From the University Presses — The Google Settlement: Boon, Boondoggle, or Mixed Blessing?

Column Editor: Sanford G. Thatcher (Director, Penn State Press, USB 1, Suite C, 820 N. University Drive, University Park, PA 16802-1003; Phone: 814-865-1327; Fax: 814-863-1408) <sgt3@psu.edu> www.psuypress.org

Everyone seems to agree that the Google settlement announced in October 2008 represents a milestone of some kind in the development of access to information, but there is a wide spectrum of views about whether, overall, this is a good thing or a bad thing as far as the general public interest is concerned. Publishers appear to be as mixed in their opinions as librarians.

A lively debate is ongoing over the library-censor listserv on the merits of the settlement. Rick Anderson, in a posting on January 23, prefers to accent the positive: “Look at what the Google settlement has done: the general public now has far better (though still imperfect) access to vastly more literary and scientific writing than it ever has had before. This access is, by any sane definition of the term, free. (More comprehensive access is available at a price, but what’s available at no charge is still amazing.) Even better, the content to which we now have access is, for the first time ever, fully searchable, and we can get it from our homes and around the clock. Better still, the public has paid virtually nothing in return for what it now gets.” To the skeptics, he says: “Sometimes I think we’ve actually made an art out of letting the perfect be the enemy of the good.”

Ann Okerson, in her posting on December 17, also finds “commendable aspects” in the settlement and points out: “What I hear from readers is that they are waiting for the day when a click on a library catalog entry will take them directly to the full text of the item and speed up their ability to get information and do research. The Google partnerships and projects bring us closer to a version of that day, much sooner than we could have imagined even five years ago. Is this good? Yes.”

Bernie Sloan, replying to Okerson on December 20, observes: “Sure, people are better off than they were five years ago as far as getting online access to book-based info. And that’s a good thing. I don’t think the critics are necessarily opposed to Google Book Search per se. I think the critics are wondering whether the ‘settlement’ is a step forward or a step back in the journey towards reaching Ann’s goal.” Bonnie Klein worries, in her December 18 message, about the further corrosive effect of the settlement on rights that libraries have traditionally relied upon: “What is at stake are the current exceptions in copyright law — Sections 108, 109, and to a lesser extent 110 — that are key to library operations, whether brick or click. We are moving to accept as common general practice that every instance of online access may be controlled by the copyright owner [or authorized agent] and subject to toll or metered use. Over time this may undermine and erode the relevance and need for Title 17 exceptions.” And Bernie Sloan, on January 14, reminds us of the qualms Siva Vaidhyanathan had initially expressed about the settlement: “My major criticisms of Google Book Search have always concerned the actions of the university libraries that have participated in this program rather than Google itself... Libraries at public universities all over this country... have spent millions of dollars collecting these books. Now they are just giving away access to one company that is cornering the market on on-line access. They did this without concern for user confidentiality, preservation, image quality, search prowess, metadata standards, or long-term sustainability. They chose the expedient way rather than the best way to build and extend their collections... I am sympathetic to the claim that something is better than nothing and sooner is better than later. But sympathy remains mere sympathy... we must reflect on how complicit some universities have been in centralizing and commodifying knowledge under a single corporate umbrella.”

