Before the
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Subcommittee on Commerce, Trade, and Consumer Protection
Fair Use: Its Effects on Consumers and Industry
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Testimony of Paul Aiken on behalf of the
Authors Guild

Mr. Chairman, I represent the Authors Guild, the largest society of published authors in the country. The Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912. Among our more than 8,000 current members are historians, biographers, poets, novelists and freelance journalists of every political persuasion. Authors Guild members create the works that fill our bookstores and libraries: literary landmarks, bestsellers and countless valuable and culturally significant works with more modest sales records. We have counted among our ranks winners of every major literary award, including the Nobel Prize and National Book Award, as well as United States Presidents, members of the Senate and, no doubt, distinguished members of the House of Representatives.

We have a 90-year history of contributing to debates before Congress on the proper scope and function of copyright law. It's an honor and a privilege to be here today, for the Authors Guild to continue to serve that role before this committee.

<u>Copyright and the Public Interest</u>

When people discuss policy issues about copyright, they often talk about balancing the public's interest against that of the rightsholder. The public's interest is frequently cast in terms of the public domain, as if the overriding public benefit of copyright is the creation of material that can be used for free. The public domain does provide a benefit to society, but that's not the primary means by which the public benefits from copyright. Not by a long shot.

Copyright allows authors and other rightsholders to work in a free market economy. Copyright transforms authors' creative efforts, their investment of countless hours of work on their manuscripts, into marketable goods, licensable products. A fortunate and talented minority of prospective authors finds publishers for their works. These authors enter into essentially joint venture agreements with their publishers, licensing the right to print and sell their works in exchange for an advance and the prospect of shared profits in the form of royalties. (Contrary to widely held belief, the advance is generally modest, merely defraying some of the author's investment of time and money in creating the manuscript.)

A published book is no guarantee of success, of course, the author's and publisher's investments may be for naught. That's how it is in an entrepreneurial system, not all efforts pay off. But authors and publishers accept those risks, and with a good book, some luck and bit of marketing skill, the author's and publisher's investments will pay off in the marketplace, and readers will value the book.

That book, and other books like it, the books that readers value, the books that public, academic, and corporate libraries choose to acquire for their collections, are the primary public benefit of copyright. I'm speaking now of the book publishing industry, but the same paradigm applies to the newspaper, magazine,

music, movie and software industries. It's the products that result from the market created by copyright, the newspapers and movies and software programs that are still under the protection of copyright, that are the fundamental and appropriate public benefit of the copyright system, that primarily and powerfully fulfill copyright's constitutional purpose of "promot[ing] the progress of science and [the] useful arts."

This seems so obvious, but otherwise clear-thinking people seem to lose their bearings when discussing copyright. There's a market for food in this country which functions pretty well. No one seriously doubts that there's a public good in the existence of this system. That one has to pay for a sack of potatoes doesn't mean there's not a tremendous value to the public in the investments and efforts of the farmer, distributor and grocer in getting those potatoes to the store. We may wish the potatoes were cheaper, we may want them to be free, we may even think that potatoes want to be free, but none would argue that the public benefit is dependent on free potatoes.

Or take the Ford Foundation. It does, I'm sure, much good work. Some might argue that this is the public good that resulted from Henry Ford's company, that he and his family were able to endow this charitable institution. But the Ford Foundation's good works, significant as they are, pale in comparison to the public benefit of the Ford Motor Company's products, automobiles. Ford revolutionized the industry, bringing independent, speedy transportation within the reach of working families, and the public valued this product tremendously, responding by buying Ford's cars by the million. (Ford's other great product, of course — it's other great benefit to our society — is good-paying, benefit-rich jobs.) The real public benefit of Ford is a direct result of the automobile market — cars that people value and the jobs to build those cars — the charity is just gravy.

And so it is with the public domain. The public domain's a fine thing, but it is, and always has been, merely a nice by-product of the copyright system. The real public benefit of copyright, easily ninety percent of the value, is the creation of progress-promoting works that the marketplace values.

Fair Use & Authorship

What does all this have to do with fair use? The same sorts of arguments are brought to bear on fair use debates. We're told, essentially, that in order for copyright to fulfill its constitutional purpose and provide a real public benefit, we have to make sure fair use is adequately broad. This misapprehends the primary value of copyright, as we've seen, and the role of fair use in the copyright system.

Fair use, originally a judicial doctrine, now codified in Section 107 of the Copyright Act, has traditionally helped define the boundary between commerce and free expression, between the commercial incentives secured by copyright and the right to free expression protected by the First Amendment.

Authors are big fans of copyright, of course, because authors like to get paid, but they're also big fans of traditional, transformative fair use.

