN: Objection, vague.</td>
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<td>You may answer.</td>
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<td>A. So I think it is what I said, that at</td>
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<td>the output for any given book, for any given</td>
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<td>search, for any given consumer, is a small</td>
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<td>portion of the book.</td>
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<td>Q. Well, that's not what you're saying</td>
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<td>says?</td>
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<td>MR. McGOWAN: Objection,</td>
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<td>argumentative.</td>
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<td>Q. Your sentence says, &quot;While it is true</td>
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<td>that an input to Google Books is the scanned,</td>
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<td>digitized book in its entirety, the output,</td>
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<td>Page 119</td>
<td>Page 120</td>
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<td>J.A. Chevalier - CONFIDENTIAL</td>
<td>search of a particular book would lead to across</td>
<td>J.A. Chevalier - CONFIDENTIAL</td>
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<td>all consumers, the entirety of the content of</td>
<td>that book being eventually displayed over some</td>
<td>Q. Do you know how many?</td>
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<td>period of time?</td>
<td>Q. I don't know how many have searches</td>
<td>A. I don't know how many have searches</td>
</tr>
<tr>
<td>Q. Yes.</td>
<td>-- I don't know, off the top of my head.</td>
<td>Q. I think they post on their website</td>
</tr>
<tr>
<td>A. Are you asking will that happen as an</td>
<td>6 that they have billions of users?</td>
<td>A. Okay.</td>
</tr>
<tr>
<td>empirical matter or are you asking could that</td>
<td>8 Q. I don't know if they're all using</td>
<td>Q. I don't know if they're all using</td>
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<tr>
<td>happen?</td>
<td>9 Google Books; do you?</td>
<td>Google Books; do you?</td>
</tr>
<tr>
<td>Q. Well, could that happen?</td>
<td>A. Well, Google Books, you know, is</td>
<td>10 A. Well, Google Books, you know, is</td>
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<tr>
<td>So I suppose it is the case that</td>
<td>11 returned from the core search engine, they may</td>
<td>11 returned from the core search engine, they may</td>
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<td>other than the piece of the book, the parts of</td>
<td>or may not be.</td>
<td>12 or may not be.</td>
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<tr>
<td>the book that is blacked -- well, it would be</td>
<td>Q. Google also states that it blacklists</td>
<td>13 Q. Google also states that it blacklists</td>
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<tr>
<td>tricky because no consumer is allowed -- gets</td>
<td>about 10 percent of a book, one out of 10 pages,</td>
<td>14 about 10 percent of a book, one out of 10 pages,</td>
</tr>
<tr>
<td>the same search terms more than a limited number</td>
<td>I'm saying 10 percent; do you understand that?</td>
<td>15 I'm saying 10 percent; do you understand that?</td>
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<tr>
<td>of times.</td>
<td>A. I understand that.</td>
<td>A. I understand that.</td>
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<tr>
<td>I suppose we could write a program --</td>
<td>Q. So that's the blacklisted portion,</td>
<td>Q. So that's the blacklisted portion,</td>
</tr>
<tr>
<td>no, no, we couldn't. I suppose if I had the</td>
<td>and then they blacklist the snippet per page.</td>
<td>and then they blacklist the snippet per page.</td>
</tr>
<tr>
<td>book, I could -- I had millions of</td>
<td>Have you read that?</td>
<td>Have you read that?</td>
</tr>
<tr>
<td>helpers -- no, I think it -- no, I don't think</td>
<td>A. I have read that.</td>
<td>A. I have read that.</td>
</tr>
<tr>
<td>it could happen because when you search -- I</td>
<td>Q. So there's a portion of the book</td>
<td>Q. So there's a portion of the book</td>
</tr>
<tr>
<td>think, I think it is un -- I'm not a computer</td>
<td>that's blacklisted?</td>
<td>that's blacklisted?</td>
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<tr>
<td>scientist, and I don't profess expertise in</td>
<td>A. Correct.</td>
<td>A. Correct.</td>
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<td>consumer science, but I think it, the entirety</td>
<td>Q. Other than that portion, Google makes</td>
<td>Q. Other than that portion, Google makes</td>
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<td>of -- across all consumers, across all time,</td>
<td>the rest available for display in snippets;</td>
<td>the rest available for display in snippets;</td>
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<td>J.A. Chevalier - CONFIDENTIAL</td>
<td>it's very unlikely, it seems impossible,</td>
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<td>actually, that the entirety of the text of the</td>
<td>3 actually, that the entirety of the text of the</td>
<td>3 actually, that the entirety of the text of the</td>
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<tr>
<td>book would be displayed.</td>
<td>4 book would be displayed.</td>
<td>4 book would be displayed.</td>
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<td>Q. You're saying you understand that</td>
<td>Google divides, generally, the practice is to</td>
<td>Google divides, generally, the practice is to</td>
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<td>Google divides, generally, the practice is to</td>
<td>divide the book into eightths, and they call each</td>
<td>divide the book into eightths, and they call each</td>
</tr>
<tr>
<td>divide the book into eightths, and they call each</td>
<td>eighth of the book a snippet; is that right?</td>
<td>eighth of the book a snippet; is that right?</td>
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<tr>
<td>MR. McGOWAN: Objection, foundation,</td>
<td>MR. McGOWAN: Objection, foundation,</td>
<td>MR. McGOWAN: Objection, foundation,</td>
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<tr>
<td>and that's actually an incorrect statement.</td>
<td>and that's actually an incorrect statement.</td>
<td>and that's actually an incorrect statement.</td>
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<tr>
<td>Yes.</td>
<td>A. So my understanding is that a snippet</td>
<td>A. So my understanding is that a snippet</td>
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<tr>
<td>is about an eighth of a page.</td>
<td>is about an eighth of a page.</td>
<td>is about an eighth of a page.</td>
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<tr>
<td>Q. You understand that those snippets</td>
<td>15 Q. You understand that those snippets</td>
<td>15 Q. You understand that those snippets</td>
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<tr>
<td>are displayed in response to search requests?</td>
<td>16 are displayed in response to search requests?</td>
<td>16 are displayed in response to search requests?</td>
</tr>
<tr>
<td>A. I understand that snippets are</td>
<td>A. I understand that snippets are</td>
<td>A. I understand that snippets are</td>
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<td>displayed in -- a limited number of snippets are</td>
<td>displayed in -- a limited number of snippets are</td>
<td>displayed in -- a limited number of snippets are</td>
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<td>displayed in response to search requests.</td>
<td>displayed in response to search requests.</td>
<td>displayed in response to search requests.</td>
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<td>Q. A limited number are -- three are</td>
<td>20 Q. A limited number are -- three are</td>
<td>20 Q. A limited number are -- three are</td>
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<td>displayed in response to each search request;</td>
<td>displayed in response to each search request;</td>
<td>displayed in response to each search request;</td>
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<tr>
<td>Q. Correct?</td>
<td>Q. Correct?</td>
<td>Q. Correct?</td>
</tr>
<tr>
<td>A. Yes.</td>
<td>A. Yes.</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>Q. But how many users does Google have?</td>
<td>Q. But how many users does Google have?</td>
<td>Q. But how many users does Google have?</td>
</tr>
<tr>
<td>A. It has a lot.</td>
<td>A. It has a lot.</td>
<td>A. It has a lot.</td>
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</table>
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2 consumers how it is one would get to the
3 subsequent uses of the term heart. So, so, so,
4 I don't believe it is the case that anything
5 resembling the book, the actual book, could be
6 outputted via the Google search engine.
7 Q. The snippet, when you search for
8 heart and you get some snippets that includes
9 the word heart, but there's a lot of other words
10 on that page than that snippet; right?
11 MR. McGOWAN: Objection, vague.
12 You may answer.
13 A. Correct, there are other words.
14 Q. People could search for those other
15 words, right, different people?
16 A. Let us, let us stipulate, I do not
17 know whether it is, and I'm not an expert in the
18 exactitude of exactly how -- I know, in general,
19 how this search engine snippet function works.
20 I believe it not to be the case that
21 you could receive, you know, that a billion
22 consumers put together, could somehow assemble
23 the entire book from the results of the Google
24 search engine.
25 They certainly can't because of the

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2 blacklisted pieces, but I think, it is my
3 understanding, they can't just in general. But,
4 you know, I don't know that for a fact.
5 Q. Oh, okay, I didn't ask you about who
6 was assembling anything.
7 I asked you whether Google employs
8 it?
9 A. So the output, which is the
10 screenshot, employs only a small portion of the
11 book.
12 Q. So this sentence is only about a
13 single search?
14 A. This sentence certainly applies to a
15 set of searches, but this sentence was intended
16 to describe the output as relevant to a
17 consumer.
18 Q. So you're talking about basically one
19 or two searches by a single consumer?
20 MR. McGOWAN: Objection, misstates.
21 You may answer.
22 A. I'm talking about the set of searches
23 that a consumer would experience. I'm not going
24 to say one or two.
25 I've done many more than one or two.

