



Google Books: Liberating the World's Information, or Appropriating It?

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In 2002, Google unveiled its plan to make all the books in the great libraries of the world available to anyone, anywhere with an Internet connection. To some, this was a grand liberating vision, unlocking the knowledge of humankind for the benefit of all. But to those owning copyrights over these books, this grand liberating vision looked more like grand larceny. In 2008, Google reached a landmark settlement in a lawsuit brought by the Author's Guild (AG) and American Association of Publishers (AAP). Google agreed to pay \$125 million to the AG and AAP and implement certain restrictions on their project. In return, they would gain non-exclusive rights to digitize copyrighted works of the authors and publishers represented by AG and AAP. This allowed Google to proceed with its library project in which it had offered to digitize library holdings of major libraries at no cost. The agreement also gave Google the right to include the full text pages in its search services, thereby increasing the potential use of its search services and benefiting Google through additional advertisement sales.

The case and settlement raise a number of ethical and political issues. Do the benefits to society accruing from timely digitization outweigh some of the potential risks and costs? What *are* the costs, risks, and benefits to the public from such a project? Are there reasons why governments and regulators should worry about a private arrangement to control access to such a massive proportion of the world's creative and intellectual property?

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“At the end of the Middle Ages, in a small town in the Rhine Valley, an unassuming metalworker tinkered with a rickety wine press, metal alloys and oil-based ink. The result of his labors was an invention that took the world’s information and made it exponentially more accessible and useful.”

- *Google Corporate Website on Johannes Gutenberg*¹

Introduction

In 2002, Google unveiled its plan to make all the books in the great libraries of the world available to anyone, anywhere with an Internet connection. To some, this was a grand liberating vision, unlocking the knowledge of humankind for the benefit of all. But to those owning copyrights over these books, this grand liberating vision looked more like grand larceny. After more than two years of litigation and negotiations, on October 28, 2008, Google reached a landmark settlement in the lawsuit brought by the Author’s Guild (AG) and American Association of Publishers (AAP). This settlement was later amended with the agreement of all parties involved and was granted “preliminary approval” by the U.S. District Court (Southern District of New York) on November 19, 2009.² Google would agree to pay \$125 million to the AG and AAP and implement certain restrictions on their project. In return, it would gain non-exclusive rights to digitize copyrighted works of the authors and publishers represented by AG and AAP. This allowed Google to proceed with its library project in which it had offered to digitize library holdings of major libraries at no cost. The agreement also gave Google the right to include the full text pages in its search services, thereby increasing the potential use of its search services and benefiting Google through additional advertisement sales.

On the surface the settlement appears to be equitable and mutually beneficial to the interested parties directly involved in the dispute: the libraries get their holdings digitized and are able to offer expanded access to their constituents, the readers; the authors and publishers get compensation for their copyrighted works included in the project and a method to opt-out; and Google gets a new content source to monetize. However, the settlement also raises many ethical and political issues. Do the benefits to society accruing from timely digitization, outweigh some of the potential risks and costs? What *are* the costs, risks, and benefits to the public from such a project? Are there reasons why governments and regulators should worry about this private arrangement to control access to such a massive proportion of the world’s creative and intellectual property?

Parties Involved in the Settlement: Google

Founding

In 1996, Larry Page and Sergey Brin, two Stanford Computer Science PhD students, began collaborating on a search engine called BackRub.³ The search engine was successfully launched on the Stanford server, but it was soon brought down because it required too much university bandwidth. Page and Brin decided to go back to the drawing board for BackRub and in 1998 launched the corporation Google. Google set itself apart from other search engines because it was able to retrieve the most pertinent information for any search query. This initial success attracted several investors to Page and Brin’s pioneering endeavor.

Within a decade of its founding in 1998, Google evolved from a two-man garage office in Menlo Park, California, to a global corporation with over 20,000 employees that secured the top spot on *Fortune* Magazine’s “Best Company

¹ “Perspectives.” Available from <http://books.google.com/googlebooks/issue.html>. Accessed March 19, 2009.

² Order Granting Preliminary Approval of Amended Settlement Agreement between The Authors Guild, Inc., Association of American Publishers, Inc., et al. and Google Inc., U.S. District Court Southern District of New York, November 19, 2009. Available on the Google Books website: http://static.googleusercontent.com/external_content/untrusted_dlcp/www.googlebooksettlement.com/en/us/05CV8136_20091119.pdf

³ “Milestones.” Available from <http://www.google.com/corporate/history.html>. Accessed March 8, 2009.

to Work For” rankings. Google was the most successful Internet-based company of the first decade of the 21st century. By the end of that decade its yearly revenues had reached \$23.65 billion. It is now a global corporation with a sales and software development presence across the Americas, Europe, and Asia. Google continues to serve as a pioneer for technological innovation by offering over 50 products apart from its search engine.⁴

Corporate Culture⁵

The Google culture continues to reflect the innovative company Brin and Page brought to life. Almost uniquely among Fortune 500 companies, Google boasts a “small, intimate company feel” that provides a relaxing and innovative atmosphere for its creative employees. In the Googleplex (Google’s headquarters located in Mountain View, California) each Googler (as Google employees are called) has a workstation in an airy space without confines. The lobbies have live projections of current search queries from around the world while hallways feature technology press clippings to keep employees up to date on emerging market trends. The Google Café provides free lunch and dinner for all Googlers and serves as a forum for free-flowing conversation across different departments. Google prides itself on its lack of corporate hierarchy and believes everyone is an equally important part of Google’s success. For this reason, at the company-sponsored bi-weekly roller hockey games that take place in the parking lot, “no one hesitates to skate over a corporate officer.”

The Google Philosophy

Google’s mission is to “organize the world’s information and make it universally accessible and useful.”⁶ In order to accomplish this goal, Google stresses two main ideals: (a) always focus on the user and (b) there is always more information out there.

In the interest of the user, Google aims to “bring all the world’s information to users seeking answers.”⁷ Google recognizes the lack of confines on information and strives to facilitate access to information for the global community. Google search result pages have been coded in over 35 languages, while its interface is available in over 100 languages. Google offers translation features and its applications (GoogleMaps, GoogleEarth, etc.) seek to serve their users outside of the United States.

