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FROM NAPSTER TO GOOGLE BOOKS:
THE FUTURE OF DIGITAL CONTENT DISTRIBUTION

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ABSTRACT

Napster and Google Books are both examples of programs that have contributed to the digital distribution of content. The company Napster, which avoided forming a partnership with industry representatives, was sued by the music industry and ultimately shut down. However, the music industry's fight against digital music did not end with Napster's closing. The MP3 file has become music's new medium, and the industry was forced to embrace the new technology, as consumers' expectations warranted its use. After its battle with Napster, the music industry found that collaboration was a necessary and inevitable strategy. For Napster, such collaboration could have saved the company. Google is in the middle of a similar content copyright lawsuit with the representative group the Authors Guild. I argue in this paper that Google and the Authors Guild can learn from the events surrounding Napster and pursue collaboration instead of a court ruling. In the end, the digital book and digital library revolutions will continue to progress, as the digital music revolution did. A partnership will allow both Google and the Authors Guild to have a say in the future of digital books.

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ACKNOWLEDGEMENTS

To my parents, Connie and John Boyle, for their support.

Introduction

Here's an adage for the Internet age: New technology has a way of making itself indispensable – even to those who are at first wary of it.

Paul Goldstein, Stanford Law School[1]

The twenty-first century has seen an increase in the digitalization of content, as technology corporations have built businesses around the online distribution of music, movies, and books. The focus on sharing, distributing, and accessing free or subscription-based content has redefined many of today's content industries. Content -- original ideas or creative work that can be shared with an audience – has been transformed into a digital format in the form of e-books, music files, and scanned images. Napster, the online music sharing program, sparked this revolution, which has seen content, and its consumers, move online. Google Books Search, Google's digital library project, is one of the newest examples of an online content distributor. The program is a collection of more than 20 million books, and it provides users with different types of access based on the book's copyright status. Both Napster and Google Books rocked the foundation of their respective content industries, provoking industry representatives to file copyright infringement lawsuits against them. Google remains embroiled in a lawsuit with the American authors' representative, the Authors Guild. And yet, many scholars have spoken out in support of Google Books because of the academic benefits on such a collection. I hope to contribute to the support of Google Books by suggesting an alternate reasoning for its acceptance. Using Napster as a case study for the dynamic between distributors, producers, and consumers, I argue that the Google Books and Authors Guild conflict would be best settled through means of collaboration between both organizations.

In this paper, I will demonstrate the importance of establishing a working relationship in disputes between content distributors and content providers. Content distributors must forge relationships with representatives from their respective industries in order to avoid legal battles which may jeopardize their businesses. Furthermore, despite U.S. lawmakers' efforts to apply outdated copyright laws to online programs, digital content distributors continue to flourish, and consumers' expectations have shifted to warrant their presence. In today's digital world, content industries must embrace online distribution if they want to have a say in its future.

In order to demonstrate the importance of collaboration, I will first highlight how Napster and the music industry failed to work together and why they should have done so. Next, I will examine how Google has already ended one of its lawsuits through compromise and why it is important for it to do the same with its lawsuit involving the Authors Guild. Just as a musician or an author relies on outside sources for help during the production of their creative work, so must collaboration be present during the distribution of the content.

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1. Paul Goldstein, "The Next Napster May Be An Insider," *The New York Times*, July 28, 2000.

Chapter 1

Napster and the RIAA

Napster began the peer-to-peer music file downloading revolution when the program was first released in 1999. The program allowed users to connect to a central server and share MP3 music files with millions of others users. From its release, the program became extremely popular among music fans. As one of the first of its kind of content distribution companies, Napster faced fierce opposition from the "Goliaths of the record industry," who eventually filed a legal suit against it.[1] When coupled with the company's poor business strategy, as I describe in what follows, these copyright infringement allegations against Napster threatened the company's stability. Because the young company was unable to turn a profit and unwilling to negotiate outside of court with the music industry, it was ultimately subject to a court injunction and forced to shut down its free music downloading server. Nonetheless, I argue that the popularity of digital music downloading today, in the form of iTunes and similar programs, proves that the music industry did not "win" its battle against digital content distribution with the downfall of Napster. Rather, it postponed the inevitable and necessary step of compromising and pursuing collaboration with future content distributors including Apple and Rhapsody. Napster, which promoted the sharing of files, was ironically unwilling to extend the idea of collaboration to its business strategy. In this section, I will detail the weaknesses of Napster and highlight the missed opportunities for negotiation on the part of both Napster and the music industry.

According to Napster's creator, Shawn Fanning, he did not begin writing the program with the intent of engaging or challenging the music industry, and perhaps that is why his

company was not prepared to work with the recording companies represented by the RIAA, or the Recording Industry Association of America. Fanning says that the idea for the file sharing software that would grow into Napster began when a friend complained about the inconvenience of hunting down MP3 music files over search engines.[2] When internet users looked for music files on the internet, the links were often broken or required knowledge of File Transfer Protocol commands used to download files. "The index would become out of date because the indexes were updated infrequently," Fanning would testify during the RIAA's lawsuit against Napster. "I began thinking about ways to solve the reliability problems."[3] The inconvenience of wading through these dead links inspired Fanning to create a better file sharing system.

Fanning's vision was a program that would serve as a hub for sharing music from one's home computer. Once downloaded, his peer-to-peer file sharing system allowed users to log on and view songs owned by other users. While viewing, one's own files would be displayed to the other users who were logged onto the server. Users could search and select MP3 files from this list of songs to download to their own computers. Fanning's program used a central computer server, where users would connect each time they logged onto the service. This system "work[ed] more like such search engines as Google or AltaVista," which connect users to data on the internet, but "leave the data where it lies for you to retrieve."[4] In this way, Napster would act as a list of available songs and a connection for sharing, instead of having to store the song files on its own server.[5] Additionally, the program solved the problem of dead links by using an active refreshing feature. "My idea was to have a real-time index that reflects all sites that are up and available to others on the network at that moment," said Fanning.[6] Through Napster, each time a user logged onto the system, the list of available files was updated, removing the files of users who had logged off and adding the files of users who had recently logged on. For users across the United States, the program would allow access to millions of computers through a "central hub" that allowed them "to swap music, computer to computer, without paying a dime."[7]

This “free” aspect of Napster prompted the RIAA to take notice of the company, which was formed by Shawn and his uncle, John Fanning, to oversee use of the program. The program’s popularity also secured it a place on the RIAA’s radar; within days of its release in 1999, Napster was downloaded by between 3,000 and 4,000 people. This rapid acceptance became a signature feature of the program. By September, Napster had been downloaded across the country, “rag[ing] across the college circuit like a forest fire.”[8] In October, Florida State University reported that the program accounted for taking up 20 to 30 percent of the campus bandwidth, and an official from the University of Illinois at Urbana-Champaign reported a 75 to 80 percent bandwidth usage. Soon, the program’s usage “surged past 1 million downloads.”[9] Less than a year after Shawn Fanning had dropped out of school to finish developing the program, it had become a staple in college dorm rooms and was being used across the country.

