



A BIMONTHLY REPORT ON RESEARCH LIBRARY ISSUES AND ACTIONS FROM ARL, CNI, AND SPARC

TRANSFORMATION OF A SCHOLARLY SOCIETY PUBLISHING PROGRAM

by Susan Skomal, Director of Publications, American Anthropological Association

The American Anthropological Association (AAA) was founded in 1902 with a mission to publish scholarly research for and by anthropologists. Throughout its first century, the association relied upon the tried and true technology of putting ink on paper to deliver the promised materials. In 2000, however, AAA's leadership recognized the need to seek a new publishing model to enable digital publishing and to offer new kinds of publishing and member services. In 2005—after studying AAA's existing publishing business, exploring alternatives, and looking for partnerships—the association launched AnthroSource, an online portal to full-text anthropological resources. The lessons learned from AAA's electronic evolution highlight issues confronting social science and humanities publishing in general and may help other publishers who are contemplating their own transformation.

Ink on Paper

In its 103 years as a scholarly publisher, AAA has produced some 280 books and over 35 periodical titles by gradually developing a small-scale publishing enterprise built upon a paper-based infrastructure as content and membership increased. By 2000, the association was producing 20 peer-reviewed journals, 7 newsletters and bulletins, and 4 book series, plus an annual guide to departments, the annual meeting program, and abstracts. The association's staff grew to provide a full range of management and production services, including copyediting, typesetting, advertising, and marketing, as well as fulfillment and accounting. This effort had become so important to the association that, by 2004, 42% of its budget was devoted to sustaining the publications program. The greatest challenges to

sustainability—managing the costs of paper, postage, and human labor—were functions generally understood by all involved in the production stream. The move to electronic production, however, not only required a much broader set of technical skills, it called for a different understanding of how the parts work together, what drives costs, and where adaptations can realistically be made.

Despite the fact that the science, technology, and medical (STM) publishing community had already begun to invest heavily in the electronic future, by 1999 there was only a faint awareness of this prospect amongst social science and humanities publishers. In fact, as AAA welcomed the new millennium with preparations to celebrate its own centennial, few of the association's members were familiar with reference linking, nor did the leadership appreciate how soon the electronic medium was to become a standard for scholarly research. At this time, for example, citations to books far outweighed those to journal articles in anthropological publications, and the culture of anthropological research was still firmly rooted in the print medium.

Signs of impending change to AAA's publications program were visible as early as 2000. Revenue from institutional subscriptions—the single most important source of income—had declined on an average of 3–4 % per year since 1996. Although a relatively benign loss in a single year, cumulatively the trend translates into a 21–28% decline over six years. Moreover, following a 20-year period of steady increase in association membership—income that had long subsidized the cost of publication—membership dues began to level off and no longer increased sufficiently to offset publication expenses.

Education for Change

Realizing that the ground was shifting beneath the publishing industry, AAA prepared to educate its staff and members about the challenges faced by libraries, trends in the scholarly communications industry as a whole, and the experiences of the STM community specifically. Early steps included mustering a committee of dedicated anthropologist-librarians (most of whom are also members of the American Library Association's Anthropology and Sociology Section) to advise AAA on the challenges confronting libraries and the digital products and prices most likely to meet libraries' needs. AAA likewise consulted a wide range of scholarly publishers from the STM to the humanities. The association conducted a series of surveys of AAA members themselves to gather both quantifiable and ethnographic information about the diverse interests and needs of the broad membership. Had there been sufficient time and money, a study of research habits would have provided another source of useful data. Simultaneously, the association's decision makers were offered presentations on electronic publishing trends featuring experts from the library and scholarly publishing communities.

In early 2002, The Andrew W. Mellon Foundation's Research and Information Technology Program expressed an interest in funding a complex social science project designed to push the digital envelope beyond merely converting print to electronic delivery. AAA was ripe for such an assignment. A discipline as diverse as the subjects it studies, anthropology analyzes raw data found in various media from across the academic spectrum. Its final products can be photos, video, audio recordings, databases, and increasingly born-digital products such as blogs, e-mail, and Web sites. AAA envisioned an electronic portal that could deliver the full complement of critical resources for scholarly research, a virtual gateway to anthropology.