With a simple interface, one of the fastest search engines in the world, and a dedication to a strict (Googler’s) code of conduct, Google has built a loyal following on the web. It became the de facto search engine in most countries (with China remaining a notable exception) through, in essence, word-of-mouth marketing – users expressing satisfaction to other potential users. By 2003 “to Google” had become a common synonym for “to search for something on the Internet.” Google does not use traditional media channels to build its brand awareness.

Finally, Google’s basic ethical commitments were famously captured in its early motto: “Don’t be evil.” This motto, which frames Google’s Code of Conduct – and looking clearly over its shoulder at Microsoft – stands for its “recognition that everything we do in connection with our work at Google will be, and should be, measured against the highest possible standards of ethical business conduct.”⁸

4 “Product Descriptions.” Available from <http://www.google.com/press/descriptions.html>. Accessed March 9, 2009.

5 “The Google Culture.” Available from <http://www.google.com/corporate/culture.html>. Accessed March 10, 2009.

6 “Company Overview.” Available from <http://www.google.com/intl/en/corporate/index.html>. Accessed March 10, 2009.

7 “Philosophy.” Available from <http://www.google.com/intl/en/corporate/tenthings.html>. Accessed March 10, 2009.

8 “Investor Relations.” Available from <http://investor.google.com/conduct.html>. Accessed January 18, 2011.

Parties Involved in the Settlement: The Authors Guild and The Association of American Publishers

The Authors Guild

The Authors Guild is America's "oldest and largest professional society of published authors, representing more than 8,000 writers." Its stated purpose is to "advocate for and support the copyright and contractual interests of published writers." The Guild lobbies on the "national and local levels on behalf of all authors on issues such as copyright, taxation, and freedom of expression," and intervenes in publishing disputes.

The Association of American Publishers

The Association of American Publishers (AAP) is the national trade association of the U.S. book publishing industry, with over 300 members. These include "major commercial publishers, as well as smaller and non-profit publishers, university presses, and scholarly societies. The AAP mission is "the protection of intellectual property rights in all media, the defense of the freedom to read and the freedom to publish at home and abroad, and the promotion of reading and literacy."⁹

Google Book Search

History

In 2002, Google founder Larry Page and VP of Search Products and User Experience Marissa Mayer teamed up to begin an inquiry into how long it would take to scan every book in the world. Mayer and Page experimented on a 300-page book with a high-resolution camera and a musical metronome: "We took the pictures to the beat of the metronome so he wouldn't be taking pictures of my thumbs."¹⁰

After conducting their experiment, Page and Mayer decided to travel the country to understand how existing digitization projects worked and how Google could use its technology to improve these efforts. After opening dialogue with the University of Michigan (UM), Page learned that the most precise estimation for scanning UM's university library (7 million volumes) was 1,000 years. Page told UM President Mary Sue Coleman: "Google can help make it happen in 6 [years]."¹¹ Soon after, Google launched a beta version of its dedicated book-search service which would first be known first as "Google Book Search," and then later simply as "Google Books." By 2010 Google had scanned more than 12 million books.

The Partner Program

The Google Partner Program works with publishers and authors to include their books in Book Search. Google's clients range from large companies who publish over 1000 publications a year to small-time authors who write several books a year. Google believes participation in the Partner Program does as much for the author/publisher as it does for the users of the Book Search.

⁹ "AAP homepage" Available from <http://www.publishers.org/>. Accessed March 12, 2009.

¹⁰ "Origin of the GBS Project." Available from <http://www.pdfzone.com/c/a/Document-Management/PDF-Too-Slow-for-Google/>. Accessed March 11, 2009.

¹¹ "Success Story of Author Richard Lowry. Available from <http://books.google.com/googlebooks/history.html>. Accessed March 12, 2009.

Charles Smith, a computer system administrator for the federal government, notes, “The vast amount of [our] human knowledge consists of the time we live in.”¹² Knowledge in the past was mainly passed down through physical representations – hard copy books, articles, etc. The Partner Program works with authors and publishers to form a technological database of physically represented knowledge and to transfer this knowledge into a new digital format for use by future generations. In the users’ interest, each book added is one closer to Google’s overarching goal: universal access to organized information that is not partial or mutated.

Authors and publishers often use the Partner Program because of the exposure it gives their books. Google allows users to purchase online access to the full text version of a book, with either the rights-holder or Google setting the price. Once a book is purchased, a user may copy and paste up to four pages of the book at one time and print up to 20 pages of the book at once. At the cost of allowing a free preview of their books, authors and publishers receive worldwide exposure to potential customers who enter any relevant terms in Google Books.

Military historian and former sailor Richard Lowry’s experience is typical for participants. While randomly searching the web, he found that his publisher, iUniverse, had enlisted the help of Google Books. Lowry had written a book in 1991 detailing his experiences in the Gulf War, *The Gulf War Chronicles*. At first, Lowry admitted he was wary of his book being searchable and available for preview; but he was pleased by the job Google did presenting his book. With no marketing on his part, Lowry found that after his book was entered into Google Book Search (as it was then called), his sales ranking jumped on the Barnes & Nobles index by 85%.¹³

Lowry has since had a second book published by Berkley Publishing and a third with Osprey Publishing. Both of these publishers are partners with Google Books and Lowry has no problem with this: “I am very happy they participate in Google Book Search as I know it will help my sales. Very soon, we’ll all have the knowledge of the world at our fingertips and Google Book Search will play a large role in bringing that knowledge into our homes and businesses.”¹⁴

The Library Project

Google has continued working with major libraries to include their volumes in Google Books.¹⁵ The Library Project serves users the same way a card catalog would. When you search for a term, a list of books comes up, and when you click a book, information about it – bibliographic information and a brief preview – appears. The Library Project functions as a tool to connect readers to relevant texts, many of which are out of copyright and would otherwise be impossible to find. Charles E. Smith writes,

Most students do not have access to the world’s finest research libraries. Previously, a scholar’s only recourse would have been to file a request with the interlibrary loan office. Now, Google is liberating multiple books from our major research libraries and providing them not only to students across the country but across the world.¹⁶

Jo Guldi, a University of California (UC) doctoral candidate, proclaims, “This is huge.” She explains that UC’s partnership with Google Book Search allows scholars, students, and faculty to search through UC Library’s 5 million books online rather than having to laboriously search through 28 miles of shelves.¹⁷ Because of the Library Project, Guldi has been able to access rare books online that she previously had to travel to Harvard, Yale, and

12 Smith, Charles E. “A Few Thoughts on the Google Library Project.” *Educase Quarterly*. Vol. 31, No.1 (January-March 2008). Pp 10-11.