On December 6, 1999, the RIAA, representing the likes of BMG, Sony Music, Warner Music Group and EMI officially began the legal battle that it hoped would provoke the downfall of Napster and online music downloading. The organization sued Napster for assisting in the copyright infringement of their users and “operating a haven for music piracy on an unprecedented scale.”[10] After “sampling” the music available on Napster, the RIAA stated that it found that, contrary to the company’s assertions that the majority of transactions involved unsigned artists or old music, “virtually all file traffic is unauthorized.”[11] The suit was filed in San Francisco’s U.S. District Court by Los Angeles lawyer Russell Frackman. By allowing users to remain anonymous, the RIAA stated, Napster was “building a business on – and seeks profit from – the daily, massive infringement it enables and encourages.”[12] With the suit, the RIAA included a list of a few hundred songs that were available on Napster, citing the work of artists including Elvis Presley, Bob Dylan, and the Beatles.

The lawsuit had pitted the new company against industry veterans and their supporters, including big-name artists like Puff Daddy and Creed. Creed’s lead singer, Scott Stapp, released a

statement after the lawsuit was announced: “When my music is given away, as taboo as it is for me to say, it is stealing. ... My music is like my home. Napster is sneaking in the back door and robbing me blind.”[13] Specifically, the RIAA sued Napster for two indirect types of copyright infringement: contributory and vicarious infringement under the U.S. Digital Millennium Copyright Act (DMC Act). “Napster is about facilitating piracy and trying to build a business on the backs of artists and copyright holders,” said Cary Sherman, RIAA senior vice president.[14] Instead of working with Napster to build an acceptable music file transfer system, the music industry wanted the system eradicated.

The trouble thickened a few months later when in April 2000, heavy metal band Metallica sued Napster in federal court for both copyright infringement as well as for violating the Racketeer-Influenced and Corrupt Organizations Act. In addition to targeting Napster, the group named Indiana University, Yale, and the University of Southern California as defendants. Dr. Dre also filed a lawsuit against the company, an act that cast even more of a spotlight on the young company. On May 3, 2000, Metallica drummer Lars Ulrich and his lawyer drove to the Napster company office in California. They entered the building with thirteen file boxes, filled with lists naming Napster users who were sharing the music group’s songs over Napster. Ulrich demanded that Napster kick the listed users off of its server. Outside of the office, Naspter users protested Ulrich’s actions by smashing Metallica compact discs. Some held a banner that referenced one of the band’s songs and read “RIAA = Master of Puppets.” Despite the crowd’s support of Napster, Ulrich tried to negotiate. “I really don’t want to sue you,” he told Napster employees. “All I want is for artists who want to get paid to get paid.”[15] Based on the numbers, the future for Napster did not look good. Due to the penalty system for copyright infringement, each “work” infringed could turn a maximum of $100,000 in penalties, and if each song shared over the server was ruled to be a separate infringement of copyright, Napster could be face

damages in the trillions of dollars.[16] But the company refused to negotiate with Ulrich or the RIAA, and the court case unfolded.

Napster's leaders believed that the chances of getting sued were slim enough that they could afford to continue the server's operations without switching to a more copyright-friendly system, such as a subscription-based program. Napster thought that the program was revolutionary enough to warrant its presence as a legitimate digital music service, but it soon had to defend this reasoning in court. In response to the RIAA's accusations, the company sought the legal representation of David Boies, who had previously defended Microsoft in an anti-trust lawsuit. Boies followed CEO Eileen Richardson's example and insisted that Napster did not have to answer to the music industry because the company was not doing anything wrong. He formed the Napster defense around two precedents: the protection provided to a service provider, as well as the precedent outlined in the U.S. Supreme Court decision of *Sony Corp. of America v. Universal City Studios, Inc.*, which stated that manufacturers of VCRs used to record television shows were not liable for aiding in copyright infringement. "What the law says is that individual consumers have a right to share," Boies said.[17] However, music industry officials argued that the sheer volume of songs that were being shared undermined Boies' statement. Instead of making a mix tape for a friend, Napster's users were downloading mass amounts of music files. Once a user added a song to his music library, he could in turn share it again without damaging the song quality. Furthermore, he could do so without leaving the comfort of his dorm room or apartment; Napster made extensive sharing both easy.

The RIAA was unwilling to let this type of sharing continue and accused Napster of violating vicarious copyright laws, which hold a party liable for his or someone else's infringement if he had the ability to control the illegal actions and had "a direct financial interest in such activities."[18] The other allegations involved contributory infringement and said that Napster was accountability for the illegal action of the program's users even though Napster's

employees did not do the downloading themselves. The U.S. Supreme Court addressed this type of infringement, stating that "One who knowingly induces, causes or materially contributes to copyright infringement, by another but who has not committed or participated in the infringing acts him or herself, may be held liable as a contributory infringer if he or she had knowledge, or reason to know, of the infringement."[19] Both of these alleged acts of infringement, the RIAA maintained, led to the direct copyright infringement committed by Napster's millions of users.

Boies asserted that Napster's operations fell under the protection of a service provider because the songs that were transferred were not stored on Napster's central system. Rather, the program offered a hub for usernames and a search engine that would locate files. However, the court found that the company did not meet the standards necessary to be protected by these service provider considerations. According to the Digital Millennium Copyright Act (17 U.S.C.), an internet service provider is protected in providing consumers with another party's material that is "temporarily stored on its service with impunity" only if certain conditions exist, including how the material is transferred and how the service provider interacts with users.[20] The court ruled that Napster's role as a "locator" did not warrant the same protections as a servicer provider. The court went further and stated that, "Because Napster does not transmit, route, or provide connections through its system, it has failed to demonstrate that it qualifies for section 512(a) safe harbor."[21]

For Napster's second defense, Boies pointed to the U.S. Supreme Court decision of *Sony Corp. of America v. Universal City Studios, Inc.*, in which the court asserted that a company developing a new technology should not be held accountable for preventing copyright infringement when there is another "substantial non-infringing use" for the product."[22] In other words, companies who created devices like the video cassette recording system should not have been "burdened" by monitoring illegal usage when the product could also be used for another purpose. In the case of a video cassette recording system, "timeshifting," or recording a television

show so that one can watch it at a later, more "convenient" time, served as the product's main purpose.[23] Boies stated that Napster, which provided a service for users, should be given the same considerations. However, the court found that Napster's case was different that Sony's because the company had the power to not only monitor who was using their product illegally but also to prohibit further use by that consumer. Napster could detect users who were posting copyrighted material in their central exchange hub and block those users from contributing MP3 files to the central server's list. Therefore, when Napster failed to take such action, the company's operations fell under the category of contributory negligence, and the court ruled that the protection of Sony's precedent was inapplicable. The court stated, "We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement."[24]

Without defense from the Sony decision or the Digital Millennium Copyright Act, Napster was subject to an injunction. The court held that, in regards to Napster, "the right to police must be exercised to the fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability."[25] In July 2000, U.S. District Judge Marilyn Hall Patel delivered the injunction, stating that "when the infringing is of such a wholesale magnitude, the plaintiffs are entitled to enforce their copyrights."[26] Napster was given orders to oversee the use of its system and block any illegal activity. The company appealed the decision and brought the case to U.S. Court of Appeals for the Ninth Circuit. Nonetheless, the Ninth Circuit maintained the original decision. When Napster was unable to effectively monitor its users, it officially closed down the service in July 2001. Napster's leaders scrambled to come up with a viable option for starting up the service again on a subscription-based plan, but the ideas never got off the ground. In 2002, Napster declared bankruptcy, and the company sold its trademark to a company called Roxio. In 2008, Napster was sold to Best Buy, and it shifted again in 2010 when it joined with Rhapsody, the country's largest digital music service. Rhapsody

remains as the largest subscription music service, where their over one million members pay a subscription fee for access to over 60 million songs.