Others have more explicitly developed Vaidhyanathan’s critique in terms of an alleged monopoly or quasi-monopoly that the settlement has effectively created for Google. Robert Darnton, writing about “Google & the Future of Books” in the New York Review of Books (February 12, 2009), concedes that “Google can make the Enlightenment dream come true,” but reminds us that “the eighteenth-century philosophes saw monopoly as a main obstacle to the diffusion of knowledge — not merely monopolies in general, which stifled trade according to Adam Smith and the Physiocrats, but specific monopolies such as the Stationers’ Company in London and the booksellers’ guild in Paris, which choked off free trade in books [and, not coincidentally, spurred the movement to adopt copyright legislation as an antidote to monopoly power]... Google is not a guild, and it did not set out to create a monopoly. But the class action character of the settlement makes Google invulnerable to competition.” Chris Castle, a former attorney for Napster writing from the UK in The Register in a posting titled “Monopoly Money from Digital Books” (http://www.theregister.co.uk/2008/12/31/chris_castle_google_books_and_beyond/) elaborates: “If a competitor tried building a competing book registry by negotiating licenses for in-copyright works, that competitor would have to bear the startup costs — and the cost of licensing. If the competitor is rewarded for respecting authors’ rights by obtaining favorable terms, that advantage can be taken away by Google. Why? Because one of Google’s goodies from its dominant position in the settlement negotiation is ‘most favored nations’ price protection. The registry is contractually required to offer Google any better terms it would give to anyone using any data or resources that Google provides the registry, or that is of the type that Google provides. So even if a competitor wants to build a parallel infrastructure from scratch, and wasn’t using any of Google’s data — any reward for their legitimacy would be trumped by Google’s MFN. There is no advantage in ‘doing it right’ except a clear conscience — an MFN inhibits competition.”

Castle warns ominously that this monopoly might well not stop at books, quoting Google co-founder Sergey Brin as seeing the new book registry as the first step toward monetizing “other areas of digital media, like video.” As Richard Johnson notes in Library Journal (December 23, 2008), “the proposed deal not only solidifies Google’s dominant position in Internet search, it gives the franchise a virtual monopoly on the long-tailed out-of-print book market.” And even though public-domain works would be offered free to the public, the mere fact that access to them will be restricted under the settlement to Google searching alone means that “in effect, for the one-time price of a scan, Google now proposes to secure and enforce a monopoly on the digital texts of works that belong to the public” — a situation that he clearly considers deplorable. As he succinctly summarizes the situation, the “settlement is a stark reminder that businesses are sustained by very different motivations than libraries. Control over library collections, once guided by the values of learning and research, is now a commercial matter. Goodbye free, hello fee.”

Instead of settling with authors and publishers, what if Google had pursued its suit over fair use to its legal conclusion in the courts, as many in academe had hoped when Google initially positioned itself as the champion defender of that legal principle? Some noted copyright authorities, like Larry Lessig and William Patry (the author of the leading text on fair use, who is now employed by Google), believe that Google would have prevailed on the merits of the argument. Others, like Siva Vaidhyanathan, had their doubts. So do I. When one considers that (a) the Ninth Circuit whose rulings in fair-use cases have crucially deployed a notion of “transformative use” as functionally different use (as, for instance, thumbnail images on the Web serve a different purpose than high-resolution images) that has not so far been adopted by other circuits, (b) its decision in the Grokster fair-use case was unanimously overturned by the Supreme Court, and (c) the Google case is being tried in the Second Circuit on whose court of appeals sits Pierre Leval, widely regarded as the pre-eminent authority on copyright issues among current judges and author of the classic article “Toward a Fair Use Standard” in the Harvard Law Review (March 1990) that identified “transformative use” as the “heart” of copy-
right law in a sense quite different from how the Ninth Circuit has interpreted it, I think the odds were against Google prevailing. Instead of continuing the fight to include... Making that up being a very expensive legal battle with at least an uncertain outcome at best, Google struck a deal for a modest investment of $125 million that is likely to be paid back many, many times over in future revenues. According to Lessig, “this agreement gives the public (and authors) more than what fair use would have permitted. That leaves fair use as it is, and gives the spread of knowledge more than it would have had.” Vaidhyanathan’s verdict is that “fair use in the digital world is just as murky and unpredictable (not to mention unfair and useless) as it was yesterday.”