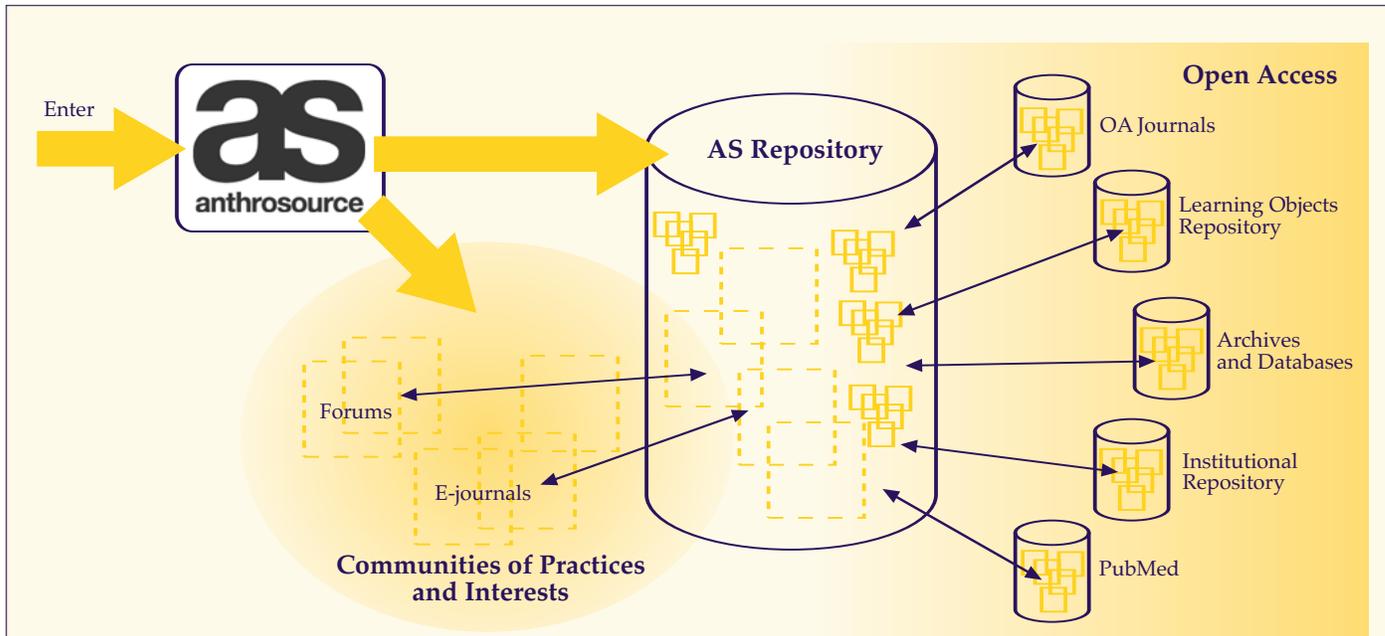
Business Strategy for Survival

Before accepting a full proposal, The Mellon Foundation wisely requested a comprehensive situation assessment and business plan for the project AAA envisioned. Supported by a Mellon planning grant, this effort became a research project itself, requiring a full year for analysis with the aid of an outside consultant recommended by the Scholarly Publishing and Academic Resources Coalition (SPARC). After 100 years, the AAA's publishing program had become complex, where journals, newsletter, bulletins, and books followed a variety of production paths, ranging from informal preparation in word-processing software on an editor's home computer to formal copyediting and typesetting through AAA's professional in-house staff. Because there were few standards and limited oversight, in many cases it was difficult to track the actual costs to run the overall publications program.

The situation assessment enabled AAA for the first time to calculate realistic profit and loss assessments for each publication, as well as for the program as a whole. The association had not realized, for example, how heavily it was subsidizing each journal, nor had it been able to track the effects of sustained subscription loss. Neither dues nor subscription prices had kept up with the market or the cost of living, with the result that, even when large increases were implemented periodically, the income generated could not compensate for the cumulative loss over time. In addition, the fact that page numbers, print runs, and production schedules fluctuated as much as 40% each year made it difficult to budget accurately. The program clearly needed stronger central oversight, where all parties clearly understood their roles and responsibilities, as well as a coordinated marketing effort to stem subscription losses and increase sales.

AMERICAN ANTHROPOLOGICAL ASSOCIATION

- Largest professional society of anthropologists in the world with 12,000 members
- Founded in 1902, currently supported by a permanent staff of 23 plus a volunteer force of thousands
- Largest single publisher of anthropological journals, with 29 current titles
- Seminal collection of over 280 books published, including monographs, textbooks and syllabi, guides to departments, disciplinary statistics, and conference programs and abstracts
- Only organization that represents anthropology's diversity, including the core fields of sociocultural, archaeological, biophysical, and linguistic anthropology, as well as such subfields as agricultural, environmental, medical, museum, nutritional, political & legal, practicing, psychological, and visual anthropology. Internally, the membership is divided into 36 sections and 15 interest groups to facilitate interaction within specialties.
- Web site is one of the largest dedicated to anthropology and related issues