After the court ruling, lack of leadership and a cohesive plan again prevented the original Napster from adapting their digital music platform. Instead, other companies were able to pick up where the failed company left off and run with the idea of a subscription-based or limited-use music sharing program. Today, companies like Pandora, Spotify, and Apple are thriving off of the consumer demand for digital music. Patrick Gelsinger, the chief technology officer at Intel, commented on the effect of Napster, saying "Napster became a lightning rod, this uniformly sensible point for the industry. Peer-to-peer is to some degree a fad that labels a bigger and longer-term trend."[27] Though unable to survive, Napster left a permanent mark on the content world.

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1. "The Brain Behind Napster," *60 Minutes*, CBS, February 11, 2009.

2. Trevor Merriden, *Irresistible Forces: The Business Legacy of Napster and the Growth of the Underground Internet* (North Mankato, MN: Capstone, 2001) 112.

3. Joseph Menn, *All the Rave: The Rise and Fall of Shawn Fanning's Napster*. (New York: Crown Business, 2003), 29.

4. Ibid., 34.

5. Ibid., 35.

6. Julianne Pepitone, "Google Strikes Deal with Publishers Over Universal Library," *Fortune*, October 4, 2012.

7. "The Brain Behind Napster," *60 Minutes*.

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10. Brian Hiatt, "RIAA Sues Napster, Claiming 'Music Piracy,'" *MTV News*, December 8, 1999, http://www.mtv.com/news/articles/569952/riaa-sues-napster-piracy.jhtml.

11. Menn, *All the Rave*, 124.

12. Menn, *All the Rave*, 125.

13. Hiatt, "RIAA Sues Napster."

14. Ibid.

15. Menn, *All the Rave*, 145.

16 Ibid., 125.

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18. Cornell University Law School, "Legal Information Institute," Accessed February 26, 2013, http://www.law.cornell.edu/wex/.

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22. Guy Douglas, "Copyright and Peer-To-Peer Music File Sharing: The Napster Case and the Argument against Legislative Reform," *Murdoch University Electronic Journal of Law* 11, no. 1 (March 2004), http://www.murdoch.edu.au/elaw/issues/v11n1/douglas111.html.

23. Ibid.

24. Ibid.

25. Ibid.

26. Edward Wyatt, "Writers Sue Google, Accusing It of Copyright Violation," *The New York Times*, September 21, 2005.

27. Menn, *All the Rave*, 315.

Chapter 2

How Napster and the RIAA Failed to Negotiate

Napster made the key mistake of assuming that its technology was so innovative and popular that reigning music industry gatekeepers would be forced to concede to its challenges. Its leaders actively avoided negotiations until the opportunity to compromise was lost and the company was shut down. I argue that Napster serves as an example of why content distributors need to approach industry members with the intention of collaborating.

From its beginning, Napster was unstable company, and internal issues prevented its leaders from preparing a feasible approach to working with record labels. Napster had lasted just over two years before it was shut down, and the nature of the company partially accounted for its eventual failure. When looking back on the short life of the company, Shawn Fanning and his business colleagues acknowledge these problems and recall warning signs that should have tipped them off to the inevitable demise of the original Napster. Author Joseph Menn commented on the company's struggle to gain investment backing, saying, "Much of Napster's early life was marked by seasoned investors or managers looking closely at the company, consulting their lawyers, their common sense, or both, and walking away from temptation."[1] However, CEO Eileen Richardson assured potential investors that the music industry would be forced to recognize the small start-up company. She insisted that the service's popularity would serve as a "Trojan horse that would make Napster even more powerful," with prime bargaining leverage.[2] Napster gained a reputation as the underdog, an idea perpetuated by the image of young Shawn Fanning, with his baseball cap and shy demeanor. "It was David versus Goliath, and he was David," Richardson said of Shawn.[3] Despite Richardson's predictions that the recording industry

would be forced to acknowledge and work with Napster, entrepreneurial investors Kleiner Perkins Caufield & Byers disagreed. The firm concluded that the company was liable for infringement and chose not to invest. Partner John Doeer said, "They were breaking the law, and it wasn't a prudent risk."[4]

Napster's leaders did not dwell on the legal implications of the activity on Napster's servers, and they also failed to create a solid business plan for the company. Venture capitalist and *Fortune Magazine* columnist Stewart Alsop examined the company and came to a less than favorable conclusion, writing, "Here's the sad truth about Napster. The company's legal argument is untenable, its business model is terrible, and its software isn't even all that good."[5] Employees bumped heads with John Fanning and threatened to quit. The company suffered under the guidance of Fanning and Richardson, who was "combative, inexperienced, and unable to develop a business model palatable to the record industry."[6] Journalist Spencer Ante pointed to Napster's bleak situation, saying, "Even if Napster defies the odds and wins the case, it faces the same thorny question that has dogged it from the beginning: How will it ever make money? Today, Napster generates zippo revenues. That could change, though, if the company works out a deal with the record industry."[7]

Despite the opportunity for such negotiations, Richardson actively avoided conversations with the RIAA prior to the lawsuit, and the company acted too late in pursuit of a compromise. Set on holding out until the record industry would be forced to strike a deal, the company pursued a plan made by John Fanning, who predicted that there was only a 10 percent chance that Napster would lose a legal suit, even though he had no legal training. Both John Fanning and Richardson agreed on a passive, "bob and weave" strategy, diligently avoiding negotiations with the RIAA and keeping conversations "ostensibly cooperative" but "noncommittal, both to forestall a suit and to prevent the RIAA from learning more about the way the system worked.[8] Yobie Benjamin, who interviewed for a leadership position with Napster, commented on the leaders' arrogant

insistence that negotiations were not an immediate concern because Napster was too revolutionary of an idea to be taken down by a lawsuit. “It was a totally megalomaniac view of the world,” he said. “This will be the ultimate business school case study. How do you fuck up the greatest opportunity on the planet? It’s a tragedy bounded by greed.”[9]

Despite John Fanning and Richardson’s predictions, the legal suit came, as the veterans of the music industry were not willing to let a renegade tech company dictate how its content was distributed, no less allow it to be swapped for free. Napster is the prime example of the naivety of the idea that an industry would look the other way while a company distributes its content. I argue that these mistakes made by Napster and its leadership crippled the company’s approach to negotiation and ultimately caused its downfall. The initial popularity of Napster coupled with its subsequent collapse, demonstrate the importance of a content distributor initiating collaboration with the standing industry.

Despite the end of Napster as a company, the concept behind the program was not eradicated by the music industry’s legal victory. Shawn Fanning improved the music downloading experience, and that would set the tone for the rest of the decade. Today, the RIAA is still battling consumers who partake in the same type of illegal downloading that was central in Napster’s operation. *PCMag*’s Michael Miller argued that the lifespan of the young company “doesn’t matter” because “Napster has already changed the way the world looks at downloaded music,” adding that “No matter what, Napster lives.”[10] I argue in this section that the popularity and consistency of post-Napster music file sharing programs proves that the music industry was eventually forced to compromise with later content distributors. Furthermore, if the music industry had collaborated with Napster from the beginning of the downloading trend, it could have had a better handle on where digital music was headed. Napster paved the way for a shift in consumer expectations, which damaged the music industry’s ability to distribute content legitimately. A 2005 survey conducted by the Pew Internet in American Life Project, reported

that 78 percent of internet users who were downloading through Napster or another music sharing site did not consider their actions as "theft."[11] Illegal downloading was killing the music industry, and those in charge were unwilling to adapt.