1 J.A. Chevalier - CONFIDENTIAL
2 So this -- for a consumer, what is the output of
3 Google Go Books for the set of books that are in
4 copyright, but not in the Partner Program, it is
5 snippets, which represent a small fraction of
6 the book.
7 Q. So you're talking about the
8 experience of a single consumer using Google
9 Books?
10 A. Well, in this footnote --
11 Q. Right, in this sentence?
12 A. -- in this footnote, I'm talking
13 about the product as it is experienced by the
14 consumer. And so it's, you know, it is the
15 output as experienced by the consumer.
16 Q. But not consumers as a whole?
17 MR. McGOWAN: Objection, asked and
18 answered.
19 You may answer.
20 A. So consumers, as a whole, all
21 experience snippets. You know, the question of
22 whether, you know, a number, you know -- yes,
23 consumers, as a whole, experience snippets.
24 Q. So paragraph 20 on page 7, this is
25 the concluding paragraph of your analysis about

1 J.A. Chevalier - CONFIDENTIAL
2 new goods; is that right?
3 A. Correct.
4 Q. So this is, again, your analysis here
5 is part of the economic theory involving the
6 development of new goods?
7 A. Correct.
8 MS. ZACK: We can take a break for
9 lunch.
10 MR. McGOWAN: Before we do that, let
11 me note for the record, the document number
12 you asked for is Google 05004751.
13 MS. ZACK: I know what that is, so
14 that's the big long list.
15 (Luncheon recess: 12:26 p.m.)
1 J.A. Chevalier - CONFIDENTIAL
2 
3 AFTERNOON SESSION
4 (Time noted: 1:15 p.m.)
5 JUDITH A. CHEVALIER, resumed
6 and testified as follows:
7 CONTINUED EXAMINATION
8 BY ZACK:
9 Q. Referring you to page 9 of your
10 report, please? You have discussion throughout
11 this section about Google Books as a complement, 
12 not substitute?
13 A. Correct.
14 Q. And which you talk about the fact
15 that books get noticed, etcetera --
16 A. Correct.
17 Q. -- through Google Books, and that
18 that's a benefit. You conclude that's a benefit
19 to authors; right?
20 A. Correct.
21 Q. That benefit is virtually exclusive
22 to in-print authors; correct?
23 A. I wouldn't say that. I think
24 in-print authors will benefit more, but
25 out-of-print authors may benefit under certain
26 circumstances.

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2 Q. Can you tell me those circumstances 
3 in which you think they'll benefit, given the
4 way Google Books works?
5 A. Yes. So I think they will benefit in
6 a number of circumstances. One would be if,
7 even though some of the authors' books are out
8 of print and some of the books -- if in
9 circumstances where some of the authors' books
10 are out of print and other of the authors' books
11 are in print, consumers may, you know, if they
12 discover a book they're interested in via Google
13 Books, that might lead them to other books by
14 those authors.
15 It may lead them to other books on
16 the same topic, probably benefitting different
17 authors. But I think also, there are some
18 mechanisms and those mechanisms, I think, are
19 becoming more relevant in the marketplace, where
20 if consumers, say, buy used books on Amazon and,
21 you know, there are used books on Amazon that
22 are selling for very high prices because there's
23 a demand for the book to come back into print.
24 There may be circumstances in which, 
25 you know, a book could be driven back into print

1 J.A. Chevalier - CONFIDENTIAL
2 by consumer demand.
3 Q. That's true whether there is or isn't
4 Google Books; isn't it?
5 A. That's true whether there is or there
6 isn't Google Books, but it's my testimony that
7 Google Books helps drive consumer demand for
8 books.
9 Q. So if consumers are buying used books
10 on Amazon, that helps drive consumer books for
11 new books by those authors?
12 A. I'm saying that -- I said, I think,
13 two distinct things. The consumer may look for
14 other books by the same author.
15 And, you know, when consumers buy
16 used books on Amazon, when used books, you know,
17 when it becomes apparent that there's a lot of
18 demand for a used book, that may assist in
19 bringing the book back into print.
20 Q. How does the author know if there's a
21 lot of demand for a used book on Amazon?
22 A. Well, for example, the price at which
23 the book is selling in the Amazon Marketplace,
24 reflects the, reflects the supply and demand of
25 the book.

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33 (Pages 126 - 129)
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1 J.A. Chevalier - CONFIDENTIAL
2 you know, look over the course of some period of
3 time, you would observe, you would observe -- I
4 don't know that it directly provides data on
5 sales.
6 But, you know, if you were to look
7 over time, you would see that, you know, sellers
8 who have posted a book at a particular price
9 have, you know, moved to those books off, which
10 would lead an author to infer that they've been
11 bought.
12 Q. Or taken down by the seller?
13 A. I suppose that's possible. But since
14 the purpose of the seller is to sell books, and
15 it doesn't really cost them anything to keep the
16 books on Amazon Marketplace, unless the seller
17 had some other desire to have the book or sell
18 it off-line or some other place, which is
19 selling the book, I think it's reasonable to
20 infer that, you know, a book, if your book, you
21 know, that books that are removed from Amazon
22 Marketplace were being sold.
23 Q. Have you ever looked at any data from
24 Amazon about that?
25 A. So I don't have data from Amazon

1 J.A. Chevalier - CONFIDENTIAL
2 available to me about that. I've used data from
3 Amazon Marketplace for books, but not for the
4 purpose that you have just asked.
5 Q. You have some data -- or I shouldn't
6 say data -- discussion in here about
7 advertising; is that right?
8 A. Yes.
9 Q. So you're analogizing Google Books to
10 advertising?
11 MR. McGOWAN: I just ask for a
12 reference to where you're reading.
13 MS. ZACK: I'm sorry, it's basically
14 throughout in different places, but an
15 example is on page 9, paragraph 28.
16 MR. McGOWAN: Thank you.
17 A. So I am saying that Google Books
18 serves a function like advertising. And that it
19 informs the consumer about the existence of
20 books.
21 Q. When companies decide to advertise
22 products, they do choose where to advertise
23 them; don't they?
24 A. So when companies purchase
25 advertising, they choose where to purchase the

1 J.A. Chevalier - CONFIDENTIAL
2 advertising.
3 Q. Right, and that choice of where to
4 place an ad can be quite important; right?
5 A. So, yes, I think firms' decisions
6 about where to place ads are important.
7 Q. There are sometimes places where
8 firms don't want ads; right?
9 MR. McGOWAN: Objection, foundation.
10 You may answer.
11 A. I understand there are circumstances
12 where, you know, a firm would not want to
13 advertise, say, in a venue that's a mismatch for
14 the firm's message or product.
15 Q. In paragraph 34 on page 10, you say
16 "I understand that it is Mr. Harris's view that
17 the excerpts were snippets provided by Google
18 Books in response to a user's search bear a
19 resemblance to these mechanisms that consumers
20 may use to "find" a book."
21 A. Yes.
22 Q. Find is in quotes.
23 So there you use the term Google
24 Books, but again, there are two parts to it, the
25 Partner Program and the Library Project; right?

34 (Pages 130 - 133)
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35 (Pages 134 - 137)

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1 J.A. Chevalier - CONFIDENTIAL
2 would help me to measure empirically whether,
3 whether more book sales take place as a result
4 of the existence of the Google Partner Program.
5 So there's a number of just --
6 there's a number sites in the record and
7 referenced in my report, but I didn't undertake
8 an empirical analysis.
9 Q. That's because you don't think that
10 would be possible or --
11 A. I don't have access -- I don't
12 believe, I don't believe it would be possible to
13 measure the effect of Google Books on the sales
14 of books.
15 Q. In paragraph -- I'm sorry, page 11,
16 paragraph 36, you state in the second sentence,
17 "That is, there is market-based evidence that
18 market participants - authors and publishers -
19 see value in Google Books, so much so that
20 through the Partner Program, they have opted to
21 have even larger excerpts than snippets
22 available for consumers to read."
23 A. Correct.
24 Q. In the Partner Program, you are aware
25 that the partners can have control over how

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2 large the excerpt is that is viewed; right?
3 A. I understand that, yes.
4 Q. There is no snippet view in the
5 Partner Program?
6 A. As though I understand that the
7 entire book is searched, as it is in the Google,
8 in the library program.
9 Q. The entire book is searched, and then
10 what happened?
11 A. So my understanding is that the
12 entire -- so if you type in the word guitar, the
13 entire book is searched for the word guitar.
14 But the partner controls the
15 percentage of the book that, that the user's
16 able to see.
17 Q. So if a book in the Partner Program
18 includes the word guitar, but if that word
19 itself is not in the excerpt that the partner
20 has permitted to be viewed, what happens?
21 A. So I would, my understanding is that,
22 my understanding is that the -- my understanding
23 is that the partner chooses the percentage of
24 the book that can be seen, provides the book for
25 scanning.