Say an author is writing a history of The Great Depression and finds a recent article in which some scholar says that the Depression was caused by the stock market crash of 1929. This drives the author nuts, because she believes it's well established that the stock market crash was only one of several factors causing the Depression. She wants to quote from this article to show just how wrong-headed it is, but the article is protected by copyright and its author may not be

inclined to grant her permission to excerpt the work. What does our historian do? She uses it anyway. She copies a reasonable amount of that article, enough to make her point, and puts it into her own book, surrounding it with her commentary and criticism. She demolishes that scholar's thesis, using his own words against him, and there's nothing that author can do about it.

That author can do nothing about it, at least in terms of her use of his copyrighted work, because this is classical, transformative fair use of the original author's work. She's taken part of his copyrighted work and transformed it, including it in a new creative expression, something completely unlike his work. As a society, we see real value in this sort of transformative borrowing from another's work, it's a vital part of the marketplace of ideas that free expression is meant to encourage, and it's everywhere: book and movie reviews, of course; biographical and historical works; novels and plays; poetry and songs.

Section 107 mediates between protected expression and free expression by setting forth four factors for a court to weigh in considering whether a use is fair, factors intended to permit the excerpting of copyrighted works needed for new creative expression, so long as the affect on the commercial market for the work is minimal. An unfortunate result of the use of four factors to determine the bounds of fair use is that fair use appears to be a bit "mooshy." Advocates of all stripes can and do read into fair use what they care to read into it.

Fair use is now often seen as another flavor of public domain, and that's perhaps one way to think of it, but it's of an entirely different nature than copyright's real public domain. Fair use doesn't mean free use of entire works — that's the realm of genuine public domain. Fair use, in fact, has been transmuted by some into free use or good use or any other use that some interest group, industry or corporation wants to make of copyrighted works without paying for them. This

isn't, and shouldn't be, what fair use is about. If we keep our eye on the true role of fair use — permitting the creation of new creative expressions without harming the commercial market for the work — we won't lose our way.

The Idea/Expression Dichotomy

I should mention one other important way in which copyright law accommodates the First Amendment. Courts have interpreted copyright law to protect creative expression in copyrighted works, but not the ideas contained in those works. When people speak of copyright preventing the free flow of ideas, they are wrong, flat out. Copyright encourages and speeds the flow of ideas.

One prominent copyright scholar, Paul Goldstein of Stanford Law School, describes the idea/expression dichotomy as creating a vast commons coursing through every copyrighted work — the publicly held and freely copyable ideas the work contains. If a particular author has creatively expressed an idea so well that another feels compelled to copy that particular expression, then one needs permission, that is, a license. That's as it should be — well-crafted expression should be compensated, or the borrower should simply limit the excerpt to the bounds of fair use.

The Internet & Fair Use

The Internet is often described as a disruptive technology. There's no doubt that that's true — just ask travel agents or those in the music industry. Authors and publishers have had a taste of this disruption, as used bookselling, a somewhat quaint enterprise before the Internet, has seen explosive growth online, certainly displacing some royalty-paying sales of new books. That displacement will only grow with time.

But the Internet also offers opportunities. Search engine firms have discovered books: all of the major firms now have book digitization efforts under way. Earlier this month, Microsoft announced an agreement with the British Library to scan 25 million pages from the library's collection. Those pages will be made available at MSN's Book Search site next year. It's just the start for Microsoft and the British Library, we're told, Microsoft is investing a reported $2 million, just to get the ball rolling. Yahoo is also in the game, announcing last month that it's working with a group called the Open Content Alliance, which includes Adobe Systems, Hewlett-Packard, and the libraries of the University of California and the University of Toronto, to scan books that will be made available through Yahoo's search engine. Since that announcement, Microsoft has signed on, to make the books accessible through its search engine as well. In building their databases of books, the Microsoft and Yahoo efforts are properly sticking to scanning works that are in the public domain or those for which they receive permission.

Not so with the mother of all book scanning and storage initiatives, Google Library. Google is working with four major American libraries, the libraries of Harvard, Stanford and the University of Michigan and the New York Public Library, and one British library, Oxford University's Bodleian Library. Some of these libraries are offering Google only public domain books, but Michigan and reportedly Stanford are offering up works still protected by copyright.

Google seems to have figured something out: there's a demand for searching those books, a demand that warrants the investment of a reported $200 million. A demand that Google is determined to satisfy, because Google, a sensible, profit-seeking enterprise, believes its investment will pay off in increased visitors

to its site, and increased ad revenues. Google senses a competitive advantage in making copyrighted books searchable.

We bet Google is right. If books were digitized and searchable on the Internet, we bet Google could turn a good profit by allowing its legions of users to search that database. And what a mind-boggling database: an assemblage of the nation's copyrighted books, the result of the efforts and investments of hundreds of thousands of authors and thousands of publishers, served up in handy excerpts by Google's computers.

But here's the bad part. Google says that its copying of these books — that its scanning of countless copyrighted volumes, then using optical character recognition technology to digitize the text of those works to create files to assemble into a new, unimaginably vast database, surely one of the largest databases ever assembled — that all of that copying and use of these works, would be fair use, so it doesn't need a license from anyone for this copying. For good measure, it's handing over a digital copy to its partner libraries, and telling them it's OK to post the works to their websites. That, too, it appears, is to be considered fair use.

