September 2005

Issues in Vendor/Library Relations -- So What's Wrong with Opt-Out?

Peter Givler

Association of American University Presses, pgivler@aaupnet.org

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>

Part of the [Library and Information Science Commons](#)

Recommended Citation

Givler, Peter (2005) "Issues in Vendor/Library Relations -- So What's Wrong with Opt-Out?," *Against the Grain*: Vol. 17: Iss. 4, Article 27.

DOI: <https://doi.org/10.7771/2380-176X.4530>

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.

Issues in Vendor/Library Relations — So What's Wrong with Opt-Out?

by **Peter Givler** (Executive Director, Association of American University Presses, 71 W. 23rd Street, Room 901, New York, NY 10010; Phone: 212-989-1010; Fax: 212-989-0275) <pgivler@aaupnet.org> www.aaupnet.org

Column Editor: **Bob Nardini** (Senior Vice President & Head Bibliographer, YBP Library Services, 999 Maple Street, Contoocook, NH 03229; Phone: 800-258-3774 x. 3251; Fax: 603-746-5628) <rnardini@ybp.com>

Last December, Google announced that it had entered into agreements with five major libraries — the New York Public, the Bodleian at Oxford, and the University Libraries at Harvard, Michigan and Stanford — to digitize their book collections, index them electronically, and make them searchable online. In return, the libraries will receive a digital copy of all the books they loaned to Google for this purpose. The Project is expected to take seven years, but when it is completed, anyone with a computer and an Internet connection would be able to access what would be the largest collection of books in the world.

Ever since Google announced the project, though, publishers have been objecting to what they regard as a massive infringement of their rights, since Google intended to digitize copyrighted works without seeking permission. Google responded that publishers could “opt-out” if they wished by withdrawing individual titles from the project. Opted-out books would still be digitized, though, a copy of them kept in Google’s database, and digital copies still given to the participating libraries. Opt-out would only mean that those titles would not be displayed in the search results.

Publishers continued to object. On August 12, Google publicly announced an expansion of the “opt-out” option. Publishers can now opt-out their entire list if they wish to, although in order to do so they still have to notify Google title-by-title. Now, opted-out titles will not be digitized, will not be included in the Google database, and copies will not be given to the libraries.

The same day Google announced their revised policy, the Association of American Publishers issued a press release (<http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=274>); in a widely quoted excerpt, Pat Schroeder characterized the new policy as “turning every principle of copyright law on its ear.” AAUP issued a statement the following week (<http://www.alpsp.org/2005pdfs/Googlestatement.pdf>).

Why all the fuss? How can a project that sounds as though it will provide such a wonderful tool to students, to researchers, to anyone seeking information stir up such widespread objections? What are publishers so worried about?

The Library Project — “making off-line information searchable,” as Google has put it — is a wonderfully appealing and seductive notion. Like many attractive, large-scale concepts, though, the devil is in the details. Among the participating libraries, the three U.S. uni-

versity libraries plan to include books in copyright among those they send to Google for digitization, and, as noted above, Google does not intend — so far, at least — to seek permission to make these copies. (The Bodleian and the NYPL are only supplying books in the public domain to Google for digitization.)

Google representatives argue that making digital copies of these copyrighted works is necessary in order to index them, and that because the index increases the ability of people to find the information they seek, making digital copies for this purpose is a fair use that does not require the permission of the copyright holder. They have argued further that since users of the library project would only be able to view short snippets of text from books under copyright — the twenty-five or thirty words surrounding the search terms — and would never be able to gain access to the full text, or even a significant portion of it, copyright holders’ interests would not be injured.

Readers of *Against the Grain* will understand as well as anyone that a simple assertion of fair use is a long way from the four-factor analysis required by Section 107 of the Copyright Act to determine whether a particular act of infringement is defensible as a fair use or not. As far as I know, Google has not publicly disclosed their version of such an analysis, although they have referred to one recent case, *Kelley v ArribaSoft*, (<http://caselaw.lp.findlaw.com/data2/circs/9th/0055521p.pdf>) as a precedent that supports them. Others have looked closely at their claim — there’s a thoughtful example sympathetic to the aims of the project in the *Duke Law & Technology Review* (<http://www.law.duke.edu/journals/dltr/articles/PDF/2005DLTR0010.pdf>) — and have concluded that, on its legal merits, Google’s argument is less than compelling.