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2 I guess I don't know exactly what
3 happens, if it is actually feasible that -- I
4 know the whole book is searched.
5 I'm exactly sure what happens if the
6 partner can block specific pages or simply
7 determines the percentage of the book that can
8 be seen. I would have to double-check on that.
9 Q. Isn't it your understanding that the
10 amount of pages that can be seen in the Partner
11 Program is fixed to certain pages?
12 MR. McGOWAN: Objection. Asked and
13 answered.
14 A. Yes, so I said I understand that the
15 fraction of the book that the user will be able
16 to browse is, is controlled by the partner in
17 the Partner Program.
18 But I do not precisely know the
19 implementation of it and, therefore, the exact
20 answer to your question.
21 Q. Does that have any bearing on your
22 report, the answer to that question?
23 A. No, the statement I make in the
24 report, the statements I make in the report are
25 still, don't, don't bear on that distinction.
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1. J.A. Chevalier - CONFIDENTIAL
2. assumed that that litigation was ended to the
3. publishers' satisfaction, but I don't know
4. anything more about it.
5. Q. You haven't asked Google about that?
6. A. No.
7. Q. Where did you gain the information or
8. assumption that the publishers' case is closed?
9. A. They are not -- I haven't read
10. anything about the publishers' case and, you
11. know, they are not a party to this, to this
12. litigation.
13. Q. So from that, you assume their case
14. was closed?
15. A. I assume their case was closed.
16. Q. You don't know on what terms?
17. A. I do not.
18. Q. Is that relevant to you?
19. A. No.
20. Q. Well, you're talking here about the
21. publishers seem to be pleased with Google;
22. correct?
23. A. I believe what I've said is that the
24. publishers have found Google Books, the Partner
25. Program, to be a program that they

1. J.A. Chevalier - CONFIDENTIAL
2. overwhelmingly want to participate in.
3. Q. Have you ever found evidence that the
4. Google Library Project is a program that the
5. publishers want to participate in?
6. MR. McGOWAN: Objection, vague.
7. You may answer.
8. A. So since the Google library project
9. is housed under the same search engine and
10. integrates search with the Google Partner
11. Program, I believe the way that a publisher
12. expresses an interest in -- you know, the
13. publisher doesn't have to do anything to have
15. If the publisher doesn't want its
16. book available in snippet view, it can tell
17. Google to remove the books.
18. If the publisher wasn't more than
19. snippets view, it joins the Partner Program.
20. So the fact that publishers have
21. joined the Partner Program, means that the
22. publishers have chosen to have a larger fraction
23. of the book viewable than would take place under
24. the Library Program.
25. Q. That's what you believe happens when

1. J.A. Chevalier - CONFIDENTIAL
2. the publishers enter the Partner Program, that
3. they have a larger portion of the book available
4. for view?
5. A. So the snippet -- instead of the
6. three line snippets, what's returned in the
7. Partner Program is, in general, a larger
8. fraction of a, a larger readable chunk.
9. Q. But it's a fixed chunk chosen by the
10. publisher; correct?
11. MR. McGOWAN: Objection.
12. A. So as I said before, my understanding
13. is that the publisher chooses the fraction of
14. the book that's viewable to the consumer.
15. Q. Have you talked to any publishers
16. about this matter?
17. A. I have not talked to any publishers
18. about this matter, except Mr. Harris, who is a
19. publishing strategist and former publisher.
20. Q. Have you talked to anyone at Random
21. House about this?
22. A. I have not talked to anyone at Random
23. House about this, though, of course, Mr. Harris
24. is formerly of Random House.
25. Q. Did you look at the settlement that