Whatever the implications for fair use may be, the question remains whether, realistically, there was any alternative to relying on the private sector to accomplish this kind of massive digitization. Darnton, among others, thinks “we missed a great opportunity. Action by Congress and the Library of Congress or a grand alliance of research libraries supported by a coalition of foundations could have done the job at a feasible cost and designed it in a manner that would have put the public interest first. By spreading the cost in various ways... we could have provided authors and publishers with a legitimate income, while maintaining an open access repository or one in which access was based on reasonable fees. We could have created a National Digital Library...” Others are not so sure. James O’Donnell, posting on liblicense on January 23, avers: “I had some reason to know the state of play around LC on these issues a decade ago, and the prospects for public funding in support of such a project were slim, to say the least.” Some public funding has gone into efforts like the Million Book Project, which received grants from the National Science Foundation totaling $3.6 million to help with its digitization of over 1.5 million books; but it has taken eight years to reach this level, and is yet very far from becoming the Universal Library it had the ambitions to become. It has been brought under the umbrella of the Internet Archive, itself established in 1996 with similar ambitions, but none of these other projects, or all of them together, has come close to reaching the level of digitization that Google has achieved in a much shorter period of time. As Paul Courant observed on his blog, “Even a win for Google would have left the libraries unable to have full use of their digitized collections of in-copyright materials on behalf of their own campuses or the broader public. Making the digitized collections broadly usable would have required negotiations with rightsholders, in some cases book by book, and publisher by publisher. I’m confident that we would have gotten there in time, serving the interests of all parties. But ‘in time’ would surely have been many years.” Others credit Google with having given a tremendous boost to efforts within academe that can build on what Google has started. Thus Michigan librarian John Wilkin writes in LibraryJournal (December 23, 2008) that the cooperative HathiTrust Project, launched initially within the CIC libraries but now involving California’s, Virginia’s, and other universities’ libraries, too, with the “aim to create nothing short of a universal digital library,” has found the Google Library Project to be “integral in seeding the market with a large body of materials as well as inspiring a new level of digitization activity by libraries, library consortia, and other partners, such as the Open Content Alliance.” And he notes also how the settlement provides legal cover for some collaborative activities that the original Google agreements with libraries did not and that are at the core of what HathiTrust wants to accomplish.

The very name HathiTrust connotes that a private enterprise like Google ultimately cannot be trusted with the mission “to protect the world’s knowledge for the public.” “Google,” Wilkin says, “cannot be that trust for the future.” But one wonders whether the will even exists in universities to make the investments, perhaps with help from state and federal governments and from foundations, necessary to achieve control just of the intellectual property immediately produced by their own faculty and to make it freely available to the public in the way advocates of “open access” proclaim to be in the best interests of society overall. Darnton, himself an advocate of “open access,” raises the specter of universities getting themselves into the same fix they did with STM journals: “What will happen if Google favors profitability over access?... Google may choose to be generous in its pricing, ... but it could also employ a strategy comparable to the one that proved to be so effective in pushing up the price of scholarly journals: first, entice subscribers with low initiation fees, then raise the price, keep them hooked, ratchet up the rates as high as the traffic will bear.” Ironically, it was first a university, John Hopkins, that launched a university press to overcome the “market failure” of scholarly communication, and it began in the late 19th century by publishing journals in chemistry and mathematics. Only later, in the wake of World War II when governments started investing heavily in scientific R&D, did a viable commercial market for STM journals come into existence. By that time there were already some fifty university presses in existence, providing enough of a publishing infrastructure for universities themselves, had they chosen to do so, to capture this developing market for themselves. But this “missed opportunity” was allowed to pass, and librarians have spent decades now rueing the consequences. In principle, there seems to be no reason that a “grand alliance” of the non-profit kind Darnton intimates couldn’t yet be formed to challenge Google’s emerging monopoly, although he thinks “it is too late now.” But even if the means exist, as they once did for publishing STM journals en masse in a non-profit manner, the will does not seem to be there to make a challenge to the Google monopoly possible. Universities appear to be content to rely on the market even when their rhetoric suggests otherwise. If they weren’t, wouldn’t those some one hundred U.S. universities that support presses be more willing to allow them to make all their publications “open access” instead of continuing to require the presses to recover 90% or more of their costs from sales in the marketplace? When push comes to shove, and budgets are tight, the rhetoric of acting in the public interest almost seems to defer to dependence on market mechanisms to make the system of scholarly communication work.