The music industry has long resisted negotiating with online music distributors. Peter Jan Honigsberg, a Professor at the University of San Francisco School of Law, commented on this phenomenon, saying:

> The dinosaur record industry is throwing everything it can at innovation, and it has made some headway. But its victories will be short-lived. Even with its power and its fierce strikes to sustain control in this fast, changing world, there will always be another Shawn Fanning with a new design that will disrupt its plans and bring forth yet another original way in which we listen to music.[12]

Honigsberg's predictions were true; after the original Napster closed, the trend of music downloading only flourished. Napster's case did not prevent other companies, including Apple and Pandora Media, Inc., from adapting Napster's music downloading program into new music distribution platforms. NPR, which examined the state of online file-sharing almost eight years after Napster shut down, reported, "Online file-sharing services turned out to be hydras. Shut one down, and two more grow up to take its place."[13] Each new company creates a slightly different variation of Napster, employing internet radio, music streaming, and programs with premium memberships requiring subscriptions. The music industry continues to see the effects of Napster's successors, even a decade after the lawsuit. Its initial rejection of Napster only delayed the inevitable: collaboration and a remodeling of the industry. Online music retailer owner Tony Sachs said, "The recording industry association saw the threat that illegal downloads would pose to CD sales. But rather than working with Napster, it tried to sue the company out of existence – which was like thinking you've killed all the roaches in your apartment because you squashed the one you saw in the kitchen."[14]

I argue that the record labels have ultimately been forced to collaborate with post-Napster companies because of a shift in consumer expectations. The music industry's public service campaign against illegal downloading has not prevented an entire generation of music listeners from adopting a different view of how music is obtained and how it should be obtained. *Frontier Economics*'s estimates that U.S. Internet users annually consume between $7 and $20 billion worth of digitally-pirated, recorded music.[15] In September 2012, the music analytics company Musicmetric released a report called *The Digital Music Index*, which followed the illegal downloading patterns of internet users worldwide. The United States was listed as downloading the most illegal music, with 96,681,133 illegal downloads between 2011 and 2012.[16] With a consumer base that expects to be able to download the latest single or stream a new album, the recording industry could not resist collaboration for long. The legal and illegal downloading of digital music files is not just a phenomenon in the United States, where Napster originated. The International Federation of the Phonographic Industry (IFPI) reported that the global spread of digital music retailers is rapid. Between 2011 and 2012, the presence of the largest international digital services jumped from 23 countries to 58 countries. Currently, iTunes is available in more than 50 countries worldwide, and in only the first six months of 2012, 405 million album and single releases were downloaded globally.[17] Clearly, the music industry has had to accept digital music as a serious industry that needs to be incorporated into its over strategy.

Even before Napster was shut down, experts were suggesting that the company and the RIAA should work out an agreement. This would have allowed the music industry to have some say in where online music was heading and to keep abreast of these changing consumer expectations. "Most analysts say the smartest thing for Napster and the record industry is to find a way to work together," said *Businessweek*'s Spencer Ante; "a deal makes sense because it would at least give the record industry some control over the online distribution of its product."[18] The RIAA could not see its way through to a workable compromise, and the music industry is paying

the price today, as it struggles to keep up with post-Napster programs and the downloading music consumer. Tony Sachs argues that the music industry waited too long to embrace the online music revolution and, as a result, has lost its influence over music consumers:

> The major labels wanted to kill the single. Instead they killed the album. The association wanted to kill Napster. Instead it killed the compact disc. And today it's not just record stores that are in trouble, but the labels themselves, now belatedly embracing the Internet revolution without having quite figured out how to make it pay…. At this point, it may be too late to win back disgruntled music lovers no matter what they do.[19]

Ken Hertz, a music industry lawyer, agrees, saying, "The consumer's conscience, which is all we had left, that's gone, too."[20]

By initiating early collaboration with content distributors, instead of resisting their innovations, content producers can have more influence in deciding how the distribution process works and proceeds. Furthermore, this overlap of industries can be mutually beneficial. Technology companies can fill in the gaps in an industry's attempts to pursue a digital market, and industry veterans can provide content distributors with insight into their traditions and operations. A joint effort is the best approach to the digital age and the online consumer. The music industry found this out too late.

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1. Menn, *All the Rave*, 77.

2. Ibid., 122.

3. Ibid.

4. Ibid., 206.

5. Ibid., 205.

6. "The Brain Behind Napster," *60 Minutes.*

7. Spencer Ante, "Inside Napster," *Businessweek*, August 13, 2000, 112-20.

8. Menn, *All the Rave*, 122.

9. Menn, *All the Rave*, 200.

10. Michael Miller, "No Matter What, Napster Lives," *PCMag*, September 19, 2000.

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Chapter 3

Google Books

Only two years after the original Napster shut down its service for good, the idea for another content sharing platform was brewing behind closed doors at Google, Inc. This idea wasn't based on the peer-to-peer sharing model that Napster employed, but it did branch from the concept of the library, an institution cemented in that same idea of sharing. In 2004, Google's founders began piecing together plans for their dream of a digital library, a project that is known today as Google Books. This website and its index of millions of e-books crept onto the internet scene slowly in comparison to the bang of Napster, yet its founders found similar legal struggles as they worked to provide internet users with content owned by others. Today, Google Books serves as the newest example of a "tech" company "wading into the world of content."[1]

The background behind for Google Books and Google's attempts to create the world's digital library began at the beginning of the company, with Google's founders, Larry Page and Sergey Brin. In 1995, while on a tour of Stanford University's campus, Page and Brin met, and one year later, the computer science graduate students developed a search engine called BackRub. The system "used links to determine the importance of individual webpages" and was soon renamed, thanks to inspiration from the word "googol," or the number represented by a 1 with 100 zeros after it. In 1998, the company known today as Google, Inc., was started, and throughout the years, Google expanded, launching an e-mail service, acquiring the website YouTube, and contributing to the mobile device market through its Android platform. On August 18, 2004, the company went public, and today, it is headquartered in Mountain View, California. Google operates under the mission of working "to organize the world's information and make it

universally accessible and useful."[2] Google is a major corporate player in the global economy; as of September 30, 2012, the company reported revenue of $14.101 billion.

When Page and Brin first announced their plans for Google Books, the program seemed to be following in Napster's failed footsteps. However, early on, Google took a different approach than Napster and began negotiating with two industry representatives: the Authors Guild and the Association of American Publishers. In this section, I will review the Google Books timeline, highlighting decisions that set it on a different path than Napster.