Any scrupulous four-factor analysis requires both close knowledge of the law and careful judgment, and while lawyers and judges have to deal with those complexities in their full glory, for the rest of us they often seem to obscure in a haze of detail the basic principles of justice and equity we expect the law to address. So what are the basic principles at issue here?

Section 106 of the Copyright Act grants certain exclusive rights to authors of works of original expression, among them the rights of reproduction, distribution, and display. Those rights are granted for a specific purpose, namely to encourage “progress in science and useful arts,” as the Constitution puts it — “science” meaning, in 18th-century usage, all knowledge acquired by formal study, or “book-learning,”

to use an old-fashioned phrase that has newly acquired relevance.

Publishers have no rights under copyright law — the word “publisher” does not appear in the Copyright Act — except as they acquire them from authors by means of a contract. Essentially, in a publishing contract the author agrees to transfer some or all of her copyright rights to the publisher in exchange for a share of the proceeds, or royalties, from sale of the work when it is published. The publisher agrees to exercise those rights in order to publish the work and to pay the author her share of the proceeds.

For many scholarly works there may be no or small royalty payments to the author, but in academic careers the indirect benefits that accrue to an author from publication — promotion, tenure, professional stature, and visibility — are substantial and have considerable economic value. On the publisher’s side, if relatively little of the income from sales gets paid out in royalties, all the other costs of publishing remain.

(People sometimes make the mistake of assuming that because many scholarly publishers, like university presses and scholarly societies, are nonprofits, their financial worries are trivial. Nothing could be farther from the truth. Profits may be slim to none, but bills still have to be paid.)

In the relationship between author and publisher, both parties gain. The author receives the benefits of publication without having to make the investment of capital and expertise required to publish the work herself, and the publisher receives the benefit of obtaining new and original work to publish without having to invest the considerable time, energy, and talent required to create it.

Even more important, the public benefits. Authors have an incentive to create new work, publishers have an incentive to disseminate new work as widely as possible, and the reading public — including authors — benefits by having access to a continually refreshed stream of new ideas. Finally, society as a whole is strengthened and invigorated by those ideas as they become manifest in scientific progress, new tools and inventions, new works of art and literature.

Note, though, that this cycle of creation and dissemination only works if the rights granted by copyright are exclusive rights, as stipulated under Section 106. That grant of exclusivity is an important legal buttress for an author’s claim

continued on page 74

that her work of original expression is, in fact, hers and cannot be appropriated by someone else. Exclusivity is also vital to publishers, since it is only by acquiring the exclusive right to reproduce and distribute a work — in other words, make and sell copies of it — that a publisher can hope to recover the costs of having published it in the first place.

That is why the limitation on those exclusive rights stipulated in Section 107 is so carefully crafted. The four factor analysis provides a way of weighing the interests of copyright holders in maintaining their exclusive rights against the public interest in allowing the unfettered use of copyrighted material, and of reaching decisions based on a particular set of facts and limitations.

Digital copying for the **Library Project**, at least if carried out as currently planned, doesn't recognize any limitations; in fact it reduces the very idea of limitations to rubble. **Google's** position is that their digitization of all copyrighted material for the **Library Project** is a legitimate exercise of fair use, but not one they will exercise for books the rights-holder chooses to opt-out. However, if this fair use claim is valid for **Google**, it is just as valid for any other company with a search engine, whether or not they also allow authors and publishers to opt-out. So opting-out is legally irrelevant. It simply doesn't address the concerns of rights-holders.

What would address them? **AAUP** would certainly like to see the **Library Project** succeed, and it seems to us the best way to do that would be through agreements that brought the **Project** within the well-established framework of licensing and permissions agreements already being implemented in **Google Print for Publishers**. There are complications in doing this — how to deal with third-party permissions, for example — and undoubtedly there would be cases in which permissions couldn't be granted, creating gaps in **Google's** index. However, **Google** has already accepted the idea that the body of texts in the **Google** index will never be as comprehensive as the actual collections of the libraries themselves, since opting-out will also create gaps.

Perhaps there is some other way besides licensing to resolve the issue. I'd certainly be happy to discuss it, and **AAUP** is ready to assist however it can in the search for a solution. But wherever that solution lies, it must be built on a basis of respect for the rights and interests of all the parties involved. **Google** speaks often of their appreciation for intellectual property and of their good relations with their publishing partners. Both qualities are evident in **Google Print for Publishers**; now it's time to extend those same good qualities to their publishing partners in the other part of **Google Print**, the **Library Project**.