37 (Pages 142 - 145)
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<td>2 house is knocked down, and there's a check for a</td>
<td>2 item being searched.</td>
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<td>3 million dollars, how does that fit into your</td>
<td>3 Q. You've also said it's a benefit to</td>
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<td>4 economic theory?</td>
<td>4 the authors?</td>
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<td>5 MR. McGOWAN: Objection, incomplete</td>
<td>5 A. I have said it's a benefit to the</td>
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<td>6 hypothetical.</td>
<td>6 authors.</td>
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<td>7 You may answer.</td>
<td>7 Q. Have you done any analysis about how</td>
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<td>8 Q. I've benefited?</td>
<td>8 quickly, over time, new books were added to the</td>
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<tr>
<td>9 A. Well --</td>
<td>9 Partner Program?</td>
</tr>
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<td>10 MR. McGOWAN: Objection,</td>
<td>10 A. I have not done an analysis of how</td>
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<tr>
<td>11 argumentative. I'd like to proceed one</td>
<td>11 quickly, over time, new books were added to the</td>
</tr>
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<td>12 question at a time, please.</td>
<td>12 Partner Program.</td>
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<td>13 MS. ZACK: Certainly. I'll withdraw</td>
<td>13 Q. You have some footnotes on the bottom</td>
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<tr>
<td>14 the last question.</td>
<td>14 of page 11, and these all refer -- well, not --</td>
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<td>15 A. So I am not a lawyer, but my</td>
<td>15 I will take them one by one.</td>
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<td>16 understanding is that while there are very few</td>
<td>16 The footnote 44, U.S. top 15</td>
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<td>17 limitations to your rights, as an owner of the</td>
<td>17 publisher sales data, that's for in-print books;</td>
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<tr>
<td>18 house, though, of course, you know, the</td>
<td>18 right?</td>
</tr>
<tr>
<td>19 government could declare your house, you know,</td>
<td>19 A. Yes.</td>
</tr>
<tr>
<td>20 knock it down.</td>
<td>20 Q. Footnote 45 talks about the Partner</td>
</tr>
<tr>
<td>21 But, you know, there are very few</td>
<td>21 Program. That's about in-print books; right?</td>
</tr>
<tr>
<td>22 limitations to what your ownership rights mean</td>
<td>22 A. I would -- I would imagine that,</td>
</tr>
<tr>
<td>23 as an owner of a house.</td>
<td>23 largely, the Partner Program is about in-print</td>
</tr>
<tr>
<td>24 There are, indeed, limitations to the</td>
<td>24 books.</td>
</tr>
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<td>25 rights of a copyright holder. And my</td>
<td>25 Though, I believe you can be a member</td>
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<td>2 understanding, though I'm not a lawyer and</td>
<td>2 in the Partner Program. I think there could be</td>
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<td>3 cannot express an opinion about exactly how my</td>
<td>3 examples of not-in-print Books that are</td>
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<td>4 economic analysis, you know, fits with you</td>
<td>4 publishers, who are members of the Partner</td>
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<td>5 know, the case law, my understanding is, as a</td>
<td>5 Program.</td>
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<td>6 copyright holder, there are limitations to the</td>
<td>6 So, for example, if they do, if</td>
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<td>7 copyright holder's rights, in that whether a</td>
<td>7 there's a link to a, there's a print-on-demand</td>
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<td>8 usage of the copyright holder's works</td>
<td>8 feature, such a thing.</td>
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<tr>
<td>9 economically harms or benefits the copyright</td>
<td>9 I believe it's not necessarily the</td>
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<td>10 holder, is a relevant factor in a way in which</td>
<td>10 case that a member of the Partner Program is</td>
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<td>11 it may not be for your house.</td>
<td>11 providing in-print books.</td>
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<td>12 Q. So your analysis is assuming that</td>
<td>12 Q. You don't consider a print-on-demand</td>
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<td>13 what Google does is a fair use?</td>
<td>13 book to be in print?</td>
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<td>14 MR. McGOWAN: Objection, misstates.</td>
<td>14 A. I don't know if a book that can be</td>
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<td>15 You may answer.</td>
<td>15 printed on demand, would count as in print from</td>
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<td>16 A. My analysis is neither assuming, nor</td>
<td>16 the perspective of the contract between the</td>
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<td>17 expressing an opinion about what Google does.</td>
<td>17 publisher and the author, in all circumstances.</td>
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<td>18 It's about what whether Google does is a fair</td>
<td>18 I simply cannot say that all of the</td>
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<td>19 use.</td>
<td>19 books, that all of the publishers in the Partner</td>
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<td>20 My analysis is simply stating that</td>
<td>20 Program, that a hundred percent of what they've</td>
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<td>21 the usage of the copyrighted works for the</td>
<td>21 put in the Partner Program is an in-print book.</td>
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<td>22 production of Google Books, is a complement,</td>
<td>22 Q. Let's use the term commercially</td>
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<td>23 rather than a substitute for the sale of the</td>
<td>23 available, instead of in print, to eliminate</td>
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<td>24 book.</td>
<td>24 that ambiguity.</td>
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<td>25 So the search is a complement to the</td>
<td>25 Do you have any information that</td>
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<td>2 Books that are not commercially available, are</td>
<td>2 function is assisting individuals find</td>
<td>2 function is assisting individuals find</td>
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<td>available in the Partner Program?</td>
<td>3 marketing. I do not know whether he represents</td>
<td>3 marketing. I do not know whether he represents</td>
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<td>4 A. Well, so I believe that, so my -- I</td>
<td>4 any out-of-print books.</td>
<td>4 any out-of-print books.</td>
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<td>5 think, in general, the books in the Partner</td>
<td>5 Q. What about Mr. Zohn and his company</td>
<td>5 Q. What about Mr. Zohn and his company</td>
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<td>6 Program will be commercially available.</td>
<td>6 William Morris, do you know if they represent</td>
<td>6 William Morris, do you know if they represent</td>
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<td>7 I believe it to be the case, though</td>
<td>7 out-of-print books?</td>
<td>7 out-of-print books?</td>
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<td>8 I'm not certain that there may be</td>
<td>8 MR. McGOWAN: Objection, vague.</td>
<td>8 MR. McGOWAN: Objection, vague.</td>
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<td>9 print-on-demand books or printable books in the</td>
<td>9 Maybe you didn't mean authors.</td>
<td>9 Maybe you didn't mean authors.</td>
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<td>10 Partner Program that are, that you don't, that</td>
<td>10 MS. ZACK: Books of authors.</td>
<td>10 MS. ZACK: Books of authors.</td>
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<td>11 are in copyright, but you don't -- but the</td>
<td>11 Q. They represent authors. Do they</td>
<td>11 Q. They represent authors. Do they</td>
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<td>12 publisher has decided to make them available</td>
<td>12 represent authors with respect to books that are</td>
<td>12 represent authors with respect to books that are</td>
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<td>13 without pay. I believe such things exist in the</td>
<td>13 out of print?</td>
<td>13 out of print?</td>
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<td>14 Partner Program.</td>
<td>14 A. They represent authors. I do not</td>
<td>14 A. They represent authors. I do not</td>
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<td>15 Q. That's based on?</td>
<td>15 know for a fact whether or not those authors</td>
<td>15 know for a fact whether or not those authors</td>
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<td>16 A. So the reason I am hesitant, I -- so</td>
<td>16 have out-of-print books.</td>
<td>16 have out-of-print books.</td>
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<td>17 for example, I have a number of works that</td>
<td>17 Q. Referring to page 13 of your report.</td>
<td>17 Q. Referring to page 13 of your report.</td>
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<tr>
<td>18 appear when you search me in Google Books, and</td>
<td>18 I guess -- sorry, it carries over from page 12.</td>
<td>18 I guess -- sorry, it carries over from page 12.</td>
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<td>19 those are National Bureau of Economic Research</td>
<td>19 Paragraph 43, talks about iUniverse</td>
<td>19 Paragraph 43, talks about iUniverse</td>
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<td>20 working papers.</td>
<td>20 back in print.</td>
<td>20 back in print.</td>
</tr>
<tr>
<td>21 And those works are in copyright, and</td>
<td>21 Did you look at any other</td>
<td>21 Did you look at any other</td>
</tr>
<tr>
<td>22 I believe the National -- I believe, though I</td>
<td>22 back-in-print programs other than iUniverse?</td>
<td>22 back-in-print programs other than iUniverse?</td>
</tr>
<tr>
<td>23 have not checked, that the National Bureau of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>24 Economic Research just let's you print them,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>25 since their primarily goal is dissemination. I</td>
<td></td>
<td></td>
</tr>
<tr>
<td>26</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 J.A. Chevalier - CONFIDENTIAL</td>
<td>2 A. Yes, my understanding is that</td>
<td>2 A. Yes, my understanding is that</td>
</tr>
<tr>
<td>2 would have to double check that.</td>
<td>3 back-in-print program makes, allows, yeah, makes</td>
<td>3 back-in-print program makes, allows, yeah, makes</td>
</tr>
<tr>
<td>3 Q. Do you know if they're in through the</td>
<td>4 books available for sale that were out of print,</td>
<td>4 books available for sale that were out of print,</td>
</tr>
<tr>
<td>4 Partner Program?</td>
<td>5 yeah.</td>
<td>5 yeah.</td>
</tr>
<tr>
<td>5 A. I think so. They're in copyright,</td>
<td>6 Q. Pursuant to contracts with copyright</td>
<td>6 Q. Pursuant to contracts with copyright</td>
</tr>
<tr>
<td>6 and I believe the full text appears.</td>
<td>7 holders; correct?</td>
<td>7 holders; correct?</td>
</tr>
<tr>
<td>7 Q. So you think so, but you're not sure?</td>
<td>8 A. Yes, authors must choose to be part</td>
<td>8 A. Yes, authors must choose to be part</td>
</tr>
<tr>
<td>8 A. I think so, but I'm not sure. I</td>
<td>9 of the program.</td>
<td>9 of the program.</td>
</tr>
<tr>
<td>9 would be hesitant to, therefore, say</td>
<td>10 Q. Right, authors who have the right to,</td>
<td>10 Q. Right, authors who have the right to,</td>
</tr>
<tr>
<td>10 categorically that all books in the Partner</td>
<td>11 as a copyright owner, right?</td>
<td>11 as a copyright owner, right?</td>
</tr>
<tr>
<td>11 Program are commercially available.</td>
<td>12 A. Correct.</td>
<td>12 A. Correct.</td>
</tr>
<tr>
<td>12 Q. Would you say that the vast majority</td>
<td>13 Q. The contract provides for royalties;</td>
<td>13 Q. The contract provides for royalties;</td>
</tr>
<tr>
<td>13 are?</td>
<td>14 correct?</td>
<td>14 correct?</td>
</tr>
<tr>
<td>14 MR. McGOWAN: Objection, vague.</td>
<td>15 A. My understanding is that if consumers</td>
<td>15 A. My understanding is that if consumers</td>
</tr>
<tr>
<td>15 You may answer.</td>
<td>16 buy books from iUniverse, yes, the author gets</td>
<td>16 buy books from iUniverse, yes, the author gets</td>
</tr>
<tr>
<td>16 A. I would, I would I assume that the</td>
<td>17 royalties.</td>
<td>17 royalties.</td>
</tr>
<tr>
<td>17 majority of the books in the Partner Program are</td>
<td>18 Q. Part of that is authors can then</td>
<td>18 Q. Part of that is authors can then</td>
</tr>
<tr>
<td>18 commercially available.</td>
<td>19 permit portions of their book to be viewed in</td>
<td>19 permit portions of their book to be viewed in</td>
</tr>
<tr>
<td>19 Q. In footnote 47, you talk about</td>
<td>20 order to spur sales; correct?</td>
<td>20 order to spur sales; correct?</td>
</tr>
<tr>
<td>20 Richard Lowry's book, The Gulf War Chronicles,</td>
<td>21 A. Authors can choose to have parts of</td>
<td>21 A. Authors can choose to have parts of</td>
</tr>
<tr>
<td>21 and that's an in-print book; right?</td>
<td>22 their book browsable, so that, in order to</td>
<td>22 their book browsable, so that, in order to</td>
</tr>
<tr>
<td>22 A. Yes, I believe so.</td>
<td>23 encourage sales.</td>
<td>23 encourage sales.</td>
</tr>
<tr>
<td>23 Q. Do you know whether Mr. Harris</td>
<td>24 Q. If there is a sale, iUniverse</td>
<td>24 Q. If there is a sale, iUniverse</td>
</tr>
<tr>
<td>24 represents any out-of-print books?</td>
<td>25 provides a royalty to the author; correct?</td>
<td>25 provides a royalty to the author; correct?</td>
</tr>
</tbody>
</table>
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1 J.A. Chevalier - CONFIDENTIAL
2 MR. MCGOWAN: Objection, form.
3 You may answer.
4 A. My understanding is that if there's a
5 sale, iUniverse provides a royalty to the
6 author.
7 Q. Referring you to paragraph 46, you
8 say, "A related benefit of the search capability
9 of Google Books is its ability to increase
10 interest in and sales of books that may be
11 relatively unknown, rare, or out-of-print.
12 Research on the effect of the Internet supports
13 the theory of a "long tail" or the creation of
14 marketplaces where buyers and sellers, who
15 otherwise would not find each other, can meet."
16 And you say, "I expect that Google
17 Books has the same effect."
18 Do you have any empirical evidence to
19 back that up?
20 A. So empirical evidence to back up that
21 consumers can find books through Google Books or
22 empirical evidence that they, that they will buy
23 used books, that they have bought used books as
24 an outcome of that?
25 I do not have any -- I have not done

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2 any empirical analysis of the sales of books
3 that were on Google Books.
4 Q. Can you provide me an example where
5 there's been a marketplace created where a
6 particular buyer and a particular seller found
7 each other after using Google Books concerning
8 an out-of-print book?
9 MR. MCGOWAN: Object to form.
10 You may answer.
11 A. No, I don't have any data about that.
12 MR. MCGOWAN: I will note for the
13 record, I think a fire alarm went off.
14 Off the record.
15 (Discussion off the record.)
16 Q. Paragraph 47 on page 14, you say,
17 "While I do find substantial evidence that
18 Google Books is a complement to the purchase of
19 a book and thus, should stimulate book sales, I
20 have not found evidence that Google Books
21 searches are a substitute for the purchase of
22 books."
23 So where did you look for the
24 evidence?
25 A. So I think the resources are in the