Unlike Napster, which operated as a renegade company and alienated its industry's representatives, Google began its project by reaching out and seeking partnerships. First, it approached university libraries, which owned copies of the millions of books that Google wished to scan into its digital library. In 2004, Page, a graduate of the University of Michigan, contacted the university about its current digitization efforts. The university had experience in this area, having assisted with the launch of JSTOR, "a shared digital library," whose founders hope will help "university and college libraries to free space on their shelves, save costs, and provide greater levels of access to more content than ever before."[3] To use the service, JSTOR users must pay an Archive Capital Fee and an Annual Access Fee. Librarians at the University of Michigan balked at Page's proposal to digitize the school's entire seven million volume library, saying that the process would take an estimated 1,000 years to complete. Page replied by saying that the might of Google Inc. could expedite that process, moving the completion date up to full digitization in six years. With the support of University of Michigan President Mary Sue Coleman, Google began phase one of its collaboration and initially established a partnership with five major libraries: the University of Michigan's library, Oxford University's library, Harvard University's library, Stanford University's library, and the New York Public Library.[4]

These partnership agreements offer a benefit for both the libraries and for Google. Google is allowed to remove books from the libraries, scan them, and include them in the Google

Books index. In return, the library is given a copy of the digital scan that Google produces and is permitted to use this scan for their own purposes. Each library has its own agreement with Google, and the only restrictions for use of the libraries' digital copies are in place to protect the scanned copy from hacking and misuse. According an article that interviewed University of Michigan's Special Projects Librarian Anne Karle-Zenith, the University of Michigan (UM) is "required to restrict automated access to its digital copy and to take measures to prevent third parties from either downloading its copy for commercial purposes or redistributing any portions of its copy. UM must also restrict automated and systematic downloading of the image files from its copy."[5] In addition to agreeing to these protection measures, the agreements included a statement about non-exclusivity. David Ferriero, director and chief executive of the New York Public Library Research Libraries stated that their agreement was "non-exclusive, meaning it is possible that multiple vendors could film or scan the same text," and the library could sign deals with other companies other than Google who were in need of digital copies of a text.[6]

To be scanned, books from these libraries are removed from circulation in the library and barcodes are scanned so that the system recognizes the book as not available to be checked out. In addition, this scanning records the book's metadata from the library catalog for Google's use in its own catalog. Then, the books are taken to Google's premises and scanned using optical character recognition (OCR) technology. The scanned page images are then indexed so that Google Book Search's search engine can access all of the books' contents when users enter keyword search terms. The books are scanned using a scanning machine built by 4DigitalBooks, a company based in Switzerland. Books are placed on the machine and its fingers carefully turns book's pages after scanning them. The scanner can digitize 1,000 pages each hour. This process has been used for each of the 20 million books that Google has digitized as of March 9, 2012. After the books are scanned and entered into Google's index system, internet users can browse them through the Google Books, or Google Book Search, website (google.com/books).

Shortly after securing the support of the University of Michigan, in October, 2004, Google extended this offer for a partnership to another key book industry player: the major book publishers. Page and Brin attended the Frankfurt Book Fair in Germany, where they made an announcement about their newest project Google Print, a program that would assist "publishers in making books and other offline information searchable online."[7] The idea resembled the "Search Inside this Book" component of Amazon.com, which began in 2003 and allowed users to look at a few pages of a book before buying it. However, unlike Amazon's feature, which was limited to including standard pages like the title page and the first page of the first chapter, this project would help internet users to tailor the limited view of the book to their own needs. Google's platform would allow them to search the contents of books using keywords or key phrases. The webpage would also offer a link to a website where the book could then be purchased. Many publishers were accepting of the idea of such a program, and Google gained the support of numerous content producers, including Blackwell, Cambridge University Press, the University of Chicago Press, Houghton Mifflin, Hyperion, McGraw-Hill, Oxford University Press, Pearson, Penguin, Perseus, Princeton University Press, Springer, Taylor & Francis, Thomson Delmar and Warner Books. United with the libraries and the publishers, Google went forward with its plans.

However, Google soon alienated the book industry as it expanded its plans for Google Print. On December 14, 2004, Google announced its plans to use the idea behind Google Print to start building a digital library, comprised of 15 million volumes. The "Google Print Library Project" would involve scanning books, a costly project that had been previously attempted by multiple research organizations and libraries but never even nearly completed. With the financial power behind their company, Page and Brin asserted that Google could make better progress toward the ambitious idea of a digital library of that size. Page said,

> Even before we started Google, we dreamed of making the incredible breadth of information that librarians so lovingly organize searchable online. Today we're pleased to announce this program to digitize the collections of these amazing

> libraries so that every Google user can search them instantly. Our work with libraries further enhances the existing Google Print program, which enables users to find matches within the full text of books, while publishers and authors monetize that information.[8]

The Google Print Library Project, which would become known as Google Book Search and later as simply Google Books, would expand its efforts beyond the initial publisher-based project to include out-of-print books as well. Google described the new project in a press release, saying, "Users searching with Google will see links in their search results page when there are books relevant to their query. Clicking on a title delivers a Google Print page where users can browse the full text of public domain works and brief excerpts and/or bibliographic data of copyrighted material."[9]

Soon, the representative groups the Authors Guild and the Association of American Publishers (AAP) decided that the project was so radically different from the idea that Google had originally pitched that they needed to challenge Google's actions. In September 2005, the Authors Guild filed a class-action lawsuit against Google in the U.S. District Court for the Southern District of New York. The Authors Guild, which was founded in 1912, is "a society of published authors" and "an advocate for fair compensation, free speech, and copyright protection."[10] It claimed that Google had infringed on its members' rights by scanning their works and allowing internet users access to these scans. The Authors Guild said that this scanned copy would adversely affect an author's ability to profit from his work. Through the lawsuit, the Authors Guild asked for "an injunction against copying and a declaration that the program violates copyright law."[11] In addition, the authors are looking for reparation for damages incurred. The lawsuit named the individual plaintiffs as novelist and playwright Herbert Mitgang, children and young adult's book author Betty Miles, both of whom have books in the University of Michigan libraries. Google responded to the suit, saying in a statement:

> We regret that this group has chosen litigation to try to stop a program that will make books and the information within them more discoverable to the world.

> Google Print directly benefits authors and publishers by increasing awareness of and sales of the books in the program. And, if they choose, authors and publishers can exclude books from the program if they don't want their material included. Copyrighted books are indexed to create an electronic card catalog and only small portions of the books are shown unless the content owner gives permission to show more.[12]

From the beginning of these tensions, Google offered to negotiate with the Authors Guild, offering middle ground through its "opt-out" system, which allowed authors to ask for their books to be removed from Google Books. Google halted scanning efforts from September to November, saying that it would give the authors a chance to take advantage of this "opt out" option before the project continued. However, Executive Director of the Authors Guild, Paul Aiken, stated that Google should not have scanned the books in the first place, echoing the concerns of many who disagreed with the "opt out" system. He voiced concern with the precedent that the project may set, where a user of a work does not have to ask for permission but rather the creator of the work must actively defend it. "You can't take the shortcut and not get the permission of the copyright holders first. What about the next company that comes along and wants to do this?" Aiken said.[13]

While Google was facing challenges from the Authors Guild, problems were also brewing with the Association of American Publishers. The AAP is comprised of 300 companies, which "span all categories of publishing and represent the major commercial, educational and professional companies as well as independents, non-profits, university presses and scholarly societies."[14] The AAP's president, Patricia Schroeder, asserts that the group worked throughout the spring and summer of 2005 to convince Google to stop scanning their books. These negotiations included a suggestion to "utilize the well-known ISBN numbering system to identify works under copyright and secure permission from publishers and authors to scan these works."[15] According to the AAP, "Google flatly rejected this reasonable proposal," and on October 19, 2005, on behalf of five of its members – Pearson Education, The McGraw-Hill Companies, Penguin Group (USA), Simon & Schuster, and John Wiley & Son -- the AAP filed a copyright

lawsuit with the U.S. District Court in the Southern District of New York.[16] The AAP and members filed the suit under the charge that through their scanned publications and Google Book Search, Google Inc. was "further[ing] its own commercial purposes."[17] The five publishing companies asked for the courts to stop Google from reproducing books that they produced and to delete from their index any of the books that were already scanned and included.