13 “Success Story of Author Richard Lowry. Available from <http://books.google.com/googlebooks/history.html>. Accessed March 12, 2009.

14 Ibid.

15 “Library Project”. Available from <http://books.google.com/googlebooks/library.html>. Accessed March 12, 2009.

16 Smith, Charles E. “A Few Thoughts on the Google Library Project.” *Educase Quarterly*. Vol. 31, No.1 (January-March 2008). Pp 10-11.

17 Louie, David. “Google Book Scanning Pays off for Scholars.” *ABC7 News*. January 21, 2008.

London to find. She is confident the Library Project will aid students to discover previously difficult resources: “You can ask higher level conceptual questions, you can go deeper into the archives. You can get really slight, finessed kinds of information about cultural change over time that were really impossible to get to before this.”¹⁸

As the director of one of the dozens of libraries around the world partnering with Google, Harvard University Library’s Sidney Verba believes the Library Project is an undertaking actively capturing the potential of the future:

The new century presents important new opportunities for libraries, including Harvard’s, and for those individuals who use them. The collaboration between major research libraries and Google will create an important public good of benefit to students, teachers, scholars, and readers everywhere. The project harnesses the power of the Internet to allow users to identify books of interest with a precision and at a speed previously unimaginable. The user will then be guided to find books in local libraries or to purchase them from publishers and book vendors. And, for books in the public domain, there will be even broader access.¹⁹

Legality

Authors Guild Class Action Suit

One of the class action lawsuits that led to the 2008 settlement was filed by the Authors Guild on September 20, 2005. It accused Google of “unauthorized scanning and copying of books through its Google Library program”:²⁰

By reproducing for itself a copy of those works that are not in the public domain, Google is engaging in a massive copyright infringement. It has infringed, and continues to infringe, the electronic rights of the copyrighted holders of those works . . . Google has announced plans to reproduce the Works for use on its web site in order to attract visitors to its web sites and generate advertising revenue.

The Guild claimed the display of these books online resulted in “depreciation in the value and ability to license and sell the Works, lost profits and/or opportunities, and damage to their goodwill and reputation.”²¹

American Association of Publishers Lawsuit

In October 2005, the AAP, the other major party to the 2008 settlement, also filed a suit against Google over its plans to digitize and make copyrighted works available without permission of the owners. As the AAP President, Patricia Schroeder (a former Colorado Congresswoman), explained,

The publishing industry is united behind this lawsuit against Google and united in the fight to defend their rights. While authors and publishers know how useful Google’s search engine can be and think the Print Library could be an excellent resource, the bottom line is that under its current plan Google is seeking to make millions of dollars by freeloading on the talent and property of authors and publishers.²²

18 Ibid.

19 “Harvard University Library: Harvard-Google Project.” © 2009. Available from <http://hul.harvard.edu/hgproject/index.html>. Accessed March 15, 2009.

20 “Authors Guild Sues Google claiming ‘Massive Copyright Infringement.’ 2005 Press Release.”

21 “Author’s Guild v. Google Class Action Suit.”

22 “Publishers Sue Google over Plans to Digitize Books. AAP 2005 October Press Release.”

According to an AAP press release, the suit was filed on behalf of five major publisher members of AAP: The McGraw-Hill Companies, Pearson Education, Penguin Group (USA), Simon & Schuster, and John Wiley & Sons.

Prima Facie Infringement

The essence of both the Author's Guild and AAP claims was that Google violated the copyright of the rightful owners of the works and engaged in prima facie infringement.

Title 17, Chapter 1 paragraph 106 of the U.S. Code of Laws defines copyright protection to “subsist in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²³

Both suits argued that Google's display of copyrighted material was a prima facie infringement since Google did not expressly seek permission to copy the works. (“Prima facie” is a legal concept where the contention is that there is enough evidence for an indictment before a trial.) While Google did offer an “opt-out” process (which expired in May 2009), the AG and AAP found it inadequate: “One cannot generally announce one's intention to infringe multiple copyrighted works and collectively offer rights holders the opportunity *not* to have their work infringed.”²⁴

Further, the suits argued that Google's plan to scan entire books violated the de minimis principle – an exception granted by the law where small snippets of copyrighted work may be copied without infringement.

The suits claimed that Google's digitization process provided no formal royalty payments to the owners of the copyrighted works, while Google stood to benefit commercially from the increase in advertising revenue from the additional use of its search engine.

Google's Counterargument

In response to the suit, Google issued an official statement:

Google Print is an historic effort to make millions of books easier for people to find and buy. Creating an easy to use index of books is fair use under copyright law and supports the purpose of copyright: to increase the awareness and sales of books directly benefiting copyright holders. This short-sighted attempt to block Google Print works counter to the interests of not just the world's readers, but also the world's authors and publishers.²⁵

Google's legal response was based on the legal concept of “Fair Use.” Google argued that while it would be digitizing entire portions of the books, it intended to only offer “snippets” of information at any time. In this regard, the process was akin to the indexing of books in a library.

Google further supported its “Fair Use” argument by asserting the exact premise of the Supreme Court explanation in a precedent case. In a section of Google's Books Search website titled, “What's the Issue?,” Google defended its stance:

²³ US Code: Title 17: Copyright.

²⁴ Okano, Ari. *Digitized Book Search Engines and Copyright Concerns*. Com. & Tech. 13 (Apr. 6, 2007).

²⁵ Price, Gary. “Association of American Publishers Sues Google over Library Digitization Plan.” October 19, 2005.

Copyright law is supposed to ensure that authors and publishers have an incentive to create new work, not stop people from finding out that the work exists. By helping people find books, we believe we can increase the incentive to publish them. After all, if a book isn't discovered, it won't be bought.²⁶

Precedents in Related Industries

Court Decisions

Kelly v. Arriba Soft Corp

Arriba Soft operated a visual search engine on the Internet, which returned images instead of text to user search queries. Arriba compiled images from various websites and despite not getting consent from any of these websites, it formed a database containing reduced thumbnails of these images.

Leslie Kelly, a professional photographer from California specializing in photographing California gold rush country, discovered that some of his pictures were embedded in the Arriba database. He sued Arriba Soft for copyright infringement.