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2 record. So, you know, first, for example, in
3 the depositions of the named plaintiffs, they do
4 not cite any evidence that Google Books is a
5 substitute for the purchase of the book, that
6 using Google Books as a substitute for the
7 purchase of the books.
8 Mr. Aiken, in his deposition, says
9 that it is his belief, and he's an expert in the
10 industry, that Google Books, the Google Book
11 search function on net is a compliment to the
12 sale of the books.
13 And the, I might add, you know, the
14 various, of course, these aren't a random
15 sample, but I don't know where I would obtain
16 one, the, you know, testimonials that I cite
17 from the Google Books website, describe authors,
18 you know, have discussions of authors who view
19 the Google Books project as a complement to the
20 sale of their books.
21 So I'm, I haven't seen anything in
22 the record, provided by the plaintiffs, to
23 suggest that the snippets provided by Google
24 Books are substitutes for the sale of the book.
25 Q. Well, the -- you referred to author

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41 (Pages 158 - 161)
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1 J.A. Chevalier - CONFIDENTIAL
2 impossible project, nonetheless.
3 But, for example, if one had, you
4 know, access to Amazon data, there may be things
5 that one could do.
6 Q. Any other data that you can think of?
7 A. I think similarly, if you had access
8 to, you know -- well, I think Amazon data would
9 be probably the primary or best source, but
10 there could be other, you know, other book
11 sellers' data.
12 Q. You don't have access to that because
13 it hasn't been provided to you by Google or any
14 compound.
15 You may answer.
16 A. So, I don't have access to Amazon's
17 proprietary data.
18 Q. Referring you to paragraph 48, you
19 say, "A related question to the one discussed
20 above is whether, in the absence of Google
21 Books, a market might have arisen in which
22 authors stood to benefit in ways they do not
23 currently."

1 J.A. Chevalier - CONFIDENTIAL
2 Did you consider any markets for
3 collective licensing for digitization of books?
4 MR. MCGOWAN: Objection, foundation.
5 You may answer.
6 A. So as I discuss in the report, I
7 considered, I considered markets for licensing
8 of -- I observed that authors have been paid in
9 situations in which books were digitized for the
10 purpose of allowing, using, displaying to users
11 the full text of the book, but I have not seen
12 an example where firms pay authors for the right
13 to scan and index their work.
14 Q. There is, albeit, as you have said, a
15 small amount of revenue, but there is a revenue
16 component to the Partner Program; correct?
17 A. There is a revenue component to the
18 Partner Program.
19 Q. Have you looked at other collective
20 licenses for other copyrighted content --
21 MR. MCGOWAN: Objection, foundation.
22 Q. -- to determine how those collective
23 licenses operate?
24 A. So can you be more specific?
25 Q. Did you do any research concerning

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1 J.A. Chevalier - CONFIDENTIAL
2 A. The library pays for the index.
3 Q. Have you heard of Marc Indexing for
4 libraries?
5 A. I have heard of that.
6 Q. Do you know whether or not libraries
7 pay for that?
8 A. My understanding is that libraries
9 pay for that.
10 Q. In the area of music, would you
11 consider a ring tone to be analogous to a
12 snippet?
13 MR. McGOWAN: Objection, vague.
14 A. You may answer.
15 Q. No, I wouldn't consider a ring tone
16 to be analogous to a snippet.
17 Q. Why not? I meant a snippet from a
18 book.
19 A. Yes, I think a ring tone is a --
20 well, I have not analyzed the market for ring
21 tones, but I would say that snippet is a de
22 minimis fraction of the total book, and that a
23 ring tone is not.
24 Q. On what basis do you say that one is
25 de minimis and one isn't?

1 J.A. Chevalier - CONFIDENTIAL
2 A. The snippet is, given the number of
3 snippets that are displayed for a user, the
4 snippet is a small fraction of the total book.
5 And I have not studied the market for
6 ring tones, but, you know, I have heard ring
7 tones, and ring tones are recognizable chunks of
8 a song.
9 Q. Do you know whether there's a market
10 for licenses for ring tones?
11 A. I believe there is a market for
12 licenses for ring tones.
13 Q. Where do you have that information --
14 what is the basis for that belief?
15 A. I believe that I have read in the,
16 you know, press that there's a market for ring
17 tones. But I don't know much about it.
18 MR. McGOWAN: If you wouldn't mind
19 taking a very short break when you're done
20 with this line, that would be useful.
21 MS. ZACK: Sure. Let me just see
22 where I am. We can take a break now, if you
23 want.
24 (Brief recess taken.)
25 FURTHER EXAMINATION

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Page 167

Page 168

Page 169

1 J.A. Chevalier - CONFIDENTIAL
2 Q. Back to page 14.
3 A. Okay.
4 Q. In paragraph 49 you state, "The
5 underlying premise of any hypothetical market
6 runs counter to the basic economics of this
7 industry outlined above - there is no reason to
8 expect that a market would arise between
9 copyright holders (as sellers) and Google (as
10 the buyer), when, as discussed above, it is the
11 copyright holder who is benefitting from the use
12 of the copyrighted material."
13 A. Are you taking the position that
14 Google does not benefit from the use of the
15 copyrighted material?
17 A. No, so Google clearly uses the
18 copyrighted material as an input to its product.
19 Just as, you know, other indexers who sell
20 indexes, use the material as an input to their
21 products.
22 So, and then they sell that product
23 or in Google's case, advertise around that
24 product. So I'm not taking the position that
25 Google does not benefit.

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1 J.A. Chevalier - CONFIDENTIAL
2 copyrighted material, if it was determined that
3 they could not use it under the Copyright Act
4 without a license?
5 MR. McGOWAN: Vague.
6 You may answer.
7 Q. Okay, so as I said before, I have not
8 entered into conversations with executives at
9 Google.
10 Q. You don't really have a full
11 understanding of how Google benefits from the
12 use of the copyrighted materials; do you?
13 MR. McGOWAN: Objection, vague.
14 You may answer. Foundation.
15 You may answer.
16 A. I understand the types of ways in
17 which Google benefits from the use of the
18 copyrighted materials, but I don't -- I can't
19 add up the benefit to Google of the use of the
20 copyrighted materials.
21 Q. Well, you haven't, you don't fully
22 understand how they use all the materials that
23 they accumulate in their search engine to
24 benefit their business; right?
25 MR. McGOWAN: Objection, vague.

1 J.A. Chevalier - CONFIDENTIAL
2 You may answer.
3 A. So I do not know all of the -- I do
4 not all -- I cannot catalog all of the benefits
5 to Google of their, of providing the search
6 functionality.
7 Q. Have you looked at their public
8 documents?
9 A. I've looked at a number of Google
10 public documents.
11 Q. Have you looked at their 10-K?
12 A. I have not looked at their 10-K's
13 pursuant to this matter.
14 Q. Have you looked at any of their
15 earning statements?
16 A. I have not looked at their earning
17 statements pursuant to this matter.
18 Q. So your statement that there is no
19 reason to expect that a market would arise
20 between the copyright holders and Google because
21 the copyright holders benefit, discounts the
22 fact that Google also benefits?
23 MR. McGOWAN: Objection, vague.
24 You may answer.
25 A. So as I describe in the report, my

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44 (Pages 170 - 173)
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1 J.A. Chevalier - CONFIDENTIAL
2 engines or anywhere?
3 A. I'm talking about in general.
4 Q. Are you familiar with the market for
5 permissions for display of portions of books in
6 other copyrighted books and other matter?
7 MR. McGOWAN: Objection, foundation,
8 vague.
9 You may answer.
10 A. Sorry, can you be more specific?
11 Q. Sure. Are you familiar at all with
12 the concept that if excerpts are used from one
13 book, copyrighted book, and either another book
14 or television or something like that, that
15 permission fees are paid?
16 MR. McGOWAN: Objection, foundation.
17 You may answer.
18 A. So, for example, so I haven't studied
19 that.
20 Q. Were you aware that that market
21 existed?
22 MR. McGOWAN: Objection, foundation.
23 You can answer.
24 A. I think it depends on the extent of
25 the market. So, for example, I know that

1 J.A. Chevalier - CONFIDENTIAL
2 MR. McGOWAN: Objection. Incomplete
3 hypothetical.
4 You may answer.
5 A. Would my opinion about what change?
6 Q. You said it was de minimis?
7 A. So if -- I said it was de minimus for
8 what purpose. So would my opinion about what
9 section of my report change, if snippets were
10 more than three lines?
11 Q. Any section of your report.
12 A. So if a snippet were 10 lines, I
13 don't think there's any section of my report
14 where my conclusions would change.
15 Q. Is there some amount of lines where
16 you can pick -- conclusions would change?
17 A. As I've said in my report, I know
18 that the amount of text that Google displays,
19 under the Library Program, is smaller than the
20 amount of text that appears to be chosen by
21 publishers and authors to display in standard
22 commercial use.
23 So to the extent that that's true, my
24 conclusions would remain the same.
25 Q. Do you think there's a market for

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45 (Pages 174 - 177)