Interestingly, the lawsuit did not target the universities – University of Michigan, Stanford University, Harvard University, or others – that were providing the publishers' materials to Google and had included works not in the public domain. Schroeder defended the decision to focus solely on Google and stated that "Google is clearly the instigator. They are the driving force behind this."[18] This detail highlights an underlying tone in the case between the AAP and Google; this was a case regarding content control. *Publishers Weekly*'s Andrew Albanese argued that publishers were not arguing about the usefulness of Google Books but rather challenging Google's decision to use content before asking permission. "Their problem was always one of control," he said; "even though Google was not displaying books, it was creating a valuable asset—an online index—publishers said, using copyrighted material for which it did not pay. Publishers wanted their cut."[19] The case proceeded, and despite the uncertain future of the program, Google Books was opened to the public in November, 2005.

As the legal proceedings continued, Google, the Authors Guild, and the AAP began negotiating outside of court. More than three years after the AAP suit was filed, on October 28, 2008, Google, the Authors Guild, and the AAP announced a $125 million settlement. The amount to be paid by Google would cover three areas of the settlement agreement: opening a Book Rights Registry, compensating authors and publishers $45 million for works that Google already scanned, and covering legal fees for both groups.

This settlement agreement detailed a number of provisions. The Book Rights Registry would cost Google $34.5 million to launch. This institution, which would operate like the music

industry's copyright protector, ASCAP, would help to divide Google Books' revenues among participating authors. A group of authors and publishers would work together to oversee the Registry's management of the scanning process, fees, and revenue distribution. Not all authors would have to be included by the registry. Through this "opt-out" system, those whose works were already included in the Google Books collection would be automatically placed in the registry. However, if an author asked to have his work removed from the collection, the book would be taken down from the site and the author would be removed from the Registry.

The details of the Registry were also accompanied by an outline of the future path that Google Books would take. Included in this plan was a provision about user access; Americans could access Google Books' digital volumes through a paid membership or through using a United States public library, all of which would be provided with free access for their patrons. If libraries wished to print from the database, they would be required to pay a fee, the only fee for libraries under this agreement. Furthermore, institutions including universities could purchase subscriptions to access Google Books. Under this subscription deal, Google Books would lift many of the viewing restrictions that were in place, including the restrictions imposed through the snippet-view feature. In an interview with *The Chronicle of Higher Education*, Google's chief legal officer, David Drummond, praised the settlement, saying that it would "unlock millions of these texts for users."[20] This attempt at collaboration was submitted to Dennis Chin, U.S. District Court Judge, who would review the agreement.

Shortly after presenting it, Google, the Authors Guild, and the AAP said that they would give rightsholders more time to review the settlement, If accepted, it would affect authors and publishers across the United States. Google attorney Alexander Macgillivray explained the reasoning for this delay, writing that Google hoped that it would ensure that "rightsholders everywhere have enough time to think about [the settlement] and make sure it's right for them."[21]

This 60-day delay was extended even further on April 28, 2009, when Chin ordered a four-month extension. After one more delay, the fairness hearing was set for February 2010.

In November, 2009, the settlement agreement was revised to include additional details about from where Google's digital library books can be taken as well as about the handling of orphan works – or works whose owners or rightsholders cannot be located or are not known. The revisions were described by *The Washington Post* as "concessions" that were made in response to criticism that the settlement eliminated the chance for other companies to compete with Google in the e-book and digital library markets.[22] The U.S. Justice Department worried that the settlement would violate antitrust and copyright standards and said that it would disapprove the deal in its original state. "We've made a number of changes to the agreement to address concerns raised, while preserving the core principles of the agreement," Google, the Authors Guild, and the AAP jointly stated.[23]

The revised settlement prevented Google from including books from other countries, including European countries like France and Germany, which were in the midst of their own legal battles with the company. It stated that Google can only take books from the United States, Australia, Great Britain, and Canada. Dan Clancy, the engineering director for Google Books, responded to the revisions, saying "We're disappointed that we won't be able to provide access to as many books from as many countries through the settlement as a result of our modifications, but we look forward to continuing to work with rightsholders from around the world to fulfill our longstanding mission of increasing access to all the world's books."[24] Furthermore, the settlement revisions required an "independent fiduciary, or trustee" to be in charge of handling the orphan works that were included in the Google Books collection.[25] This trustee would be assisted by Congress in overseeing the revenue generated by the books while a part of Google Books. Instead of being distributed to other members of the Registry if unclaimed after five years, as was planned in the first version of the settlement agreement, the money would be used to locate the

owner. After 10 years, it would be donated to a philanthropy. Under the original agreement, control of orphan works would have fallen under Google's control. In addition to this work, the trustee would oversee selling the rights to sell the orphan works to companies other than Google.

Following the announcement of the settlement proposal, some scholars expressed skepticism about the positive impact of such a deal, which would be applied to all U.S. publications regardless of whether the individual authors agreed with it or not. Robert Darnton, a Harvard University librarian, wrote in a *New York Times* op-ed piece that he was concerned about the specifics of the deal, writing, "That solution amounted to changing copyright by means of a private lawsuit, and it gave Google legal protection that would be denied to its competitors."[26] He also pointed out that the settlement would affect all authors in the United States, even those who did not agree with its provisions. "In other words, the settlement didn't do what settlements are supposed to do, like correct an alleged infringement of copyright, or provide damages for past incidents; instead it seemed to determine the way the digital world of books would evolve in the future," Darnton wrote.[27] The settlement, which on the surface looks like a collaboration, actually turned out to be a deal. Instead of forming a partnership that would allow all three parties to actively work together as the digital library market continued to expand, this settlement issued a sweeping verdict. I argue that this approach to compromise, while highlighting the industry's willingness to work with a content distributor, does not amount to a true collaboration. As I will explain later when discussing the Authors Guild and the remaining lawsuit, this step towards collaboration is an improvement from Napster's situation but still not an adequate approach.

Ultimately, Judge Chin expressed similar reservations about the settlement. On March 22, 2011, Chin officially rejected the settlement, calling it unfair and pointing to the "opt-out" procedures as a main problem. He released a 48-page ruling and stated:

> Before the Court is plaintiffs' motion pursuant, to Rule 23 of the Federal Rules of Civil Procedure for final approval of the proposed settlement of this class action on the terms set forth in the Amended Settlement Agreement (the "ASA"). The

> question presented is whether the ASA is fair, adequate, and reasonable. I conclude that it is not. While the digitization of books and the creation of a universal digital library would benefit many, the ASA would simply go too far. It would permit this class action – which was brought against defendant Google Inc. to challenge its scanning of books and display of "snippets" for online searching – to implement a forward-looking business arrangement that would grant Google significant rights to exploit entire books, without permission of the copyright owners. Indeed, the ASA would give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission, while releasing claims well beyond those presented in the case.[28]

He found issue with the orphan works trustee position, saying that the court should not be responsible for such decisions, and further stating that the fate of such publications should not be addressed "through an agreement among private, self-interested parties."[29] Furthermore, Chin said that the settlement agreement went into details too far past the original lawsuits, which dealt with "an indexing and searching tool, not the sale of complete copyrighted works."[30] Chin stated that the agreement spoke for authors who may not agree with its terms, and in addition, it infringed on an author or rightsholder's right to not make a decision about his work. Rather, Chin wrote, "Under the ASA [Amended Settlement Agreement].... if copyright owners sit back and do nothing, they lose their rights."[31] He also stated that the agreement did not address foreign works that were registered with copyrights in the United States. Finally, Chin expressed concern about the agreement's antitrust violations.