In this case, the U.S. Court of Appeals for the 9th Circuit determined Arriba's use of Kelly's photographs were "Fair Use" and thus not a copyright infringement. The decision was based on an analysis of each of the four tenets of Fair Use:

- (1) Arriba's use of the photos were found to not be commercial in nature. Rather, they were found to serve a "transformative" purpose in that they helped form a large database. The court said Arriba's search engine "functioned as a tool to help index and improve access to images on the Internet."²⁷
- (2) The nature of copyright law is to protect creative works more so than works of fact. The court found the second tenet to weigh against declaring Arriba's actions as Fair Use.
- (3) Arriba copied the entire portion of Kelly's pictures and argued if the search engine only provided the thumbnails of the images, it would hamper the efficiency of the search engine to the detriment of the user's interest. The court found that Arriba should not have provided a full size image separated from the content on the original web page and this copying was against Fair Use.
- (4) The courts found Arriba's use of the images to serve as an advertising medium for Kelly's work. The images would lead users to the original website and create more sales for Kelly.

The court decided (1) & (4) were consistent with Fair Use and (2) & (3) were not. But on balance this was enough for it to grant Arriba's motion and deny Kelly's claims to copyright infringement, because of the weight it attached to (1). The court found that Arriba never took ownership of Kelly's work and determined the search engine used Kelly's images for a purely transformative purpose.

²⁶ "The Issue." <http://books.google.com/googlebooks/issue.html>. Accessed on March 18, 2009.

²⁷ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003)

UMG Recordings v. MP3.com

In 2000, UMG Recordings, Inc. brought a lawsuit to the U.S. District Court for the Southern District of New York against MP3.com. UMG Recordings sued MP3.com for copying its recordings and placing them onto MP3.com's computer servers. These servers allowed people who had previously bought the CD to access the music on this CD online from multiple locations.²⁸

MP3.com elected to defend itself with a Fair Use argument. The district courts, however, ruled in UMG's favor stating that "copyright holders had the exclusive rights to control derivative markets by refusing to license a copyrighted work."²⁹ By entirely copying recordings – creative works closer to the core of copyright protection – the court did not find MP3.com's use of the recordings to be consistent with the tenets of fair use.

Sony Corp. of America v. Universal City Studios

Universal City Studios sued Sony Corporations in 1979 on the claim that Sony's new recording device was a copyright infringement. The Betamax (Sony's home recording device) allowed users to copy complete TV shows for "time shift" – the ability to watch programs at a time different than the allotted broadcast time slot. Sony argued its recording device was fair use and did not constitute any contributory infringement of copyright.³⁰

The Supreme Court agreed with Sony on its contention of fair use, and in its decision emphasized the value of creating a new area of fair use to adapt for new technological capabilities: "Where valuable technology does not promote contributory infringement by third parties, the courts are more likely to grant fair use."³¹

Effect of "Piracy" on the Music Industry

During the late 1990s, MP3s (files of digitized music that could be uploaded via a computer and sent via the Internet) began to spread across the Internet. In particular, Napster was a portal where users could utilize "peer-to-peer" technology to share the MP3s on their computer with other users. This enabled users to download the music free of cost.

In 1999, A&M Records, along with 17 other record companies within the Recording Industry Association of America (RIAA), sued Napster for copyright infringement on the grounds that the site was a "haven for music piracy."³²

Napster, which at height of its popularity had around 60 million users, argued that recording MP3's was "fair use."³³ In February of 2001, the Ninth Circuit Court rejected Napster's argument. The court argued that Napster harmed copyright holders in two ways: "By reducing the market for CD purchases and by making it more difficult for the record companies to enter the market for paid downloads of digital music."³⁴ The court ordered Napster to stop allowing users to download music through its service. But there is no evidence that shutting down Napster hindered the online piracy of music.

28 UMG Recordings, Inc. v. MP3.COM, Inc., 92 F.Supp. 2d 349(S.D.N.Y. 2000).

29 Ibid.

30 Sony Corp of America v. Universal City Studios. 464 U.S. 417, 442-456 (1984).

31 Ibid.

32 "RIAA Claims Website is 'Piracy Haven' in Lawsuit." Billboard Bulletin Publication. December 8, 1999.

33 Costello, Sam. "Court Orders Napster to Stay Shut." IDG News Service. March 25, 2002.

34 Blanchette, Kasie. "Effects of MP3 Technology on the Music Industry: An Examination of Market Structure and Apple iTunes." April 23, 2004.

According to an undated RIAA press release, “global music piracy causes \$12.5 billion of economic losses every year, 71,060 U.S. jobs lost, a loss of \$2.7 billion in workers’ earnings, and a loss of \$422 million in tax revenues, \$291 million in personal income tax and \$131 million in lost corporate income and production taxes.”³⁵ In addition, RIAA argues, the loss in revenues provides a disincentive for record producers and music artists to produce the music. (For a graphical view of piracy on the music industry, please see Appendix IV).

The decline of album and single track sales, however, tell only part of the story about the effects of digitization on the recording industry from the final decades of the twentieth century. The industry had become an oligopoly with a handful of large record companies, each of which was part of larger media conglomerate like Sony Corporation or Time-Warner Inc. The record companies still exist, but move less physical and digital product than they once did. The large record retailers, like Tower Records and Virgin, have mostly disappeared. Now Apple’s iTunes store, Amazon.com, and other online retailers serve as the primary gateways to customers and wield more power and influence over tastes than the big record companies. Small record labels and individual bands can sell their music through these sources, bypassing entirely the need for a traditional major label. Both major and “indie” recording acts now expect to make most of their revenue from touring rather than from recording.

Arguably, all of these seismic shifts of power within the recording industry have changed the nature of the actual music produced by the artists. In the past, the major labels could “discover” a “sound,” promote heavily the acts that exemplified that sound, and sign up dozens of other acts who played (or were willing to play) in that style. By 2010 it was much harder to identify the “zeitgeists” or “sounds” of the previous decade’s music. Without the pressure to conform to industry categories and subgenres, musicians released albums with a broader range of styles and genres, and there seemed to be a much broader range of styles and genres from different acts simultaneously available. To rework the famous, if cryptic, analysis of the literature professor and 1960s communications guru, Marshall McLuhan, the change in “*medium*,” and how it was produced, promoted, and sold, has changed the “*message*” or the nature of the music being sold.³⁶

Consequences of Digitization

There is no doubt that in the first decade of the 21st century publishers and authors were looking closely at what had happened in the music industry and wondering how digitization might transform their world.