So, forced as they are to rely on the market to cover most of their operating costs, how do university presses view the Google settlement? I think it is fair to say that opinions among press directors vary as much as opinions among librarians do. While presses generally were excited about the new possibilities for selling backlist titles opened up by Google Book Search and its facilitation of “the long tail,” they were equally dismayed by Google’s preemptive strike against copyright interests in its library digitization program and sided with authors and commercial publishers in their suit, though not formally being a party to it other than their being included in the class of rightsholders once the suit was certified to be a class action. Ambivalent about Google from their past experience, presses seem to have so far accepted the settlement as something of a mixed blessing.

On the one hand, Google’s acceptance of the “opt-in” approach for all in-copyright, in-print books is a major victory for all publishers, as it was meant to protect this principle against Google’s favored “opt-out” approach that the suit was brought in the first place. Google did get the plaintiffs to agree to the “opt-out” approach for all in-copyright, out-of-print books, and as this category is by far the largest (constituting five of the seven million books already in the Google database, with the remainder equally split between books in the public domain and books still covered under copyright), Google can boast that in sheer practical terms it won the battle. However, inasmuch as this approach as applied to this category bears considerable similarities to the approach that was embedded in the “orphans works” legislation that both librarians and publishers had been supporting in Congress, it can be considered a reasonable compromise that mostly solves a long-standing problem. (The chief opposition to that legislation has come from creators of images, and it is possible that worthy that an extension to definitions in children’s books, the settlement excludes images from the scope of the agreement altogether — and hence only “mostly” solves the problem.) Depending on how one evaluates the potential monetary value of out-of-print books, attitudes toward the possible financial benefits from the various programs that the settlement envisions for Google to launch, beginning with institutional subscriptions and extending through sharing of ad revenues and supplying print-on-demand editions, range from the optimistic to the skeptical. I wonder myself how much demand there will be for this vast sea of out-of-print material. There is, after all, good reason these books went out of print in the first
place: demand simply had deteriorated to the point where offset printing technology made reprinting uneconomical. Books with strong continuing value have never gone out of print, whether classics of philosophy like Hume's *Treatise on Human Nature*, foundational works in social science like Morgenstern and Von Neumann's *Theory of Games and Economic Behavior*, popular expositions of science like Einstein's *The Meaning of Relativity*, or great novels like Austen's *Pride and Prejudice*. As a publisher for forty years of scholarly works in the humanities and social sciences, I have read many works that have now outlived their usefulness, either because their theoretical frameworks have long since been superseded or because their factual information has been corrected by later investigation; many of them are of interest now only to people who are writing about the history of disciplines, and even these investigations would likely focus on the primary works that had achieved near classic status in these fields (the "paradigm-changing" works, to use Kuhnian language), rather than the multitude of "case studies" in the social sciences or applications of various popular interpretative approaches like deconstruction in the humanities. Some old books really do deserve to be left in the dustbin of history. Thus I count myself among the skeptics about how great the financial returns will be from this monetization of the out-of-print corpus. Still, I have been pleasantly surprised at how well the "long tail" has worked so far for older backlist titles — though not yet producing much more income than e-books have for most publishers, namely, less than 5% of total revenues — and I am prepared to be pleasantly surprised again at the eventual results the Google settlement might produce.

On the other hand, with all the benefits, actual and potential, come some significant costs. What Google will charge for its services — 37% of all revenues generated under the programs envisioned under the settlement — seems excessive. It is nearly double, for the programs envisioned under the settlement, what publishers might produce.

There is a great deal of uncertainty right now about how all this new arrangement with Google will work out in the long run — whether, for instance, it will become the veritable pot of gold at the end of the rainbow or, instead, simply income marginal for the publishing industry, which may become a reliable source of extra income but nothing on a scale to revolutionize the business in any fundamental way. Each publisher will be placing its own bets, initially by opting out of or staying in the settlement, and it will be interesting to watch which kind of gamble pays the best returns in the future.