Chin's ruling served as a blow to negotiation attempts and proved that even some plans to collaborate between content providers and content distributors cannot stand if they go against a legal standard. The rejection of the settlement agreement meant the continuation of both lawsuits, leaving "Google's effort to digitize millions of books from libraries into legal limbo" and "undo[ing] years of painstaking negotiations."[32] Without a settlement, the class-action lawsuits continued, and *Publishers Weekly* reported Google's total exposure to be more than $3.6 trillion.[33] In an op-ed in *Slate*, Siva Vaidhyanathan, author of *The Googlization of Everything*, responded to the rejection, writing, "Google has been humbled."[34] After rejecting the settlement,

Chin suggested that revisions be made to the "opt-out" provision of the deal and rather include a system where authors would need to "opt-in." However, Google maintained that they would not propose a deal with such a system and insisted that any collaboration include an "opt out" system.

While the issue remained to be resolved, Google announced the addition of Google Play, a resource for Google Books users looking to purchase books. On March 6, 2012, Google posted about the program's launch on its website:

> Starting today Google eBooks will be available on Google Play - a new place to experience books, music, movies, and Android apps and games, available anywhere you go. For users of our Google Book Search platform, we are excited to offer this seamless way to purchase and enjoy the eBooks you've discovered. With over 4 million titles, Google Play is your home for the world's largest selection of eBooks. Beyond books, Google Play lets you store up to 20,000 songs for free and buy millions of new songs. It's home to 450,000 Android apps and games and gives you access to thousands of your favorite movies for rent, including new releases and HD titles.[35]

Google continued to expand the reach of Google Books despite the seemingly uncertain future of the program. Considering the uncertainty of the lawsuit, this decision may not initially seem prudent. However, expanding Google Books and launching Google Play demonstrated to the AAP and the Authors Guild – as well as to the court and the public – the potential of the service as well as the benefits of its use. When placed under the umbrella of Google Play, Google Books was no longer solely an index of copyrighted work. Instead, Google Play demonstrated the power of Google Books to serve as a marketing tool and a link between consumers and an e-book store.

Then, a little more than a year and a half after the legal cases began, the seven-year road to a court decision regarding the AAP's suit against Google came to a sudden end. On October 4, 2012, an agreement was made between the parties outside of court. The AAP described the agreement in press release, stating:

> The settlement acknowledges the rights and interests of copyright-holders. US publishers can choose to make available or choose to remove their books and journals digitized by Google for its Library Project. Those deciding not to

> remove their works will have the option to receive a digital copy for their use. Google Books allows users to browse up to 20% of books and then purchase digital versions through Google Play. Under the agreement, books scanned by Google in the Library Project can now be included by publishers.[36]

According to the AAP, the agreement will affect all publishers in the organization, and also applies to some that are not member.[37] A *Publishers Weekly* article outlined details surrounding the agreement, saying that the "main component" involved giving the rightsholders the option of "opting out" of the Google Books Program, which – the article noted – was always a component of Google's proposed program.[38] However, the released details of the agreement were vague, described by *Inside Higher Ed* as "momentous" yet "mysterious."[39] Representatives from both the AAP and Google insisted that they would not release any more details about the agreement. Neither party would confirm or deny whether the agreement included a monetary settlement. The mysterious nature of the settlement may stem from the group's desire to avoid media attention during the beginning of their negotiations. The lack of details may also be attributed to the groups' desire to exclude other companies or organizations from challenging the collaboration. Regardless, both parties agreed to move forward as a team. The agreement, which was made outside of the court, did not require approval from Judge Chin.

Google and the AAP acknowledged the importance of such collaboration in the future of the book and library industries. Senior Vice President, Corporate Development and Chief Legal Officer at Google, David Drummond, said that moving past the lawsuit would let Google focus on improving Google Play. The AAP's president and CEO, Tom Allen, said that the agreement "shows that digital services can provide innovative means to discover content while still respecting the rights of copyright-holders."[40] He acknowledged that the copyright issues may not have been solved in the agreement, saying "We basically worked out an arrangement that doesn't resolve the legal issues. We agree to disagree on those. But as a practical matter, it does resolve our differences with Google."[41]

Barbara Fister, a librarian from Gustavus Adolphus College said that the future of the industry is still unclear. Nonetheless, she said that the agreement "potentially could be helpful" as "it signals a détente between publishers and Google."[42] I argue that the second settlement between Google and the AAP is a prime example of how a content provider and a content distributor can unite, acknowledge differences, and move forward to make joint decisions about the future of the online segment of their industry.

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Chapter 4

What's Next: Compromise between Google and the Authors Guild

For technology industry analyst Greg Sterling, the agreement between Google and the AAP offers a commendable example of how Internet companies and copyright holders can find a middle ground in hopes of keeping abreast of changing consumer expectations. "It's a very sensitive and important issue. That's why the settlement is so interesting. Google budged and the copyright owners budged in trying to acknowledge the reality of both their respective situations," Sterling said.[1] This middle ground, I argue, is the key to the future of content distribution. The collaboration and agreement between Google and the AAP was made independently from the Authors Guild class-action lawsuit, which, at the time of this publication, remains unsettled. However, I argue that the legal case needs to be dropped, as the other lawsuit was, and replaced with negotiation and collaboration attempts. In this section, I will examine why this is beneficial option for both parties.

The ideas of copyright and fair use of works are at the center of the lawsuit against Google, and recent legal developments suggest that Google's actions may be considered legal by the United States judicial system. In October, 2012, a judge ruled that Haiti Trust Digital Library, a collection of libraries' digital copies of books, was acting in accordance with fair use requirements. Fair use is determined by amount of and purpose of the copying, the nature of the copied work, and the effect of the copying on the work's market. Judge Harold Baer ruled that the

libraries working with Haiti Trust are working under the fair use guidelines when keeping copies of digital books for "transformative purposes." Judge Baer wrote that:

> The use to which the works in the HDL are put is transformative because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material. The search capabilities of the HDL have already given rise to new methods of academic inquiry such as text mining.[2]

This ruling does not definitely apply to Google, as the company is not a non-profit like the Haiti Trust libraries. Nonetheless, NYU Law Professor James Grimmelmann asserts that this decision still suggests that Google would win the suit with the Authors Guild if the legal battle continues. "Perhaps together with the AAP settlement, this is a moment for a reevaluation of the Authors Guild's suit against Google. My estimate of the likelihood of settlement just went up substantially," he said.[3]

This development confirms that legal disputes between content providers and content distributors do not always favor the provider. Therefore, organizations like the Authors Guild cannot rely on an injunction to stop a distributor's actions. Considering this, it is smart for a content provider to consider other ways to dictate the future of online content distribution, namely collaboration. Even if the courts did side with the Authors Guild, legal actions may not move quickly enough to keep up with the development of content distribution technology. Former HarperCollins CEO Jane Friedman stated that she didn't think the legal issue behind Google's digital book sharing technology would be resolved in her lifetime. She was quoted in an article by *Wired* magazine founder Kevin Kelly, who said, "the courts may haggle forever as this complex issue works its way to the top. In the end, it won't matter; technology will resolve this discontinuity first… And as scanning technology becomes faster, better and cheaper, fans may do what they did to music and simply digitize their own libraries."[4]