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1 J.A. Chevalier - CONFIDENTIAL
2 Q. I'm asking you whether Google's
3 currently selling ebooks?
4 A. So okay --
5 Q. It could be a yes-or-no answer.
6 A. Okay, fine. All right, okay, I
7 wasn't sure what you were referring to.
8 Yes, my understanding is you can buy
9 ebooks through Google Play.
10 Q. You understand that libraries buy
11 ebooks too; right?
12 A. I understand that libraries sometimes
13 buy ebooks, yes.
14 Q. When Google digitized its books in
15 the Library Program, it didn't pay the copyright
16 owners for that right; did it?
17 MR. MCGOWAN: Objection to the extent
18 it calls for a legal conclusion.
19 You may answer.
20 A. So my understanding is that when
21 Google digitized books as part of the Library
22 Program, it did not pay authors or publishers
23 for the, for the scanning.
24 Q. I previously asked you about
25 collective licensing, and I asked you about the

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1 J.A. Chevalier - CONFIDENTIAL
2 CCC.
3 Are you aware of any other collective
4 licensing organizations? Are you familiar with
5 any?
6 A. Do you mean collective licenses
7 organizations for books?
8 Q. For copyrighted material.
9 A. So I have some familiarity, as you
10 know, as I said I've I disclosed some work for
11 SESAC, and I have some familiarity with
12 licensing of performance rights for music.
13 But music licensing is very
14 complicated, and I've only worked on narrow
15 portions of it. So I have some familiarity with
16 it, but --
17 Q. What about licensing for music
18 lyrics, as opposed to performance rights?
19 A. I'm not familiar with that market, if
20 it exists.
21 Q. In paragraph -- I'm sorry, footnote
22 63 on page 15?
23 A. Um-hmm, yes.
24 Q. You do talk about ASCAP and BMI?
25 A. I do.

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1 J.A. Chevalier - CONFIDENTIAL
2 Q. You say they "arose as a solution to
3 the problems of widely, disbursed rights holders
4 and widely disbursed music users."
5 A. Correct.
6 Q. With respect to Google Books, are
7 there widely disbursed rights holders?
8 A. There are widely disbursed rights
9 holders.
10 Q. Are there widely disbursed users of
11 Google Books?
12 A. So here I'm referring to the entity
13 that -- not the end user, but the entity that
14 would, that is making use of the license.
15 And so in the music case, the music
16 users were widely disbursed. But in the Google
17 Books case, Google Books is a single entity.
18 It's not widely disbursed.
19 Q. So here you are saying the music
20 users are like restaurants, etcetera?
21 A. Correct.
22 Q. This is all about performance rights?
23 A. This discussion is about performance
24 rights.
25 MS. ZACK: Let's mark as the next

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1 J.A. Chevalier - CONFIDENTIAL
2 exhibit, a series of pages from the Internet
3 concerning the acquisition by Google of
4 Rightsflow.
5 (Defendant's Exhibit 97, a series of
6 pages from the Internet concerning the
7 acquisition by Google of Rightsflow,
8 marked for identification, as of this
9 date.)
10 Q. Are you familiar with Rightsflow?
11 A. No.
12 Q. Or Google's acquisition of this
13 collective licensing company?
14 A. No.
15 Q. If you look at the second page of
16 this document, it says -- the second page,
17 second paragraph, "The acquisition gives
18 video-sharing service YouTube access to
19 technology to help it manage its relationship
20 with one of the most fragmented and unwieldy
21 parts of the music industry: Music publishing.
22 Music publishing concerns the copyrights on
23 songs' lyrics and melodies, as distinct from a
24 particular recording of a given song."
25 Do you see that?
<table>
<thead>
<tr>
<th>Q.</th>
<th>Answer.</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.</td>
<td>So you were not aware, prior to now, that there was a -- there is a collective licensing organization for copyrighted lyrics?</td>
</tr>
<tr>
<td>5.</td>
<td>A. So as I read this, it says, &quot;Music publishing concerns the copyrights on songs' lyrics and melodies, as distinct from a particular recording of a given song.&quot;</td>
</tr>
<tr>
<td>6.</td>
<td>My understanding is that, my understanding of your previous question was performance rights are also rights for -- that flow to the composer and lyricist of the song. Those are composer's rights. So I don't, I -- from what I read here, I don't know this to be different than what I described. It may be, but I don't know this to be different than what I described ASCAP and BMI to be.</td>
</tr>
<tr>
<td>7.</td>
<td>Q. Would you agree that the collective licensing has developed in response to changes in technology?</td>
</tr>
<tr>
<td>8.</td>
<td>MR. McGOWAN: Objection, vague.</td>
</tr>
<tr>
<td>9.</td>
<td>You may answer.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Q.</th>
<th>Answer.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>As I described in my report, the collective, the collective licensing that we observe in music -- well, this is, this is a new entity by which I don't know anything. But the description that I gave of the music rights organizations, that collective licensing process is a very old process.</td>
</tr>
<tr>
<td>2.</td>
<td>Q. When you say, &quot;very old,&quot; how old are you talking about?</td>
</tr>
<tr>
<td>3.</td>
<td>A. Well, I don't remember precisely, but my recollection is, you know, dates from Tin Pan Alley in the 1920's.</td>
</tr>
<tr>
<td>4.</td>
<td>Q. Do you have any information about whether or not different types of licenses have been developed as new technologies have come into existence?</td>
</tr>
<tr>
<td>5.</td>
<td>MR. McGOWAN: Objection, vague.</td>
</tr>
<tr>
<td>6.</td>
<td>You may answer.</td>
</tr>
<tr>
<td>7.</td>
<td>A. The performance license that I describe, I believe, incorporates new technologies, but I do not know about the development of new types of licenses. That may exist, but I haven't studied it.</td>
</tr>
<tr>
<td>8.</td>
<td>Q. So you don't know one way or the other?</td>
</tr>
</tbody>
</table>

47 (Pages 182 - 185)
1. J.A. Chevalier - CONFIDENTIAL
2. A. So as I describe in the report, as
3. I've discussed, locating rights holders is a
4. very, you know, as Dr. St. Clair reports,
5. locating rights holders is a very difficult and
6. costly process.
7. If you're referring to an
8. organization where book rights holders, you
9. know, provide, you know, register or provide
10. their books, I think there are already, I think
11. there are already mechanisms in the marketplace
12. for book rights holders who want to, you know,
13. who want to -- I don't, I think the problem is
14. the rights holders who cannot be found, largely
15. speaking, or the rights holders who, the orphan
16. works problem.
17. And the thing you're describing to me
18. does not solve the orphan works problem.
19. Sorry, I don't, I cannot, since I
20. can't tell you whose need would be met, it's
21. hard for me to tell you why it doesn't fill an
22. unmet need.
23. The product you describe, I can't, I
24. cannot figure out whose need would be met by
25. that product.

1. J.A. Chevalier - CONFIDENTIAL
2. Q. Well, what about the need of
3. copyright owners to obtain compensation for the
4. digitization of their books?
5. MR. McGOWAN: Objection, foundation.
6. You may answer.
7. A. So as I've said in the report, I
8. don't think, I don't think there are a body of,
9. for example, libraries or other entities, with
10. an interest in digitizing books, who are willing
11. to pay for licenses for less than the full text
12. of books.
13. And if this product helped those
14. libraries, let's say, find the copyright
15. holders, it might be valuable.
16. But if it, if it doesn't solve that
17. problem, I don't think it would be -- it wouldn't
18. meet an unmet need of a buyer.
19. Q. What if it, what if the collective
20. licensing organization created efficiencies for
21. entities like libraries and others who are
22. trying to get rights to use books?
23. A. So it may be the case that some
24. entities could create some efficiencies, but I
25. don't -- I think what I'm saying is I don't see

48 (Pages 186 - 189)
1 J.A. Chevalier - CONFIDENTIAL
2 performing, and that ASCAP and BMI served the
3 intermediary function of negotiating and
4 transacting with those disbursed rights holders.
5 Q. So you don't know the genesis of it
6 beyond what you said here?
7 A. I know that ASCAP and BMI are a
8 solution -- are a solution to the economic
9 problem of disbursed rights holders.
10 I don't know that much more about the
11 history than that. Sorry, disbursed rights
12 holders and disbursed users.
13 Q. Right, but there would be no problem
14 to solve from the perspective of the music
15 users, if they didn't have to pay for the use of
16 the music; right?
17 MR. McGOWAN: Objection, foundation,
18 calls for legal conclusion.
19 A. So my understanding is that, yes, the
20 users -- that the purpose of ASCAP and BMI, is
21 to track down the users and get them to pay.
22 Q. Because what they're using is
23 copyrighted music?
24 MR. McGOWAN: Same objections.
25 A. So my understanding is that the user
26 -- my understanding is that the users have to
27 pay because the performance rights are a right
28 that has, it has been determined by some, by a
29 court that users of music, in these
30 circumstances, have to pay.
31 But the full scope of when users of
32 music have to pay, etcetera, you know, is
33 factually fairly complicated.
34 Q. But you would agree that music users
35 wouldn't be paying unless they had to; right?
36 A. I am sure some music users would be
37 paying, you know, if they didn't have to.
38 But the point of ASCAP and BMI is to
39 make sure they all pay, to collect from them.
40 Q. So if it was determined that Google
41 could not display snippets without permission
42 under the copyright laws, are you expressing an
43 opinion about whether a market would or would
44 not develop for Google to pay for the use of the
45 materials necessary for them to produce the
46 snippets?
47 MR. McGOWAN: Objection, incomplete
48 hypothetical.
49 You may answer.