BEYOND BOUNDARIES

AnthroSource will expand the AAA's mission beyond the boundaries of its current scholarly publishing program. AnthroSource was conceived as the indispensable research and educational resource for anthropologists, the primary professional venue for building global communities based on anthropological knowledge, and the authoritative source for a public understanding of anthropology. The AnthroSource Steering Committee developed this conceptual map to graphically depict the relationships between discrete services envisioned for the portal. After entering the collection of published scholarship branded as AnthroSource, subscribers are

able to participate in communities of practice and interest by posting commentary to forums, sharing their own working papers for comment, and assembling collections of posted comments and papers into new e-journals. These materials and functions are hosted in a dedicated AAA repository that is in turn connected to open access journals, learning objects, archives and data sets, as well as to other repositories and open access collections. This map and the boundaries it draws will necessarily evolve as AnthroSource develops beyond the current vision.

(Credit: Leslie Chan, 2005.)

Armed with the situation assessment, AAA was able to outline a comprehensive plan to improve its publishing program. This included development of a set of shared goals and expectations for each publication and negotiation of a Memorandum of Understanding to be signed by those parties most intimately involved in a publication's production and oversight. The association's accounting system was also reconfigured to be able to evaluate the profitability of each publication. This now enables AAA to track the progress for each publication and to do comparative trends and analysis for the publishing program as a whole. The new system likewise provides a tool for staff to educate editors and decision makers in the financial aspects of publication. Thus, when viewed as a strategy for sustainability and survival, the concept of operating as a business became far more palatable to a community of scholars whose primary goal is to share, rather than profit from, knowledge.

Strategic Partnership

Early in the investigation process, it became apparent that AAA could not effect a profound transformation of its publishing program alone. The association possessed neither the technical expertise nor sufficient resources to formulate a business plan or fund conversion of its some 250,000 pages of print legacy. Nor was the current production process fully digital at the time. In 2000, for example, staff were still pasting up artwork by hand, and it was not until 2002 that AAA was equipped to submit PDFs to the printer. Several scenarios for going electronic were floated, ranging from outsourcing management of the entire program to investing in an even larger in-house operation. Both solutions, however, would have required staff, expertise, and funds beyond the capacity of the association at the time.

AAA's decision to outsource the production process was designed to retain ownership of its own publishing program, as well as to control the problems of spiraling

costs and irregular production highlighted in the situation analysis. Rather than invest further in an operation still too small to generate economies of scale, AAA decided to seek a partnership with a like-minded nonprofit publisher. Eight university presses were invited to bid on a proposal to provide production and electronic hosting services as well as build the infrastructure to support a full-service portal. The University of California (UC) Press impressed AAA with a business model flexible enough to adapt quickly to changing technological demands, but also, to AAA's delight, the press had independently targeted development of their anthropology collection in their latest long-range plan. AAA began working with UC Press in September 2003, and by April of the following year, had transferred production of AAA's 10 biggest journals to the press's system. Within one year of the partnership, UC Press had increased their staff by one third to accommodate the expansion.

Strengthened by the improvements recommended in the situation assessment, armed with a realistic plan for sustainability in the comprehensive business plan, and supported by a sympathetic partnership with UC Press, AAA presented a full proposal to The Mellon Foundation. Beginning with a complete collection of the association's periodicals, AnthroSource was conceived as a virtual community that would grow to include third-party publications, as well as other authoritative resources—both published and unpublished. These would include grey literature, field notes, data sets, photos, video and audio recordings. In December 2004, Mellon awarded AAA \$756,000 to cover the one-time start-up costs incurred over a three-year period. For its part, AAA has committed over \$1 million of its own resources over the three-year grant to cover the ongoing operating expenses and further development costs. One year after receiving the Mellon grant and effecting the transfer of its production to UC Press, AnthroSource was ready for prime time.

Adapting to Change

Considering the static character of the association's homegrown publishing operation, the pace with which AAA achieved the outsourcing of its production, conversion from print to digital, and creation of a comprehensive portal service was nothing short of meteoric. As any student of social change might have predicted, however, this operation has posed challenges for all involved, including AAA and UC Press staff, AAA leadership and members, as well as librarians and users around the world. AAA is committed to making AnthroSource a sustainable service by the end of 2007. To meet these goals, the association and its 36 publication-sponsoring sections have had to reassess their financial priorities.