If the Authors Guild decides to collaborate with Google, it would benefit by bypassing the uncertainty of the legal suit. In addition, the organization can have a say in what some

scholars are calling a revolutionary and necessary technological development. Kelly highlighted the opportunities that Google Books presents to the library and publishing industries, pushing the book and its library into the digital realm. “Soon a book outside the library will be like a Web page outside the Web, gasping for air. Indeed, the only way for books to retain their waning authority in our culture is to wire their texts into the universal library,” he wrote.[5] University of Michigan President Mary Sue Coleman pointed to the possibilities available thanks to Google Books during her address to the Professional/Scholarly Publishing Division of the Association of American Publishers in February 2006. She referred to Google Books as “an idea that can—and will—preserve the whole of printed knowledge for future generations and enable research never before thought possible.”[6] Coleman spoke out in support of the program, urging her audience to embrace Google Books as an opportunity:

> It is this criticism of the project that prompted me to accept your invitation to speak — and explain why we believe this is a legal, ethical, and noble endeavor that will transform our society. Legal because we believe copyright law allows us the fair use of millions of books that are being digitized. Ethical because the preservation and protection of knowledge is critically important to the betterment of humankind. And noble because this enterprise is right for the time, right for the future, right for the world of publishing, right for all of us.[7]

The University of Michigan, under Coleman’s guidance, was one of the first universities to offer its library resources to the Google Books project.

Despite Coleman’s partiality toward Google Books, her speech is still a useful overview of the possibilities that Google Books presents and its potential to continue influencing the library and publishing industries. She pointed to disasters like Hurricane Katrina and events like the destruction of the Cambodian library collections by Khmer Rouge fighters as problems that the possibility of a digital library could solve. Coleman commented on the revolutionary nature of the program, saying:

> I have spent 45 years in higher education, from being a freshman at a small liberal arts college in Iowa, to leading of one of the premier research universities of the world. I have been involved in groundbreaking medical research, have

> worked alongside some of the brightest minds in academe, and have dined with Pulitzer Prize winners and Nobel laureates. Google Book Search is the most revolutionary enterprise I've ever experienced. It has the potential to transform the flow of knowledge….[8]

As Coleman argues, the digital book revolution was sparked and furthered by Google's launch of Google Books. The potential that the project presents to libraries and publishers is similar to what Napster introduced to the music industry. However, Napster's case proves that a court injunction cannot stop future digital content distribution, and shutting down Google Books will not ensure that the digital library project will not be taken up by another group. If the Authors Guild collaborates now with Google Books, it secures a role in dictating the future of the digital library and book searching.

After considering all of the above benefits, the final piece lies with Google, and whether it can find middle ground with the Authors Guild. The negotiations with the AAP prove that the technology company is willing to collaborate with members of the industry. Adam Smith, director of product management at Google said that such negotiations are a good business move. "…we very much view it as enabling a future business relationship, one that we believe will be very beneficial for Google, the authors and the publishers," he said.[9] Unlike Napster's leaders, it seems that those at Google realize the importance of forming a partnership with the industry veterans. Without the Authors Guild, Google is prevented from including content and therefore restricted from pursuing its goal of a searchable, digital library. If Google Books survives, Google can use the data collected through users' selections in Google Books to better align its sidebar advertisements with individual users. Furthermore, the content scanned from books will contribute to its pool of data, and a larger compilation of data will improve its search engine. Google Books offers the Authors Guild the potential to market to a variety of readers, and the site serves as a link between book searches and online book retailers. The Authors Guild can also use Google Books to monitor the internet traffic on certain books.

A partnership will allow Google and the Authors Guild to examine how the online service should move forward. Collaboration will likely bring to light more features of Google Books that will benefit both Google and the Authors Guild. After witnessing the successful AAP settlement, I predict that the Authors Guild will seriously consider following a similar path. The AAP's decision to drop its suit may lead the court to reconsider the strength of the Authors Guild's claim against Google, and settling before a court rules in favor of Google may now be a top option. Although the AAP and the Authors Guild are two different groups with two different agendas, I think that the benefits of collaboration apply equally to both.

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6. Mary Sue Coleman, "Google, The Khmer Rouge and the Public Good," The Professional/Scholarly Publishing Division of the Association of American Publishers, February 6, 2006.

7. Ibid.

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9. Perez, "Google Book Settlement," 2008.

Chapter 5
Conclusion

While addressing the Association of American Publishers about the potential of Google Books, University of Michigan President Mary Sue Coleman argued that the shifting of consumer expectations is not exclusive to the book industry. She referenced changes in her own state of Michigan, where the automotive industry is struggling to keep abreast of a changing market. In her speech, Coleman quoted one Ford official and restated his assessment of the automotive industry's situation: "Change or die."[1]

As the advancement of technology continues to speed up, industries would do well to take this frank advice. The past decade has seen its share of companies and industries falling into obsolescence, and many of these bankruptcies can be attributed to a failure to adapt. In January, 2012, the camera and film company, Eastman Kodak Co., declared bankruptcy.[2] *Forbes* writer Erik Kain pointed to the company's inability to shift quickly enough to the digital era, saying, "Of course it's not *really* technology that killed Kodak. *We* killed the film manufacturer. We chose to use digital cameras instead of film. We found the SD cards and USB cables far more convenient. And so we killed the company through our neglect, and Kodak didn't know how to respond or how to respond in time."[3] Kodak ironically created the first digital camera but was hesitant to market a product that might compete with its film camera.[4] As one of first companies to offer affordable cameras in the early 1900s, Kodak lost its hold on the camera market and paid for this mistake in a reported debt of $6.8 billion.

The twentieth century saw its share of legal suits between content distributors and content providers, and the lessons learned from Napster can be applied to countless industries. More than a century ago, in the 1908 Supreme Court case of *White-Smith Music Publishing Company v.*

Apollo Company, the music industry sued piano roll manufacturers, another group of content distributors. The industry argued that piano rolls, which were made for player pianos, were illegal copies of sheet music.[5] The film industry also has a history of content disputes. In the 1970s, it fought to prevent the sale of VCR's, and a decade later, the industry brought video cassette rental stores to court.

Stanford University law professor Paul Goldstein points to the trend in these events, saying "Almost every confrontation between the entertainment industry and new technology ends in the same way: four or five years after the litigation and legislation end, the new technology – once the industry's fearsome enemy – becomes its staunchest ally. Indeed, the technology ends up generating abundant new revenue for the owners of copyrights."[6] Certainly, the piano roll and the video recording cases follow this trend. Decades after the 1908 legal confrontation, the radio and phonorecording distributed the content of music industry legends like Elvis and the Beatles. Another pattern relates to the need to change to stay relevant. The cycle of innovation and the need for adaptation never stop. Today, the video cassettes that the film industry battled have been traded in for Netflix files.

President Coleman urged the AAP to run with the new technology presented by Google and Google Books. Embracing the changes, she said, is the way of the future:

> Newspapers and TV networks are trying to figure out how to make money with online editions. Hollywood is experimenting with simultaneously releasing movies to theatres, DVD and cable. Cell phones are ubiquitous. For better or worse, they are shaping how, when, and where we communicate. Universities are not islands in this sea of technology. We must change with our students, and that means embracing the Internet and all it can, and does, offer. [7]

Google Books is not the last technology that will threaten the status quo of an industry, and Google and the Authors Guild are not the last organizations that will engage in conflict over content distribution. Nonetheless, with an eye for compromise and a focus on the future, Google Books can serve as an example of progress gone right.

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5. U.S. Copyright Office, “Music Licensing Reform,” July 12, 2005, http://www.copyright.gov/docs/regstat071205.html.

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