

# PROCEED WITH CAUTION: HOW DIGITAL ARCHIVES HAVE BEEN LEFT IN THE DARK

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Digital preservation practice exists in a legal gray area. Following the proposed settlement of Google's Library Project litigation—a pair of class action copyright infringement lawsuits brought against Google in 2005 by the Authors Guild, the Association of American Publishers, and several publishing houses<sup>1</sup>—the legality of digital archives and libraries remains unclear. Furthermore, cases such as the short-lived *Internet Archive v. Shell*<sup>2</sup> provide little guidance but highlight many of the dangers digital archives may encounter.

This Note lays out the principal liabilities to which digital archives are exposed, including their potential but imperfect defenses, using the recently settled but non-precedential *Internet Archive v. Shell* case as an example of the uncertainty surrounding digital archiving. Digital archives face many legal barriers, including practically perpetual copyright terms in the material they include, an uncertain fair use doctrine, a chaotic licensing scheme, and a proliferation of online contracting that threaten archivists' efforts to construct comprehensive digital libraries. While scholarly literature has already explored the application of the fair use defense to archives such as Google's Library Project<sup>3</sup> and to some extent the Internet Archive,<sup>4</sup> this Note further explores the fair use defense in light of the Google

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1. See generally Lawrence Jordan, *The Google Book Search Project Litigation—“Massive Copyright Infringement” or “Fair Use”?*, 86-SEP. MICH. B.J. 32 (2007) (providing a quick overview of Google Book Project and the New York litigation).

2. 505 F. Supp. 2d 755 (D. Colo. 2007).

3. See, e.g., ROBIN JEWELER, CONG. RESEARCH SERV., THE GOOGLE BOOK SEARCH PROJECT: IS ONLINE INDEXING A FAIR USE UNDER COPYRIGHT LAW? (2005), available at [http://www.opencrs.com/rpts/RS22356\\_20051228.pdf](http://www.opencrs.com/rpts/RS22356_20051228.pdf); Jonathan Band, *Google and Fair Use*, 3 J. BUS. & TECH. L. 1 (2008); Douglas L. Rogers, *Increasing Access to Knowledge Through Fair Use—Analyzing the Google Litigation to Unleash Developing Countries*, 10 TUL. J. TECH. & INTELL. PROP. 1 (2007); Elizabeth Hanratty, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 10.

4. See, e.g., Kinari Patel, *“Authors v. Internet Archives”: The Copyright Infringement Battle Over Web Pages*, 89 J. PAT. & TRADEMARK OFF. SOC'Y 410 (2007); Rebecca Bolin, *Locking Down the Library: How Copyright, Contract and Cybertrespass Block*