Because all AAA publications are now bundled as a single electronic package, where individual subscriptions are available only for print versions, publications that had previously relied upon non-publication revenue to cover production costs (such as membership dues) are becoming skilled in strategic budgeting. Education is again key. The member volunteers responsible for the success of these publications are learning to consider timeliness of production as well as factors that influence cost, such as volume of content, format, and presentation. Association leaders are likewise thinking creatively about how to bridge the costly transition to electronic production with dwindling print-subscription revenue. Although there are no plans to discontinue printing AAA publications, it may soon become necessary, for example, to price the print versions at cost. With the print thus paying for itself, publications could invest more in their electronic future.

Serving Diverse Communities

The publishing programs of scholarly societies serve two important audiences: their individual society members and institutional subscribers. With its increased accessibility, the electronic medium has posed another set of challenges for balancing these two types of consumers. When members can access their scholarly society's publications through a university library, for example, the incentive to retain membership may well decrease. AAA is therefore developing new benefits of membership to distinguish the service provided for members from that offered to libraries. Based on member feedback, AAA is also considering the development of additional member services such as discussion forums, author services, and repository functions for use in conjunction with AnthroSource.

AAA's partnership with JSTOR is one example of how the association has met the challenge of serving these two very important communities. This pioneering effort enables users to move seamlessly from materials hosted on AnthroSource to the six AAA publications archived in JSTOR. (Once JSTOR likewise registers its content with CrossRef in November of 2005, users will be able to link from JSTOR into AnthroSource.) As a benefit of AAA membership, users who enter AnthroSource with their membership login and password have access to the entire collection. If they log on through their institution, access to these six publications is determined by whether the library also subscribes to JSTOR.

Vision for the Future

To guide the future development of AnthroSource, AAA has established a permanent steering committee composed of librarians, archivists, technologists, association members with expertise in areas such

as research and scholarly communications, as well as AAA staff and a representative from the university press. Chaired by Suzanne Calpestri (Director of the George and Mary Foster Anthropology Library, UC Berkeley), the AnthroSource Steering Committee (ASSC) has already created both a mission and scope statement, plus a content selection policy that outlines criteria for evaluating the relevance and quality of new AnthroSource resources, including open access content. The ASSC has likewise advised on the site's privacy policy, recommended broadening the author agreement contracts to allow deposition of AAA-published articles into institutional repositories, and conducted its own study of user needs and behaviors. Based on the ASSC's detailed archiving and migration strategy, AAA is making plans for yet another partnership to archive its entire AnthroSource content with Portico, a Mellon, Ithaca, and JSTOR-supported initiative to provide a permanent archive of scholarly journals. The energy, dedication, and expertise concentrated in this dynamic committee of volunteers portends well for the future of AnthroSource.

AnthroSource is now positioned to extend its services to other anthropologically relevant scholarly publications interested in joining its electronic community. The arrangement is analogous to that which we currently offer with JSTOR, wherein libraries subscribe separately to the non-AAA publications but users search and access content within the site. AnthroSource is likewise negotiating to allow full-text searching within anthropological publications hosted elsewhere. Searches in this case would resolve to the publisher's site, where access is authenticated.

Lessons Learned

Through the process of evolving from 16th- to 21st-century technology in five years, AAA has learned many valuable lessons. Six of these lessons have enabled the association to move faster and with greater confidence.

- 1. Research.** By paying careful attention to the experiences of the STM publishing community, AAA avoided reinventing the wheel, synchronized its own products and services with a well-established market, and will be better positioned to adapt to the rapidly evolving needs of users and changes in technology.
- 2. Education.** An organization that operates by consensus through a deliberately inclusive democratic process, AAA has found that education of all stakeholders has been critical. This is particularly important now that scholarly publishing is undergoing such a radical transformation itself. Resistance to change and misunderstanding the benefits and risks can cause serious delays and even halt progress altogether.

- 3. Partnering.** Today's electronic environment mitigates against a small scholarly publisher continuing to operate its entire program independently. Given the complex set of working parts, partnering with vendors, consultants, funding agencies, and even other publishers increases the likelihood of success. Moreover, AAA deliberately chose to work with as many nonprofit and like-minded partners as possible to ensure that it could meet its mission to provide scholarship affordably to both members and libraries.
- 4. Sustainability.** To meet its commitment for the long-term, AAA based its strategy on a solid business plan that was in turn informed by a realistic assessment of the existing publishing program.
- 5. Multi-Source Funding.** AAA sought external funding to support the business plan as well as one-time start-up costs. It has likewise dedicated its own resources to cover the ongoing costs.
- 6. Volunteer Energy.** The solid backing and creative input of a dedicated group of members is as important as a solid financial base. Not only does this provide a direct connection to the users themselves, it will provide the energy and enthusiasm necessary to keep AnthroSource alive and growing well into the future.