Group Therapy

by **Beth Bernhardt** (Electronic Journals / Document Delivery Librarian, Jackson Library, University of North Carolina at Greensboro, PO Box 26170, Greensboro, NC 27402; Phone: 336-256-1210; Fax 336-334-5097)
<beth_bernhardt@uncg.edu>

GRYPE: Submitted by Tian Zhang (Serials Librarian, St. John's University Libraries, St. John's University, Queens, NY)

I have a question: right now, we subscribe more and more to e-journals, and usually, I have to sign the license agreement with the publisher directly. Also I have to activate the journal by IP address and then put the URLs to our catalog records for our library users. With online journals, our library does not make claims. And most of the time, I subscribe to the journals by packages with the publisher if it is available. I want to subscribe to these titles directly through the publisher and withdraw them from any agent by spending service fees. What are your opinions about it?

RESPONSE: Elizabeth R. Lorbeer, (Collection Development Manager, Library of Rush University Medical Center, Rush University Medical Center)

The per title fee that subscription agents charge customers has become a serious budgetary issue. With the increase of online-only subscriptions, publishers who traditionally offered agents commission for print orders often do not with the electronic counterpart. It is unfair to the agent who has historically brought a steady stream of customers to the publisher. For the agent to recoup its lost commission, the library is now assessed an additional per title fee. If the library purchases an electronic bundle or collection through the agent and no commission is offered, the library can now expect an additional charge in the thousands of dollars just in fees.

It is too tempting for the customer to leave the agent and buy its electronic journals directly from the publisher. Circumventing the agent to save money, or at least be able to afford next year's renewal, may seem reasonable. However, this places the library in a less than favorable position to deal directly with publishers who are not adequately equipped to handle the doldrums of subscription management. Furthermore, when the decision is made by the library to remove a substantial amount of business from the agent in favor of the publisher, the only recourse the agent has is to raise its annual service charge on the remaining subscriptions ordered. The situation at hand is causing a schism between agent and library.

The library community needs to strongly encourage our agent and publisher colleagues to sit down and broker a deal that allows the agent to recoup their commission again. When the agent receives their deserved compen-

sation, this ends per title fees which frees up dollars for the library to buy more resources. It is in our best interest to work together to better our common welfare.

RESPONSE: Lila (Angie) Ohler (Acquisitions Librarian, Bizzell Library, University of Oklahoma Libraries)

The introduction of electronic resources has complicated the traditional print-based business relationship between publishers, vendors, and libraries. This has caused some significant repercussions for libraries in the way they do business, both internally and externally.

In the halcyon days of print based materials, a vendor did the grunt work of keeping track of the library's many journal subscriptions year after year; placing orders on behalf of the library for the authorized materials at the beginning of every publisher's yearly renewal period. What interaction the library had with the publisher was limited, if at all necessary. The margin of profit the library paid to the vendor in terms of service fee per order outsourced seemed justifiable. I think we can all safely agree that the introduction of electronic materials has complicated the traditional business relationship between publisher, vendor, and library?

As many have pointed out, libraries have had to adapt to a model of business based more on negotiating the lease of materials, rather than on the sale of goods. The new world of licensing materials never quite truly "owned" seems almost antithetic to the traditional model of library acquisitions. In this new world, the library is expected to expend personnel resources never dreamt in the traditional vendor model. Consider the things needed from a library even before the resource is formally "acquired" (trial subscriptions, legal council on contract negotiations) and extending long after the resource has been "purchased" (troubleshooting problem links, processing yearly access fees, updating library "holdings," ensuring that electronic access is consistent as publishers change electronic platforms for materials or buy and sell different publications.) And all of this in addition to the peculiarities of adapting print based acquisitions procedures to the more ephemeral fluid nature of acquiring electronic resources. As so many of the recent sessions at **ALA** pointed out, the concept of change for organizations deeply rooted in print based workflows and procedures can be very intimidating, especially when libraries overlook seemingly obvious things like how the order clerk will "process" an order for electronic materials when faced with a computer screen asking for details only relevant to print materials. Needless to say ingenuity prevails,

continued on page 75