49 (Pages 190 - 193)
CERTIFICATE

STATE OF NEW YORK

COUNTY OF NEW YORK

I, NANCY SORENSEN, Notary Public within and for the State of New York, do hereby certify:

That JUDITH A. CHEVALIER, the witness whose deposition is hereinafter set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8TH day of JUNE, 2012.

______________________________

NANCY SORENSEN

ERRATA SHEET
VERITEXT REPORTING COMPANY
1250 BROADWAY
NEW YORK, NEW YORK 10001
800-362-2520
CASE: AUTHORS GUILD, ET AL. VS. GOOGLE, INC.
DEPOSITION DATE: JUNE 8, 2012
DEPONENT: JUDITH A. CHEVALIER
PAGE LINE(S) CHANGE REASON

JUDITH A. CHEVALIER

SUBSCRIBED AND SWORN TO BEFORE ME THIS ___ DAY OF __________, 20__.

______________________________

(NOTARY PUBLIC) MY COMMISSION EXPIRES: 50 (Pages 194 - 197)
## Errata Sheet

Name of Case: THE AUTHORS GUILD, et al. v. GOOGLE, INC.  
Date of Deposition: June 8, 2012  
Name of Deponent: Professor Judith A. Chevalier

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Confidential

Judith A. Chevalier
July 11, 2012
with rights holders. They may well abandon the project. I don’t know the answer to that.

MS. ZACK: I don’t have anymore questions.

(Time noted: 2:59 p.m.)

JUDITH A. CHEVALIER

Subscribed and sworn to before me this ___ day of ______________, 2012.

Notary Public
EXHIBIT 43
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., Associational Plaintiff, BETTY MILES, JOSEPH GOULDEN, and JIM BOUTON, on behalf of themselves and all other similarly situated, Plaintiffs,
v.
GOOGLE INC.,
Defendant.

DEFENDANT GOOGLE INC.’S RESPONSES AND OBJECTIONS TO PLAINTIFFS’ FIRST SET OF INTERROGATORIES
Pursuant to Federal Rule of Civil Procedure 26 and 33, Defendant Google Inc. ("Google"), by its attorneys, hereby responds and objects to Plaintiffs’ First Set of Interrogatories (the “Interrogatories”) dated March 14, 2012.

These responses are based on the information currently available to Google. Google reserves the right to amend, supplement or modify its responses and objections at any time in the event that it obtains additional or different information.

**GENERAL OBJECTIONS**

1. Google objects to the preface, instructions, and definitions to the Requests to the extent that they purport to impose obligations that exceed those imposed by the Federal Rules of Civil Procedure, relevant local rules, and applicable case law. In responding to these requests, Google has followed the applicable law and has ignored the improper preface, instructions, and definitions.

2. Google objects to the Requests in their entirety and to each request to the extent that the documents and information sought are protected from discovery by the attorney-client privilege, the work-product doctrine, or any other applicable privilege.

3. Google objects to each and every request to the extent that it seeks information that is confidential and/or proprietary information. To the extent not otherwise subject to objection, Google will provide such confidential information in accordance with the terms of the protective order entered in this case.

4. Google objects to Plaintiffs’ definition of “Google” as vague, ambiguous, unintelligible, and overly broad. For purposes of responding to these discovery requests, Google will interpret “Google” to mean Google, Inc. and/or its agents.
RESPONSES AND OBJECTIONS TO INTERROGATORIES

INTERROGATORY NO. 1:

Identify all factual and legal bases supporting Google’s defense that its digital copying in libraries of Books in their entirety is a fair use under 17 U.S.C. § 107, including without limitation all facts Google intends to rely on with respect to the four factors set forth in Section 107.

RESPONSE TO INTERROGATORY NO. 1:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory’s use of the term “digital copying in libraries of Books” is vague and ambiguous, and understands it to refer to Google’s digitization of Books from library collections. Google objects to this interrogatory to the extent it seeks more than “the claims and contentions” of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google’s digitization of Books from library collections is a fair use under 17 U.S.C. § 107. Specifically:

- The “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” weighs in favor of a finding of fair use.
  - The purpose and character of Google’s use is transformative, because it adds something new, with a further purpose or different character, and does not merely supersede the objects of the original.
    - The purpose of Google’s use is to assist users in identifying Books which may be of interest by creating a search engine by which the text of Books may be searched.
Google’s digitized copies do not serve as a substitute for Books, but rather are necessary to create Google’s book search engine, which is a new tool for finding books.

- The nature of Google’s use is at least partially noncommercial, because the use facilitates access to the collections of libraries, enables research and scholarship, and does not directly generate revenue for Google.

- The “nature of the copyrighted work” weighs in favor of a finding of fair use.
  - All of the Books at issue have been published.
  - Some of the Books at issue are factual in nature, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
  - Some of the Books at issue are less factual in nature, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
  - Some of the Books at issue are out of print, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
  - Some of the Books at issue are in print, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.

- The “amount and substantiality of the portion used in relation to the copyrighted work as a whole” weighs in favor of a finding of fair use.
  - Because the use is transformative, and the use of the whole is necessary to the transformative purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified, the digitization of the entire work does not militate against a finding of fair use.
The “effect of the use upon the potential market for or value of the copyrighted work” weighs in favor of a finding of fair use.

- A search engine is not a market substitute for a book.
- The effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified.
- There is no market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified.
- The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is not a traditional market.
- The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is not a reasonable market.
- The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is not a market which is likely to be developed.
- The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is a transformative market, and is thus not cognizable.

Balanced in light of the purposes of copyright, the four factors favor fair use.

- Each factor either favors fair use or is neutral.
o A finding of fair use promotes the purpose of copyright, which is to promote the
dissemination of knowledge by granting limited exclusive rights to authors.
Google’s use promotes the dissemination of knowledge, by assisting users in
identifying books which may be of interest, while not serving as a substitute for
the Books themselves.

In addition, Google’s use is fair because it is necessary to the fair use purpose set forth in
Google’s response to Interrogatory No. 3. Google reserves the right to make different or
additional contentions for the purpose of rebutting Plaintiffs’ contentions. Pursuant to the
agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs
require additional details regarding the contentions identified herein.

INTERROGATORY NO. 2:

Identify all factual and legal bases supporting Google’s defense that its distribution to
libraries of entire digital copies of Books is a fair use under 17 U.S.C. § 107, including without
limitation all facts Google intends to rely on with respect to the four factors set forth in Section
107.

RESPONSE TO INTERROGATORY NO. 2:

Google objects to this interrogatory to the extent it calls for attorney-client privileged
information, attorney work product, or information protected by any other privilege or immunity.
Google objects to this interrogatory to the extent it seeks more than “the claims and contentions”
of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these
objections, Google responds as follows:

Google does not distribute entire digital copies of Books to libraries. Rather, Google
makes available to libraries an automated system, called GRIN, by which a library may choose
to create and download digital copies of Books which have been scanned from its collection. A
library performs the volitional acts which result in the creation of the digital copies which are created by the GRIN system and which result in the transmission of the content of those digital copies to that library. Accordingly, Google can be at most liable under doctrines of secondary liability, and cannot be directly liable for the library copies.

Google is not secondarily liable with respect to the library copies. First, Google is not secondarily liable with respect to the library copies under any theory of secondary liability because there is no underlying act of direct infringement by the libraries, since the libraries’ volitional acts in creating and downloading the library copies are fair use, not infringement. Second, Google is not vicariously liable because vicarious liability requires a financial benefit directly attributable to the particular infringing activity, and Google does not derive any financial benefit directly attributable to the library copies. Third, Google is not liable under a theory of contributory liability because (1) the GRIN system has at least substantial noninfringing uses; (2) the libraries were and are contractually bound to use the GRIN system only in a noninfringing manner; and (3) Google lacks knowledge of any use of the GRIN system which is infringing, as opposed to fair use.

The libraries’ volitional acts in creating and downloading the library copies are fair use under 17 U.S.C. § 107. Specifically:

- The libraries’ use is in part for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.
- The “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” weighs in favor of a finding of fair use.
The purpose and character of the libraries’ use is transformative, because it adds something new, with a further purpose or different character, and does not merely supersede the objects of the original.

- One purpose of the libraries’ use is to assist users in identifying books which may be of interest by creating a search engine by which the text of books may be searched.
- The libraries’ digitized copies do not serve as a substitute for Books, but rather are necessary to create the libraries’ book search engine, which is a new tool for finding books.

The nature of the libraries’ use is entirely for nonprofit educational purposes.