AAA gratefully acknowledges the guidance received—both formal and informal—from the American Library Association, Association of Research Libraries, SPARC, Chain Bridge Group, and BioOne throughout development of AnthroSource, and welcomes input from the library community. Feel free to explore the AAA content on AnthroSource at <http://www.anthrosource.net/> and let us know what you think. Please contact UC Press at customerservice@anthrosource.net with questions or to arrange for a free trial access to AnthroSource.

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Editor's note: Effective October 2005, Susan Skomal is leaving the American Anthropological Association to become Executive Director of BioOne, a nonprofit online aggregator of scholarly journals in the biosciences. During her 15-year tenure at AAA, Dr. Skomal served as Press Officer and Managing Editor of Anthropology News before becoming Director of the Publications Department in 2000. She earned a PhD in anthropology from the University of California, Los Angeles, and was formerly an Adjunct Professor at the University of Maryland, University College.

THE GOOGLE PRINT LIBRARY PROJECT: A COPYRIGHT ANALYSIS

by Jonathan Band¹

On August 11, 2005, Google announced that it would not scan copyrighted books under its Print Library Project until November, so that publishers could decide whether they want to opt their in-copyright books out of the project. Given the confusion in press reports describing the project, publishers should carefully study exactly what Google intends to do and understand the relevant copyright issues. This understanding should significantly diminish any anxiety publishers possess about the project.

The Google Print Project

The Google Print project has two facets: Print Publisher Program and the Print Library Project. Under the Publisher Program, a publisher controlling the rights in a book can authorize Google to scan the full text of the book into Google's search database. In response to a user query, the user receives bibliographic information concerning the book as well as a link to relevant text. By clicking on the link, the user can see the full page containing the search term, as well as a few pages before and after that page. Links would enable the user to purchase the book from booksellers or the publisher directly, or visit the publisher's Web site. Additionally, the publisher would share in contextual advertising revenue if the publisher has agreed for ads to be shown on their book pages. Publishers can remove their books from the Publisher Program at any time. The Print Publisher Program raises no copyright issues because it is conducted pursuant to an agreement between Google and the copyright holder.

Under the Print Library Project, Google plans to scan into its search database materials from the libraries of Harvard, Stanford, and Oxford Universities, the University of Michigan, and the New York Public Library. In response to search queries, users will be able to browse the full text of public domain materials, but

only a few sentences of text around the search term in books still covered by copyright. This is a critical fact that bears repeating: for books still under copyright users will be able to see only a few sentences on either side of the search term. Users will *not* see a few pages, as under the Publisher Program, *nor* the full text, as for public domain works. Indeed, a full page of the book is never seen for an in-copyright book scanned as part of the Library Project unless a publisher decides to transfer their book into their Publisher Program account, in which case it would be under the agreement between Google and the copyright holder.²

Google's August 11th Announcement

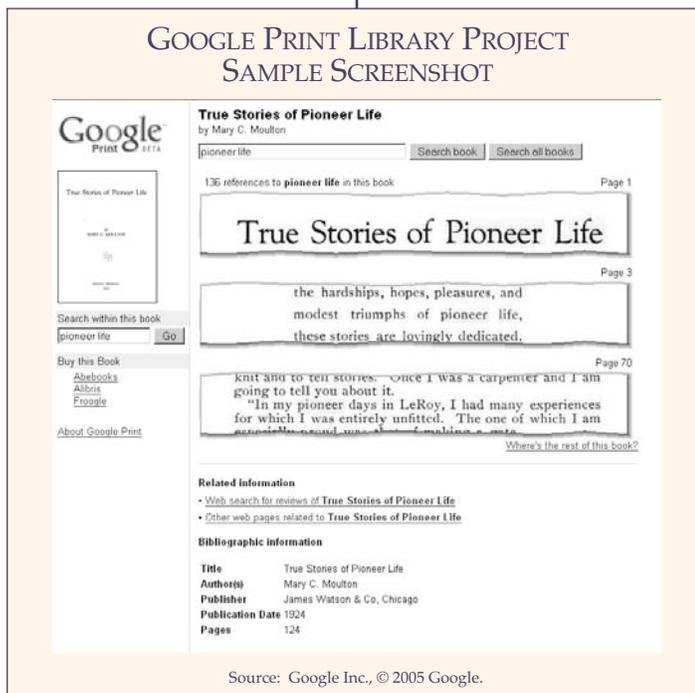
The Association of American Publishers (AAP) reacted negatively to the Print Library Project. In response to the AAP's concerns, Google announced on August 11, 2005, that if a publisher provided it with a list of its titles that it did not want Google to scan at libraries, Google would respect that request, even if the book were in the collection of one of the participating libraries. To allow publishers to determine whether they wanted to exclude any of their titles from the

Library Project, Google stated that it would not scan any more copyrighted works until November.

