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

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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 libelous 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 price, to which we now have access is, for the first time in history, ‘free.’) This is a step forward or a step back in the journey towards the Enlightenment dream come true,” but “the eighteenth-century philosophers can make us want to back away from the arbitrary, metered use. Over time this may undermine the relevance and need for Title 17 — 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 practice a system in which every instance of online access may be controlled by the copyright owner [or authorized agent] and subject to toll or metered use.”

Others have more explicitly developed Vaidyanathan’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 philosophers 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...”}

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

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() NISO’s goal is to build understanding among the variety of players in this process of transforming metadata to fulfill the needs of the many different users and uses in the chain. The subtleties of differences in needs and the significant infrastructure investments made by different constituencies make it unlikely that the community can settle on one single data structure or transport mechanism. What is potentially more likely is creating standardized crosswalks and application profiles for different standards used in the community. Obviously, standards or best practices will play a role in the eventual solutions or improvements to the exchange of metadata. However, just as important will be a deeper understanding of the investments and the strengths that each participant in the exchange process brings to the table. Each constituency will have something to learn from the others in the chain, which might help reduce costs and improve functionality for everyone.
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 competitors. Castile, a former attorney for Napster writing from the UK in *The Register* in a posting titled “Monopoly Money from Digital Books” (http://www.thereregister.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, they’d be tripping up 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 registry. The registry is contractually required to offer Google any better terms it wishes to 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 rewards they would be tripping over are not just Google’s MFN. There is no advantage in ‘doing it right’ except a clear conscience — an MFN inhibits competition.” Castile 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 van Noorden, posting in *Library Journal* on January 23, 2008, wrote, “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 libraries are sustained by many 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 academia had hoped when Google initially positioned itself as the scholar’s defender at hearings? Some noted copyright authorities, like Larry Lessig and William Patry (the authors 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 compares the Ninth Circuit’s (b) its decision in the 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 preeminent authority on copyright issues among current judges, then one must ask whether a “fair use standard” in the *Harvard Law Review* (March 1990) that identified “transformative use” as “the heart of copyright 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 to fight what would have been a losing battle, and even more clearly in a 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 widespread 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 over many universities... 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, 2008, had some problems with 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 early books, but it has taken eight years to reach this level, and is yet 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 been another challenge. Google, although he thinks “it is too late now.” But even if the means exist, as they once did for publishing STM journals on 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 threats are tight, the public interest always 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 possibilities for selling backlist titles opened up by Google Book Search and its facilitation of “the
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considerable similarities to the approach that was
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cal terms it won the battle.  However, inasmuch
(copyright),
public domain and books still in print and under
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the largest (constituting five of the seven million
out-of-print books, and as this category is by far
agree to the "opt-out" approach for all in-copyright,
mainly to defend this principle against
books is a major victory for all publishers, as it was
"opt-in" approach for all in-copyright, in-print
"opt-out" approach that the suit was brought
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
mainly to defend this principle against Google's fa-
avored "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 in print and under
copyright), Google can boast that in sheer practi-
cal terms it won the battle. However, inasmuch
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 note-
worthy that, except for illustrations 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 fi-
nancial benefits from the various programs that
the settlement envisions for Google to launch, begin-
ning 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 mate-
rial. 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 Ein-
stein'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 pri-
mary 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 applica-
tions 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 eBooks 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, 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 example, what most literary
agents charge authors for their services, or what the
Copyright Clearance Center exacts as a transac-
tion fee, or what even the most famous authors
receive in royalties. Added to the fee that the book
registry will demand to cover its operating costs,
which will probably be around 20%, this means
that rightsholders will be getting less than 50% of
the income, or not much more than Google itself.
I have heard no argument that justifies such a steep
toll, and it vastly exceeds the micropayments for
advertising upon which Google originally built
its multi-billion dollar business. Although Rick
Anderson has praised Google because it "has
elected to absorb effectively all of the up-front costs
and labor involved in this remarkable project," in
fact not a single penny has been provided to pay
for the substantial labor costs that publishers will
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incurred in researching what digital rights they have in the five million out-of-print works in Google's database, costs that are particularly onerous for small, understaffed university presses like mine to bear. Even finding out what books a publisher can potentially claim in Google's database is not proving easy. Google has provided technical means for searching its database, but so far it is not working very efficiently. Using ISBNs to help a publisher identify its titles, for example, only gets one so far because the ISBN did not come into use until 1970 and in-copyright titles can have publication dates as far back as 1923. One needs to investigate the language in older contracts to see whether it can be interpreted to include any kind of digital rights at all, and commercial publishers have the additional problem of tracking the legal ownership of rights through a long maze of mergers in the publishing business. Looking ahead, publishers must figure out how to handle income deriving from advertising under the settlement, as this has not heretofore been a type of revenue that publishers have had to worry about sharing with authors. As one university press director has been quoted as saying, “that's one check I don't want.” They also face the daunting prospect of having to enter into negotiations with authors over many rights that the settlement identifies as shared between authors and publishers, such as how much of a book to display. It is easy to understand why this type of negotiation was factored into the settlement: it was, after all, an association of authors who publish trade books and are represented by literary agents that was one of the plaintiffs filing the class-action suit. But this represents only a small, even if influential, segment of the class of authors overall. Academic authors publishing with university presses, for instance, typically transfer all rights in their books to the university presses because in this sector presses themselves have traditionally taken on the role of serving as literary agents for authors. It imposes a very significant burden on university presses to obligate them to negotiate every right of this kind with their authors, who mostly want to be left alone to pursue their research and are generally not interested, as trade-book authors are, in all the many details of subsidiary rights. The settlement provides no money to presses to cover these extra costs. Conceivably, these costs will exceed what income can be expected from “long-tail” sales of out-of-print titles. There is also a strong possibility that, with its makeup evenly divided between representatives of authors and publishers, the book registry will find itself frequently split in the decisions it will have to make, thus leaving it to the prescribed arbitration rules to resolve at least some of the many potential disputes that may arise under the settlement. Lack of control over outcomes is thus another cost that can be anticipated.

Whether the settlement overall will be sufficiently beneficial to make it worthwhile for a publisher to remain in the class instead of opting out altogether and thereby preserving the option of bringing suit later or reaching an agreement with Google outside the terms of the settlement, such as within the alternative framework of the Google Book Search program that already exists, is a complex decision that each publisher will have to make for itself. While the settlement seems a mixed blessing for publishers on the whole, the exact mixture of costs and benefits will vary from one publisher to another depending on a variety of factors different for each, among them the number of titles already in the database that each publisher can credibly lay claim to owning, the degree of complexity anticipated in negotiating the display and other rights with authors, the terms of any other agreements a publisher may invoke (such as Google Book Search), if a publisher should decide to bring some now out-of-print titles back in print in such a way as to satisfy the requirement that they be “commercially available,” and the potential monetary rewards under alternative programs compared with the settlement (which guarantees just $60 per title already digitized plus a 63% share, minus the registry’s fee, of income derived from institutional subscriptions according to whatever formula the registry devises) and the likelihood that the terms of alternative agreements outside the settlement will remain relatively favorable upon renewal of those agreements.

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.