Canadian Publishers Report

In May 2007, the Association of Canadian Publishers, a group representing 145 Canadian-owned book publishers, released a report entitled, *The Impact of Digitization on the Book Industry*, and offered a suggestion for action toward Google. It concluded that the best course of action was to “educate publishers as to the situation but to leave it to them to determine whether to participate or not.” The report emphasized that “Google presents the industry with both an opportunity and a huge challenge.”³⁷

The report noted that there is no fee for publishers to join the program, and Google “gives publishers a share of revenue from contextual ads, placed next to the book pages, that are actually clicked on.” The report confirmed that Canadian publishers were “receiving regular, although not substantial, monthly cheques for monies generated by the ads”³⁸ but advised that, “publishers are best served if they own their own digital files, that Google does not give publishers a copy of any file that they digitize and that the Google file is not of superior quality.”

35 “Piracy Online and On the Street.” RIAA Homepage. Available from <http://www.riaa.com/physicalpiracy.php>. Accessed March 20, 2009.

36 Marshall McLuhan, *Understanding Media: the Extensions of Man*. Cambridge, Mass: MIT Press, 1994. (Originally published in 1964.)

37 Davy, Diane. “The Impact of Digitization on the Book Industry.” Association of Canadian Publishers. May 31, 2007.

38 Ibid.

Monopoly on the Market

Google's settlement appeased the Authors Guild and the American Association of Publishers. But it also brought out many new critics who argued that Google was building a *monopoly* on the digitization of books. Wendy Seltzer, a professor at American University's Washington College of Law, explained how the Google Settlement creates high barriers for entry for firms that would potentially enter the book-digitization industry.

I worry about the effects on competition. Google's high settlement payments are barriers to entry by anyone else. Though it's plausible no one had the resources or spine to compete with Google regardless, a judicial determination that the use was fair would have enabled more competition in parallel and distinct library offerings. Now, Google cements its advantage in yet another field.³⁹

Michael Madison, professor at the University of Pittsburgh School of Law, asks, "Has Google backed away from an interesting and socially constructive fair use fight in order to secure market power for itself? Does this deal give Google an unfair head start against any second-comers to book scanning?"⁴⁰

As part of the settlement, Google agreed to pay \$34.5 million to establish the Books Rights Registry, which is supposed to serve as an independent party to dole out Google's royalties to the rightful parties. Seventy percent of all revenues earned through the Google Books Project would go to the Books Rights Registry, and then on the holders of the copyrights.⁴¹

The class action suit allowed the Books Rights Registry to cut a deal with Google on behalf of all of the rights holders. It might be optimal for the Books Registry to offer this kind of "blanket license" to everyone but this raises important questions. First, how long will it take to extend the "blanket licenses" to everyone? And second, would the power to use "blanket licenses" turn the Rights Registry into a monopoly capable of fixing prices for the entire market of copyright owners? Madison foresees the construction of such a monopoly to be a potential problem and notes this is "precisely the kind of thing that landed ASCAP and BMI, which dole out blanket licenses for music, in antitrust trouble decades ago."⁴²

Robert Darnton, the head of the Harvard library system, adds "Google will enjoy what can only be called a monopoly – a monopoly of a new kind, not of railroads or steel but of access to information. Google has no serious competitors."⁴³

Open Content Alliance

In opposition to the Google Books Project, a number of organizations created and joined the so-called Open Content Alliance (OCA). These included the British Library, the National Library of Australia, the Boston Library Consortium, Columbia University, the University of Toronto, the University of Chicago, Johns Hopkins, and the University of California libraries. Yahoo, Microsoft, Adobe, and Hewlett Packard also joined the Alliance.⁴⁴ As Jean-Claude Guédon, Professor of Literature at the University of Montreal put it, "Dozens of libraries have understood the danger of the Google Book maneuver and have joined the OCA."⁴⁵

39 Perez, Juan Carlos. "In Google Book Settlement, Business Trumps Ideals." IDG News Service. October 30, 2008.

40 Lohmann, Fred Van. "GoogleBook Search Settlement: A Reader's Guide – Legal Analysis." Available from <http://www.eff.org/deep-links/2008/10/google-books-settlement-readers-guide>. Accessed March 16, 2009.

41 "Google Books Settlement Agreement."

42 Perez, Juan Carlos. "In Google Book Settlement, Business Trumps Ideals." IDG News Service. October 30, 2008.

43 Cohen, Noam. "Some Fear Google's Power in Digital Books." *The New York Times*. February 1, 2009.

44 "Contributors to the OCA." Available from <http://www.opencontentalliance.org/contributors/>. Accessed March 15, 2009.

45 Guédon, Jean-Claude. "Who Will Digitize the World's Books?" *The New York Review of Books* Vol. 55 No. 13. August 14, 2008.

Under the Google settlement, participating libraries must access the digitized works through the Google web portal.⁴⁶ This, the OCA argues, places restrictions on content that libraries can share with other libraries. In contrast, the OCA seeks to operate on a much smaller scale, and not place restrictions on participating libraries.

The fundamental difference is that the OCA uses an opt-in policy. Yahoo's Vice President of Search Content David Mandelbrot explains, "We are only including copyrighted content with the express permission of the copyright holder." The OCA makes its digital content available through the Internet Archive (www.archive.org).⁴⁷

However, some question the OCA's ability to build a digital library due to insufficient funds. Guédon explains, "The OCA has nothing like Google's deep pockets." Further, the withdrawal of Microsoft from the project in 2008 "makes the OCA's position even more difficult."⁴⁸

Is Google a monopolist?

With 12 million books already scanned by mid-2010, Google announced in August 2010 its intention to scan all of the roughly 130 million books in existence.

Granting access to all of humanity's books within all of the world's libraries is certainly in line with Google's mission to "organize the world's information and make it universally accessible and useful." But it is still not clear whether Google does or should have the legal right to make all of that information and creative content freely available.