Patricia Schroeder, AAP President, stated that "Google's announcement does nothing to relieve the publishing industry's concerns."³ She claimed that Google's opt-out procedure "shifts the responsibility for preventing infringement to the copyright owner rather than the user, turning every principle of copyright law on its ear." The AAP expressed continued "grave misgivings about...the [p]roject's unauthorized copying and distribution of copyright-protected works."

Analysis of the AAP's Copyright Claims

The Print Library Project involves two actions that raise copyright questions. First, Google copies the full text of books into its search database. Second, in response to user queries, Google presents users with a few sentences from the stored text. Because the amount of expression presented to the user is *de minimus*, this second action



Source: Google Inc., © 2005 Google.

probably would not lead to liability. But even if a court did not view the second action as *de minimis*, both actions fall within the scope of the fair use privilege.

The leading decision that considered the fair use issues relating to search engine operations is *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003). Arriba Soft operated a search engine for Internet images. Arriba compiled a database of images by copying pictures from Web sites, without the express authorization of the Web site operators. Arriba reduced the full-size images into thumbnails, which it stored in its database. In response to a user query, the Arriba search engine displayed responsive thumbnails. If a user clicked on one of the thumbnails, she was linked to the full size image on the original Web site from which the image had been copied. Kelly, a

photographer, discovered that some of the photographs from his Web site were in the Arriba search database, and he sued for copyright

infringement. The lower court found that Arriba's reproduction of the photographs was a fair use, and the Ninth Circuit affirmed.

With respect to the first factor, "the purpose and character of the use, including whether such use is of a commercial nature,"⁴ the Ninth Circuit acknowledged that Arriba operated its site for commercial purposes. However, Arriba's use of Kelly's images

was more incidental and less exploitative in nature than more traditional types of commercial use. Arriba was neither using Kelly's images to directly promote its [W]eb site nor trying to profit by selling Kelly's images. Instead, Kelly's images were among thousands of images in Arriba's search engine database. Because the use of Kelly's images was not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use.⁵

The court then considered the transformative nature of the use—whether Arriba's use merely superseded the object of the originals or instead added a further purpose or different character. The court concluded that "the thumbnails were much smaller, lower resolution images that served an entirely different function than Kelly's original images."⁶ While Kelly's "images are artistic works intended to inform and engage the viewer in an aesthetic experience," Arriba's search engine "functions as a tool to help index and improve access to images on the [I]nternet...."⁷ Further, users were unlikely to enlarge the thumbnails to use them for aesthetic purposes because they were of lower resolution and thus could not be enlarged without significant loss of

clarity. In distinguishing other judicial decisions, the Ninth Circuit stressed that "[t]his case involves more than merely a transmission of Kelly's images in a different medium. Arriba's use of the images serves a different function than Kelly's use—improving access to information on the [I]nternet versus artistic expression."⁸ The court closed its discussion of the first fair use factor by concluding that Arriba's "use of Kelly's images promotes the goals of the Copyright Act and the fair use exception" because the thumbnails "do not supplant the need for the originals" and they "benefit the public by enhancing information gathering techniques on the [I]nternet."⁹

Everything the Ninth Circuit stated with respect to Arriba applies with equal force to the Print Library

Project. Although Google operates the program for commercial purposes, it is not attempting to profit from the sale of a copy of any of the books scanned into its database, and thus its use is

not highly exploitative. The Google search index functions as a tool that makes "the full text of all the world's books searchable by everyone."¹⁰ Neither the full-text copies in the index, nor the few sentences displayed to users in response to queries, will supplant the original books. Rather, they will bring the books to the user's attention.

With respect to the second fair use factor, the nature of the copyrighted work, the Ninth Circuit observed that "[w]orks that are creative in nature are closer to the core of intended copyright protection than are more fact-based works."¹¹ Moreover, "[p]ublished works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred."¹² Kelly's works were creative, but published. Accordingly, the Ninth Circuit concluded that the second factor weighed only slightly in favor of Kelly. The Print Library Project involves only published works. And while some of these works will be creative, the vast majority will be nonfiction.