Since there's no license needed, in Google's view, Google doesn't have to give rightsholders contractual assurances of the security of their database. Could a backup tape go astray from Google or one of its partner libraries, unleashing a couple hundred thousand copyrighted works onto the Internet? Sure seems possible. We're asked to trust that that's under control. The list of companies, meanwhile, that lose critical data grows daily. What successes do hackers have at breaking in to the sites of Google and its partner libraries? There'd be no contractual need to report this, so it would likely go unreported. Security experts

tell us that most data losses to hackers go unreported, and we don't doubt it. No contract, no reporting, no control. "Trust us" security.

What about other companies that want to do the same thing? When we first filed suit against Google, we mentioned to reporters our concern that others would see the same business opportunity and join in. Microsoft and Yahoo, as I've discussed, have since jumped in, but in a manner that appears to respect copyright. But if Google gets away with its vast database, Yahoo and Microsoft won't stand still. They'll make their own databases of copyrighted works, just to keep pace. They probably would be joined by Amazon, which has been investing heavily in its search engine, and has a strong interest in protecting its position in online bookselling.

So we might have four or more companies, each pursuing private gain, digitizing the stacks of libraries. We'd have to trust each of them, naturally, and no doubt their partner libraries, not to misplace backup tapes or let down their guard against hackers.

Specialized databases wouldn't be far behind. WebMD might want to digitize a couple medical libraries for excerpting by its users. Fair use, naturally. Veterinarians, chemists and electrical engineers have their needs and websites, too. Harry Potter readers, science fiction fans and Civil War buffs wouldn't be far behind. All one needs is a scanner and a few hundred dollars worth of software to get going with a workable system. These digital databases would all be secure, not to worry. Trust us, but don't audit us.

What remedy would authors and publishers have if these databases are deemed to be fair use copies but one of them is hacked into or its collection of digital books otherwise finds its way onto the Internet? If we're fortunate, the negligent

party would have substantial resources, but stating a claim against that entity might well be impossible. There's no license, so there's no breach of contract. We're postulating that the copy is a non-infringing fair use copy, so there'd be no remedy under copyright. And the defendant would have a strong argument that copyright law pre-empts any state law cause of action. Plaintiffs might well find themselves shut out.

What about uses by the partner libraries? The only contractual obligation imposed on libraries — at least in the sample available to us from the University of Michigan contract with Google — allows the University of Michigan to use the works at its website. No mention in the contract of limiting browsers to so-called fair use snippets. The contract also contemplates sharing the works with other academic libraries. The threat to the market for academic books couldn't be clearer or more direct. If Google and the University of Michigan are correct in their interpretation of fair use law, then profit-minded publishers and royalty-seeking authors would be wise to abandon that market.

What if the University of Michigan is wrong, and its uses overstep the bounds of fair use? Authors and publishers could just sue for damages, right? No, we'd probably be out of luck, as a state institution protected by the 11th Amendment, the University of Michigan is immune from damages claims under copyright law.

Fair Use & The Market for Online Delivery of Books

Recent developments make it appear likely that Google intends to leverage its interpretation of fair use into more than just ad revenue profits. In the past few weeks, there has been a spate of announcements, from Amazon, Random House and Google, of various schemes for selling and renting the right to view books

online. Whether readers will accept these business models is anyone's guess, but at some point, someone will likely discover the equivalent of iTunes for books, and online book sales or rentals will take hold.

If Google can scan all copyrighted books into its databases as a fair use, then it may well establish its search engine as the dominant and unassailable portal to online books, the portal that readers and prospective buyers of online books would turn to first. It's not too much of a stretch to imagine that Google might do as any right-thinking corporation would, use that dominance to extract favorable terms, a high percentage of all proceeds derived from the sale or rental of books through its portal.

In this way, and the irony certainly won't be lost on the publishing industry, Google could turn authors' and publishers' own works, their own vast libraries of works, against them, securing the upper hand for the indefinite digital future. All it takes is a couple hundred million dollars, and an expansive view of fair use.

The Role of Licenses

Fortunately, it need not come to that. We don't believe the courts will share Google's radical, expansive, and devastating view of the scope of fair use. At some point, we believe that Google will do the right thing, and look to a licensing solution for the use it wants to make of these millions of works. It's too early to discuss what such a license would look like, but its general outlines might be guessable. Revenues, in the form of some reasonable split of advertising income, could be paid to authors and publishers. Rightsholders would have the right to review Google's security protocols, and Google would be obliged to contractually guarantee the security of its database. And a negotiated license

could pave the way for a *real* online library — something far beyond the excerpts Google intends to offer through its Google Library program.

I would like to thank this Committee for holding this hearing and inviting us to participate.