- The “nature of the copyrighted work” weighs in favor of a finding of fair use.
  - All of the Books at issue have been published.
  - Some of the Books at issue are factual in nature, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
  - Some of the Books at issue are less factual in nature, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
  - Some of the Books at issue are out of print, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
  - Some of the Books at issue are in print, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.

- The “amount and substantiality of the portion used in relation to the copyrighted work as a whole” weighs in favor of a finding of fair use.
Because the use is transformative, and the use of the whole is necessary to the transformative purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified, the digitization of the entire work does not militate against a finding of fair use.

- The “effect of the use upon the potential market for or value of the copyrighted work” weighs in favor of a finding of fair use.
  - A search engine is not a market substitute for a Book.
  - The effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified.
  - There is no market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive.”
  - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive” is not a traditional market.
  - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive” is not a reasonable market.
  - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive” is not a market which is likely to be developed.
• The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive” is a transformative market, and is thus not cognizable.

  • Balanced in light of the purposes of copyright, the four factors favor fair use.
    - Each factor either favors fair use or is neutral.
    - A finding of fair use promotes the purpose of copyright, which is to promote the dissemination of knowledge by granting limited exclusive rights to authors. The libraries’ use promotes the dissemination of knowledge, by assisting users in identifying books which may be of interest, while not serving as a substitute for the Books themselves.

Google provides this response as a courtesy to Plaintiffs, and the burden of proving infringement (be it direct or secondary) remains with Plaintiffs. To the extent Google performed any volitional act with respect to library copies, which Google denies, Google’s conduct was fair use because it was necessary to the foregoing fair use purposes and was conducted at the behest of the libraries expressly for the purpose of achieving the foregoing fair use purposes. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs’ contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

**INTERROGATORY NO. 3:**

Identify all factual and legal bases supporting Google’s defense that its display of verbatim expression from Books in response to search requests is a fair use under 17 U.S.C. §
107, including without limitation all facts Google intends to rely on with respect to the four
factors set forth in Section 107.

**RESPONSE TO INTERROGATORY NO. 3:**

Google objects to this interrogatory to the extent it calls for attorney-client privileged
information, attorney work product, or information protected by any other privilege or immunity.
Google objects to this interrogatory’s use of the term “display of verbatim expression from
Books in response to search requests” is vague and ambiguous, and understands it to refer to
Google’s display of snippets of Books from library collections in response to search requests.
Google objects to this interrogatory to the extent it seeks more than “the claims and contentions”
of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these
objections, Google responds as follows:

Google’s display of snippets of Books from library collections in response to search
results is a fair use under 17 U.S.C. § 107. Specifically:

- The “purpose and character of the use, including whether such use is of a commercial
  nature or is for nonprofit educational purposes,” weighs in favor of a finding of fair use.

  - The purpose and character of Google’s use is transformative, because it adds
    something new, with a further purpose or different character, and does not merely
    supersede the objects of the original.

    - The display of snippets is important to helping users find books which
      may be of interest.

    - The snippets displayed do not serve as a substitute for Books, but instead
      serve as a tool to identify books which are of interest.
Snippets are not displayed with respect to those Books for which there is a possibility that a snippet could serve as a substitute for a Book, such as dictionaries and books of quotations.

- The nature of Google’s use is at least partially noncommercial, because the use facilitates access to the collections of libraries, enables research and scholarship, and does not directly generate revenue for Google.

- The “nature of the copyrighted work” weighs in favor of a finding of fair use.
  - All of the Books at issue have been published.
  - Some of the Books at issue are factual in nature, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
  - Some of the Books at issue are less factual in nature, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
  - Some of the Books at issue are out of print, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
  - Some of the Books at issue are in print, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
  - Some of the snippets at issue are factual in nature, and as to those snippets, this factor tilts more strongly in favor of a finding of fair use.
  - Some of the snippets at issue are less factual in nature, and as to those snippets, this factor tilts less strongly in favor of a finding of fair use.

- The “amount and substantiality of the portion used in relation to the copyrighted work as a whole” weighs in favor of a finding of fair use.
  - Snippets are displayed only in response to user search queries.
Each snippet is only approximately one-eighth of a page.

At maximum, three snippets are displayed in response to a particular search query.

Only snippets containing the user’s search query are displayed.

The location of a snippet on a page is fixed.

Some snippets are blacklisted.

Some pages are blacklisted.

Measures are in place to prevent any one user, or users in the aggregate, from abusing the system by repeated queries.

Some of the snippets at issue are taken from long books, and as to those snippets this factor tilts more strongly in favor of fair use.

Some of the snippets at issue are taken from short books, and as to those snippets this factor tilts less strongly in favor of fair use.

The “effect of the use upon the potential market for or value of the copyrighted work” weighs in favor of a finding of fair use.

A snippet is not a market substitute for a Book.

The effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified.

There is no market for a license to display short snippets as part of a search engine so that books of interest may be identified.

The market for a license to display short snippets as part of a search engine so that books of interest may be identified is not a traditional market.
The market for a license to display short snippets as part of a search engine so that books of interest may be identified is not a reasonable market.

The market for a license to display short snippets as part of a search engine so that books of interest may be identified is not a market which is likely to be developed.

The market for a license to display short snippets as part of a search engine so that books of interest may be identified is a transformative market, and is thus not cognizable.

Balanced in light of the purposes of copyright, the four factors favor fair use.

Each factor either favors fair use or is neutral.

A finding of fair use promotes the purpose of copyright, which is to promote the dissemination of knowledge by granting limited exclusive rights to authors. Google’s use promotes the dissemination of knowledge, by assisting users in identifying books which may be of interest, while not serving as a substitute for the Books themselves.

Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs’ contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

**INTERROGATORY NO. 4:**

Identify by title, author, publisher and ISBN (if applicable) all Books as to which Google claims a license to digitally copy in full, and for each Book identify all factual and legal bases supporting the defense of license.
RESPONSE TO INTERROGATORY NO. 4:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than “the claims and contentions” of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google claims the defense of license with respect to those Books listed in the document bearing Bates number GOOG05004752. Google is permitted by law, at least under the doctrine of fair use, to digitally copy in full all of the remaining Books at issue, as set forth in Google’s response to Interrogatory No. 1. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs’ contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 5:

Identify by title, author, publisher and ISBN (if applicable) all Books as to which Google claims a license to distribute digital copies to libraries, and for each Book identify all factual and legal bases supporting the defense of license.

RESPONSE TO INTERROGATORY NO. 5:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than “the claims and contentions” of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:
Google claims the defense of license with respect to those Books listed in the document bearing Bates number GOOG05004752. Google is permitted by law, at least under the doctrine of fair use, to digitally copy in full all of the remaining Books at issue, as set forth in Google’s response to Interrogatory No. 1. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs’ contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

**INTERROGATORY NO. 6:**

Identify by title, author, publisher and ISBN (if applicable), all Books as to which Google claims a license to display verbatim expression in response to search requests, and for each book identify all factual and legal bases supporting the defense of license.

**RESPONSE TO INTERROGATORY NO. 6:**

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than “the claims and contentions” of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google claims the defense of license with respect to those Books listed in the document bearing Bates number GOOG05004752. Google is permitted by law, at least under the doctrine of fair use, to digitally copy in full all of the remaining Books at issue, as set forth in Google’s response to Interrogatory No. 1. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs’ contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.
**INTERROGATORY NO. 7:**

Identify any and all affirmative defenses other than fair use and license which Google claims in this case and, for each such defense, identify all factual and legal bases supporting such defense.

**RESPONSE TO INTERROGATORY NO. 7:**

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than “the claims and contentions” of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google does not claim any affirmative defenses other than fair use and license affirmative defenses with respect to Plaintiffs’ claims of direct copyright infringement as to Books scanned from the collections of libraries, but does not intend to waive any such defenses to the extent they overlap with Google’s fair use and license defenses. Google reserves the right to present different or additional affirmative defenses in the event Plaintiffs make other or further claims, or for the purpose of rebutting Plaintiffs’ contentions. Google reserves the right to present defenses which rebut or negate elements upon which Plaintiffs bear the burden, which defenses are not encompassed within this interrogatory because they are not affirmative defenses. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.
Dated: April 27, 2012

Respectfully submitted,

By: /s/ Joseph C. Gratz  
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Attorneys for Defendant Google Inc.
PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the State Bar of California, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On April 27, 2012, I served the following document(s) in the manner described below:

DEFENDANT GOOGLE INC.’S RESPONSES AND OBJECTIONS TO PLAINTIFFS’ FIRST SET OF INTERROGATORIES

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.

☐ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.

☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri’s electronic mail system from jcotton@durietangri.com to the email addresses set forth below.

☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.
On the following part(ies) in this action:

Michael J. Boni
Joanne E. Zack
BONI & ZACK LLC
15 St. Asaphs Road
Bala Cynwyd, PA 19004
Telephone: 610-822-0200
Fax: 610-822-0206
Email: mboni@bonizack.com
jzack@bonizack.com

Attorneys for Plaintiffs

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 27, 2012, in San Francisco, California.

/s/ Janelle Cotton
Janelle Cotton