The third fair use factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."¹³ The Ninth Circuit recognized that "copying an entire work militates against a finding of fair use."¹⁴ Nonetheless, the court states that "the extent of permissible copying varies with the purpose and character of the use."¹⁵ Thus, "if the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her."¹⁶ In *Kelly*, this factor weighed in favor of neither party:

although Arriba did copy each of Kelly's images as a whole, it was reasonable to do so in light of Arriba's

...the billions of dollars of market capital represented by the search engine companies are based primarily on the fair use doctrine.

use of the images. It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating [W]eb site. If Arriba copied only part of the image, it would be more difficult to identify it, thereby reducing the usefulness and effectiveness of the visual search engine.¹⁷

In the Print Library Project, Google's copying of entire books into its database is reasonable for the purpose of the effective operation of the search engine; searches of partial text necessarily would lead to incomplete results. Moreover, unlike Arriba, Google will not provide users with a copy of the entire work, but only with a few sentences surrounding the search term. And if a particular term appears many times in the book, the search engine will allow the user to view only three instances—thereby preventing the user from accessing too much of the book. Thus, at least with respect to the search results, the third factor weighs in favor of Google.

The Ninth Circuit decided that the fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,”¹⁸ weighed in favor of Arriba. The court found that the Arriba “search engine would guide users to Kelly’s [W]eb site rather than away from it.”¹⁹ Additionally, the thumbnail images would not harm Kelly’s ability to sell or license full-size images because the low resolution of the thumbnails effectively prevented their enlargement.

Without question, the Print Library Project will increase the demand for some books. The project will expose users to books containing desired information, which will lead some users to purchase the books or seek them out in libraries (which in turn may purchase more copies of books in high demand). It is hard to imagine how the Library Project could actually harm the market for certain books, given the limited amount of text a user will be able to view. To be sure, if a user could view (and print out) many pages of a book, it is conceivable that the user would rely upon the search engine rather than purchase the book. Similarly, under those circumstances, libraries might direct users to the search engine rather than purchase expensive reference materials. But when the user can access only a few sentences before and after the search term, any displacement of sales is unlikely.

Publishers might argue that the Library Project restricts their ability to license their works to search engine providers. The existence of the Print Publisher Program, however, undermines this argument. By

participating in Print Publisher Program, publishers receive revenue streams not available to them under the Library Project. And Google presumably prefers for publishers to participate in the Publisher Program; Google saves the cost of digitizing the content if publishers provide Google with the books in digital format.

In sum, under the Ninth Circuit’s analysis in *Kelly*, Google’s Print Library Project satisfies the requirements of the fair use doctrine.

The Big Picture

Stepping back from the technicalities of the four fair use factors, it becomes clear that the Print Library Project is similar to the everyday activities of Internet search engines. A search engine firm sends out software

“spiders” that crawl publicly accessible Web sites and copy vast quantities of data into the search engine’s database. As a practical matter, each of the major search engine companies copies a large (and

increasing) percentage of the entire World Wide Web every few weeks to keep the database current and comprehensive. When a user issues a query, the search engine searches the Web sites stored in its database for relevant information. The response provided to the user typically contains links both to the original site as well as to the “cache” copy of the Web site stored in the search engine’s database.

Significantly, the search engines conduct this vast amount of copying without the express permission of the Web site authors. Rather, the search engine firms believe that the fair use doctrine permits their activities. In other words, the billions of dollars of market capital represented by the search engine companies are based primarily on the fair use doctrine.

In addition to fair use, search engine firms rely on the concept of implied license. Search engine firms assume that if information is posted on a Web site, the Web site operator wanted the information to be found by users, and search engines are the most efficient means for users to find the information. Thus, search engine firms assume that most Web site operators want their sites copied into the search engine database so that users will be able to find the site. If an operator does not want his site crawled and copied, he can use an exclusion header, a software “Do Not Enter” sign, which most search engine firms respect. But if a Web site operator does not use an exclusion header, a search engine will assume that the operator wants the site included in the search database.

This implied license theory has not yet been tested in court, and could actually constitute an element of a fair use

...by giving publishers the opportunity to opt out of the Print Library Project, Google is replicating the exclusion header feature of the Internet.

defense. Courts have described fair use as an “equitable rule of reason,”²⁰ and industry practice is considered relevant in assessing the reasonableness of a defendant’s conduct. Accordingly, a court is likely to excuse as fair use a search engine’s copying of a Web site that did not use an exclusion header, provided that the search engine could show that it typically respected exclusion headers when Web site operators did employ them.