The net effect of Google's expected settlement with the AG and AAP is that despite the fact that the relationship is a non-exclusive one, there are sufficient barriers to entry and thus the initiative is rapidly becoming a de facto exclusive arrangement. In effect, the debate is shifting from a question of whether Google is violating copyrights to whether Google will gain and abuse monopoly power.

The University of California, which had joined the OCA in 2005, reversed its position and in 2007 granted Google full access to its volumes and sole search engine rights to its contents. Daniel Greenstein, a University of California librarian who set up the arrangement with Google said, "I think last month we did 3,500 books with the OCA... Google is going to do that in a day. So, what do you do?"⁴⁹

46 "Google Books Settlement Agreement."

47 "Yahoo Backs Digital Library Plan." BBC News. October 3, 2005.

48 Guédon, Jean-Claude. "Who Will Digitize the World's Books?" *The New York Review of Books* Vol. 55 No. 13. August 14, 2008.

49 Carlson, Scott. "UC Will Provide up to 3,000 Books a Day to Google for Scanning, Contract States." *The Chronicle of Higher Education*. August 25, 2006.

Study Questions for Google Books

1. What legal rights do authors and publishers have over the sale and distribution of the content of their work? Why have such rights traditionally been granted and protected by governments? Has Google violated these rights? Are these rights still justified in the “digital” age?
2. What obstacles may Google face in the future as Google Books progresses? Who will decide which books to digitize and when: Google, the market, the publishers, libraries whose works are being digitized, governments?
3. What effects will digitization have on the market for books? Will it affect incentives for authors to create and innovate? Will it change the kind of books, or the content of the books, that are written? What will be the consequences for those authors who “opt-out” of the agreement? Who is responsible for these effects: Google, the publishers, the authors, or the consumers?
4. What might be the repercussions of allowing a private company to hold a virtual monopoly on searching the content of books? Does such power advance Google’s mission to make information “universally accessible and useful” or does it potentially limit accessibility whenever that might be in Google’s interest?
5. Should digitization of information have been considered a vital public goods project under the direction of a governmental or intergovernmental organization (akin to NASA for space exploration or, at a global level, the United Nations?) rather than a private for-profit corporation?

Appendix I Google Book Search Front Page Screen Shot

The screenshot shows the Google Book Search interface. At the top, the Google logo is followed by a search bar and the text "Book Search BETA". To the right of the search bar are links for "Search Books", "Advanced Book Search", and "Google Book Search Help". Below the search bar, there is a promotional message: "New! Research your midterm papers with Google Book Search." and "Google has reached a groundbreaking agreement with authors and publishers."

On the left side, there are two main category lists:

- Fiction**
 - [Literature](#)
 - [Science fiction](#)
 - [Fantasy](#)
 - [Romance](#)
 - [Mystery](#)
 - [Fairy tales](#)
 - [Short stories](#)
 - [Poetry](#)
- Non-fiction**
 - [Philosophy](#)
 - [Economics](#)
 - [Political science](#)
 - [Linguistics](#)
 - [Mathematics](#)
 - [Physics](#)
 - [Chemistry](#)
 - [Biology](#)

Below these lists is a section for **Random subjects** with links to [Mythology](#), [Time travel](#), [Design History 20th century](#), and [High performance](#).

The main content area is divided into three sections:

- Magazines**: A row of four magazine covers. From left to right: "vegetarian times" featuring a bowl of food; "American Cowboy" featuring a cowboy; "Popular Mechanics" featuring a man in a workshop; and "better nutrition" featuring a man wearing sunglasses.
- Interesting**: A row of four book covers. From left to right: "The End of the Jihad State" with a brown cover and a circular pattern; "Protein Lipidation Protocols" with a red cover; "DETERGENTS IN THE ENVIRONMENT" with a green cover and a molecular structure; and "COURT OF CULTURE RENAISSANCE SCOTLAND" with a purple cover and a figure.

Appendix II

Google Book Search “Search” Screen Shot

Google Book Search Search Books [My library](#) | [Sign in](#)

About this book Preview this book **The Adventures of Tom Sawyer** By Mark Twain Page 9 Search in this book Go

Scratch, but laws-a-me! he's my own dead sister's boy, poor thing, and I ain't got the heart to lash him, somehow. Every time I let him off, my conscience does hurt me so, and every time I hit him my old heart most breaks. Well-a-well, man that is born of woman is of few days and full of trouble, as the Scripture says, and I reckon it's so. He'll play hookey this evening, * and [* Southwestern for "afternoon"] I'll just be obleeged to make him work, to-morrow, to punish him. It's mighty hard to make him work Saturdays, when all the boys is having holiday, but he hates work more than he hates anything else, and I've GOT to do some of my duty by him, or I'll be the ruination of the child."

Tom did play hookey, and he had a very good time. He got back home barely in season to help Jim, the small colored boy, saw next-day's wood and split the kindlings before supper - at least he was there in time to tell his adventures to Jim while Jim did three-fourths of the work. Tom's younger brother (or rather half-brother) Sid was already through with his part of the work (picking up chips), for he was a quiet boy, and had no adventurous, troublesome ways.

While Tom was eating his supper, and stealing

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Appendix III

Timeline (drawn from “Google Books” on Wikipedia.org)

2004 Google announces partnerships with several high-profile universities and public libraries – the University of Michigan, Harvard (Harvard University Library), Stanford (Green Library), Oxford (Bodleian Library), and the New York Public Library.

September 2005: The Authors Guild files a class action lawsuit against Google

October 2005: The Association of American Publishers, with five other large publishers, brings a suit against Google.

November 2005: Google renames its program enabling publishers and authors to include their books in the service “Google Books Partner Program” and the partnership with libraries becomes Google Books Library Project.

September 2006: The Complutense University of Madrid becomes the first Spanish-language library to join the Google Books Library Project.

October 2006: The University of Wisconsin-Madison announces that it will join the Book Search digitization project along with the Wisconsin Historical Society Library. The libraries offer 7.2 million holdings.

November 2006: The University of Virginia joins the project. Its libraries contain more than five million volumes and more than 17 million manuscripts, rare books, and archives.

March 2007: The Bavarian State Library announces a partnership with Google to scan more than a million public domain and out-of-print works in German as well as English, French, Italian, Latin, and Spanish.

May 2007: Google and the Cantonal and University Library of Lausanne jointly announce a book digitizing project partnership.

May 2007: The Boekentoren Library of Ghent University announces it will participate with Google in digitizing and making digitized versions of nineteenth books in the French and Dutch languages available online.

July 2007: Keio University becomes Google’s first library partner in Japan with the announcement that it would digitize at least 120,000 public domain books.

September 2007: Book Search adds the “snippets” feature, which allows users to share snippets of books that are in the public domain.

September 2007: Google debuts a new feature called “My Library” which allows users to create personally customized libraries with selections of books that they can label, review, rate, or full-text search.

May 2008: Microsoft confirms the end its scanning project. Its project reached 750,000 books and 80 million journal articles.

October 2008: A settlement is reached between the publishing industry and Google.

November 2008: Google reaches the 7-million-book mark for items scanned by Google and by its publishing

December 2008: Google announces the inclusion of magazines in Google Books. Titles include *New York* magazine, *Ebony*, and *Popular Mechanics*, among others.

May 2009: Google plans to introduce a program that would allow publishers to sell digital versions of their newest books direct to consumers through Google.

November 2009: The Court grants preliminary approval of the Amended Settlement.

December 2009: A French court shuts down the scanning of books published in France saying that the scanning violates copyright laws. It is the first major legal loss for the scanning project.

January 2010: Google announces partnerships with e-reader manufacturers Samsung and Spring Design.

February 2010: A final settlement hearing takes place before the Court to determine if the terms of the Amended Settlement are fair, reasonable, and adequate.

April 2010: Visual artists were not included in the previous lawsuit and settlement, and are the plaintiff groups in another lawsuit. The lawsuit's statement reads, "The new class action goes beyond Google's Library Project, and includes Google's other systematic and pervasive infringements of the rights of photographers, illustrators and other visual artists."

June 2010: Google passes 12 million books scanned.

August 2010: It is announced that Google intends to scan all known existing 129,864,880 books by the end of the decade, accounting to over four billion digital pages and two trillion words in total.

December 2010: Google eBooks (Google Editions) is launched in the U.S. to compete with Amazon, Barnes & Noble, Apple, and other electronic book retailers with its very own e-book store. Unlike others, Google Editions will be completely online and will not require a specific device (such as Kindle, Nook, iPad, etc.).

Appendix IV

List of Other Digitization Efforts

- Live Search Books – Funded by Microsoft and started in 2006, folded in May of 2008.
- www.archive.org – driving force behind the Open Content Alliance, Internet Archive is a non-profit, and is the second-largest books scanning project, has scanned 1.3 million books
- www.booksurge.com/ – subsidiary of Amazon.com, effort to digitize “hard-to-find” books, giving 35% royalties on retail sales of paperback books.
- Jstor.org – archive system for academic journals
- europeana.eu/ – provides access to European digital items including digitized paintings, books and films
- <http://www.safaribooksonline.com/> – provides access to books, videos, and tutorials from O’Reilly, Peachpit, Prentice Hall, Microsoft Press, and others.

Appendix V

List of Google's Early Library Partners

Bavarian State Library*
Columbia University
Committee on Institutional Cooperation (CIC)
Cornell University Library
Harvard University
Ghent University Library*
Keio University Library*
Lyon Municipal Library
The National Library of Catalonia*
The New York Public Library
Oxford University*
Princeton University
Stanford University
University of California
University Complutense of Madrid*
University Library of Lausanne*
University of Michigan
University of Texas at Austin
University of Virginia
University of Wisconsin – Madison

*denotes a non-U.S. library

Appendix VI

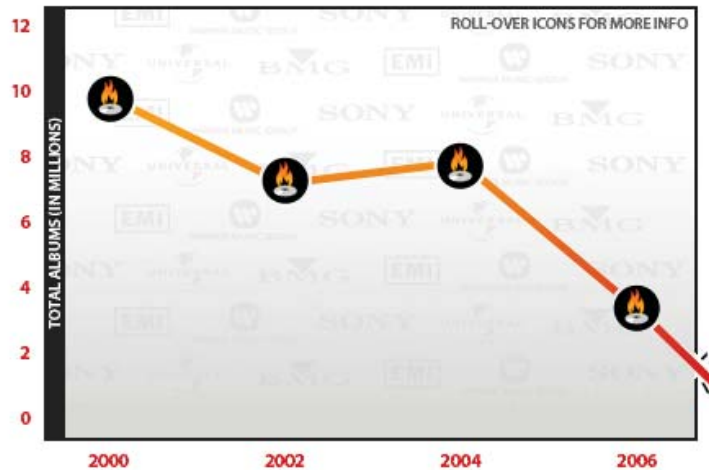
Total Album Sales (in millions) from 2000 to 2007

The Story of the Decline

The record business has been shrinking since the beginning of the decade. U.S. album sales have fallen twenty-five percent since 2000, the biggest year on record – and the year Napster went mainstream. Sales of digital singles – which are up 2,930 percent since 2003 – haven't come close to making up the difference, driving revenue down sharply.

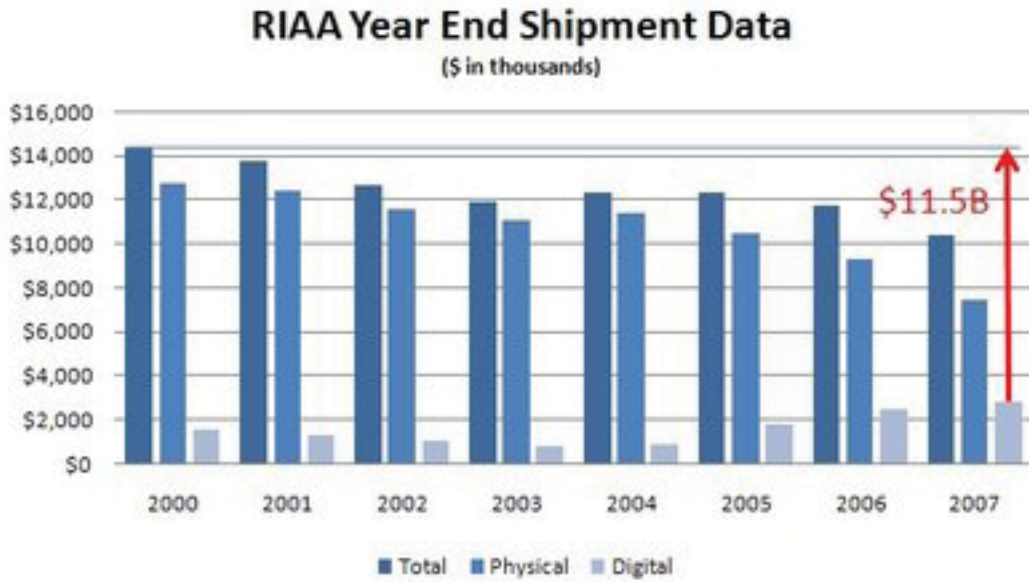
-  ALBUM SALES TREND
-  ALBUM SALES HOTPOINT
(ROLL-OVER ICONS FOR DETAILS)

SALES FIGURES COURTESY OF NIELSEN SOUNDSCAN



Source: Rolling Stone. Available from <http://www.rollingstone.com/recordindustrydecline>. Accessed March 18, 2009.

Appendix VII
RIAA Sales Data (in millions) from 2000 to 2007



Source: 2007 RIAA Year End Shipment Statistics. Available from <http://ad-supported-music.blogspot.com/2008/04/myth-of-digital-sales.html>. Accessed March 18, 2009.

Appendix VIII

Revised Google Books Settlement Agreement

The AAP published a document highlighting revisions from the original Google Books Settlement Agreement. For a broader list of changes, visit the link to the Supplemental Notice document.

The Revised Google Books Settlement Agreement

In October 2008, a broad class of authors and publishers, the Authors Guild, the Association of American Publishers, and Google announced a settlement agreement that will unlock access to millions of out-of-print books in the U.S. and give authors and publishers new ways to distribute and control access to their works online. If approved by the Court, the settlement will:

- Generate greater exposure for millions of in-copyright, out-of-print books, by enabling students, scholars, and readers to search, preview, and purchase online access to these works;
- Open new opportunities for authors and publishers to sell their copyrighted works and to maintain ongoing control over the ways those books can be displayed;
- Create an independent, not-for-profit Book Rights Registry that will locate and represent rightsholders, making it easier for everyone, including Google's competitors, to license works;
- Offer a means for U.S. colleges, universities, and other organizations to obtain subscriptions for online access to collections from some of the world's most renowned libraries;
- Provide free, full-text, online viewing of millions of out-of-print books at designated computers in U.S. public and university libraries; and
- Enable unprecedented access to the written literary record for people who are visually impaired.

On November 13, 2009, the parties to the settlement filed an amended agreement with the U.S. District Court for the Southern District of New York. Over the last several months, we have been carefully reviewing the submissions filed with the Court, including that of the Department of Justice. The changes made to the settlement were developed to address many of these concerns, while preserving the core benefits of the agreement.

Areas of change are summarized below and a broader list of changes can be found in the supplemental notice (<http://googlebooksettlement.com/Supplemental-Notice.pdf>).

International Scope

As revised, the settlement will only include books that were either registered with the U.S.

Copyright office or published in the U.K., Australia, or Canada. After hearing feedback from foreign rightsholders, the plaintiffs decided to narrow the class to include only these countries, which share a common legal heritage and similar book industry practices. British, Australian, and Canadian rightsholders are joining the case as named plaintiffs and will also be represented on the Board of the Book Rights Registry.

In addition, as we have stated previously, we have clarified the wording in the agreement to make it clear that works that are for sale as new internationally are considered commercially available and thus Google will not display any of their content by default.

Google remains interested in working directly with international rightsholders and organizations that represent them, including those in countries excluded from the settlement, to reach similar agreements to make their works available worldwide. Authors, and publishers from around the world can also enter into promotional and revenue-generating programs through Google's Partner Program.

Unclaimed Works

The amended settlement agreement requires the Book Rights Registry to search for rightsholders who have not yet come forward and to hold revenue on their behalf. The settlement now also specifies that a portion of the revenue generated from the unclaimed works may, after five years, be used to locate rightsholders, but will no longer be used for the Registry's general operations or redistributed to other rightsholders. The Registry make ask the court after 10 years to distribute these funds to nonprofits benefiting rightsholders and the reading public, and may provide abandoned funds to the appropriate government authority in compliance with state property laws. The Registry will now also include a Court-approved fiduciary who will represent their rightsholders of unclaimed books, act to protect their interests, and license their works to third parties, to the extent permitted by law.

Just as with the original agreement, nothing in the amended settlement limits anyone's ability to use unclaimed works. In terms of the small subset of unclaimed works that some have referred to as "orphans," as we've said repeatedly (<http://googlepublicpolicy.blogspot.com/2009/06/google-book-search-settlement-and.html>), the settlement agreement takes one important step towards opening up access to unclaimed books. In the meantime, we continue to encourage legislation that provides meaningful avenues for any entity to use these works.

Syndication of All Works in the Settlement to Others, Including Google's Competitors

As Google first announced in September 2009, any book retailer –Amazon, Barnes & Noble, local bookstores, or other retailers – will be able to sell consumers online access to the out-of-print books covered by the settlement, including unclaimed books. Rightsholders will still receive 63% of the revenue, while retailers will keep the majority of the remaining 37%. This

provision has been explicitly written into the revised agreement as a Google obligation.

Access Models

The amended settlement does not change the primary access models outlined in the original agreement, including enabling readers to preview and purchase books, selling institutional subscriptions to the whole database, and giving libraries free access at designated terminals. Under the revised agreement, possible additional access models to which Google and the Registry might agree in the future have been reduced and are now limited to: print-on-demand, file download, and consumer subscription.

The amended agreement also enables the Registry to increase the number of terminals at a public library building, and it clarifies that rightsholders can choose to make their books available for free or allow re-use under Creative Commons or other licenses. Rightsholders can also choose to modify or remove restrictions placed on Google's display of their books, such as limits on the number of pages that users can print.

Pricing and Non-Discrimination Clause

The amended settlement clarifies how Google's algorithm will work to price books competitively. The algorithm used to establish consumer purchase prices will simulate the prices in a competitive market, and prices for books will be established independently of each other. The agreement also stipulates that the Registry cannot share pricing information with anyone but the books' rightsholder.

In addition, the amended settlement removes the non-discrimination clause (commonly called the "Most Favored Nation" clause) that pertained to the Registry licensing of unclaimed works. The Registry is free to license to other parties without ever extending the same terms to Google.