In the Print Library Project, Google is relying on fair use just as it and its search engine competitors rely on fair use when they copy millions of Web sites every week. Moreover, by giving publishers the opportunity to opt out of the Print Library Project, Google is replicating the exclusion header feature of the Internet. Most authors want their books to be found and read. Moreover, authors are aware that an ever increasing percentage of students and businesses conduct research primarily, if not exclusively, online. Thus, if books cannot be searched online, many users will never locate them. The Print Library Project is predicated upon the assumption the authors generally want their books to be included in the search database so that readers can find them. But if a copyright owner does not want Google to scan her book, Google will honor her request.

Contrary to the AAP’s assertion, this opt-out feature does not turn “every principle of copyright law on its ear.” Rather, it is a reasonable implementation of a program based on fair use.

International Dimensions

Fair use under the US Copyright Act is generally broader and more flexible than the copyright exceptions in other countries, including fair dealing in the UK. Thus, the scanning of a library of books might not be permitted under the copyright laws of most other countries. However, copyright law is territorial; that is, one infringes the copyright laws of a particular country only with respect to acts of infringement that occurred in that country. Since Google presumably will be scanning the books in the United States, the only relevant law with respect to the scanning is US copyright law.²¹

Nonetheless, the search results will be viewable in other countries. This means that Google’s distribution of a few sentences from a book to a user in another country must be analyzed under that country’s copyright laws. (Google arguably is causing a copy of the sentences to be made in the random access memory of the user’s computer.) While the copyright laws of most countries might not be so generous as to allow the reproduction of an entire book, almost all copyright laws do permit short quotations. These exceptions for quotations should be sufficient to protect Google’s transmission of Library Project search results to users.

Conclusion

The Google Print Library Project will make it easier than ever before for users to locate the wealth of information buried in books. By limiting the search results to a few sentences before and after the search term, the program will not conflict with the normal exploitation of works nor unreasonably prejudice the legitimate interests of rights holders. To the contrary, it will often increase demand for copyrighted works.

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Editor’s note: This article was previously published in E-Commerce Law & Policy 7, no. 8 (August 2005), <http://www.e-comlaw.com/lp/index.asp>.

- ¹ Mr. Band is an attorney who represents Internet companies and library associations on intellectual property matters. He does not represent any entity with respect to the Google Print project. He may be contacted via his Web site <http://www.policybandwidth.com/>.
- ² Displays of the different treatments can be found at <http://print.google.com/googleprint/library.html>. Google has also agreed to provide each library participating in the program with a digital copy of all the works in that library’s collection scanned by Google. The libraries typically will keep the files of the in-copyright works as a dark archive for preservation purposes. See “University of Michigan Library/Google Digitization Partnership FAQ,” August 2005, <http://www.lib.umich.edu/staff/google/public/faq.pdf>. The fair use analysis of these preservation copies is different from that of the copies in Google’s search index, but the result is the same: both are fair uses.
- ³ Association of American Publishers, “Google Library Project Raises Serious Questions for Publishers and Authors,” August 12, 2005, <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=274>.
- ⁴ *United States Code*, Title 17, Chapter, 1, Section 107.
- ⁵ *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003), 818.
- ⁶ *Ibid.*
- ⁷ *Ibid.*
- ⁸ *Ibid.*, 819.
- ⁹ *Ibid.*, 820.
- ¹⁰ Adam M. Smith, “Making Books Easier to Find,” *Google Blog*, August 11–12, 2005, <http://googleblog.blogspot.com/2005/08/making-books-easier-to-find.html>.
- ¹¹ *Kelly*, 820.
- ¹² *Ibid.*
- ¹³ *United States Code*, Title 17, Chapter, 1, Section 107.
- ¹⁴ *Kelly*, 820.
- ¹⁵ *Ibid.*
- ¹⁶ *Ibid.*, 820–821.
- ¹⁷ *Ibid.*, 821.
- ¹⁸ *United States Code*, Title 17, Chapter, 1, Section 107.
- ¹⁹ *Kelly*, 821.
- ²⁰ *Stewart v. Abend*, 495 US 207, 237 (1990).
- ²¹ Google is scanning only public domain materials at the Oxford libraries.

STATISTICS & MEASUREMENT

Martha Kyrillidou, Director, Statistics & Measurement Program

ARL UNIVERSITY LIBRARIES' SPENDING TRENDS

According to the forthcoming *ARL Statistics*, the median total library expenditures of ARL university libraries was \$20 million in 2003–04, almost two and a half times the 1986 figure, which has increased at an average rate of 5% per year. Library expenditures have risen somewhat more sharply than the Consumer Price Index (3.1% per year), i.e., “real” spending has grown slightly over this period.

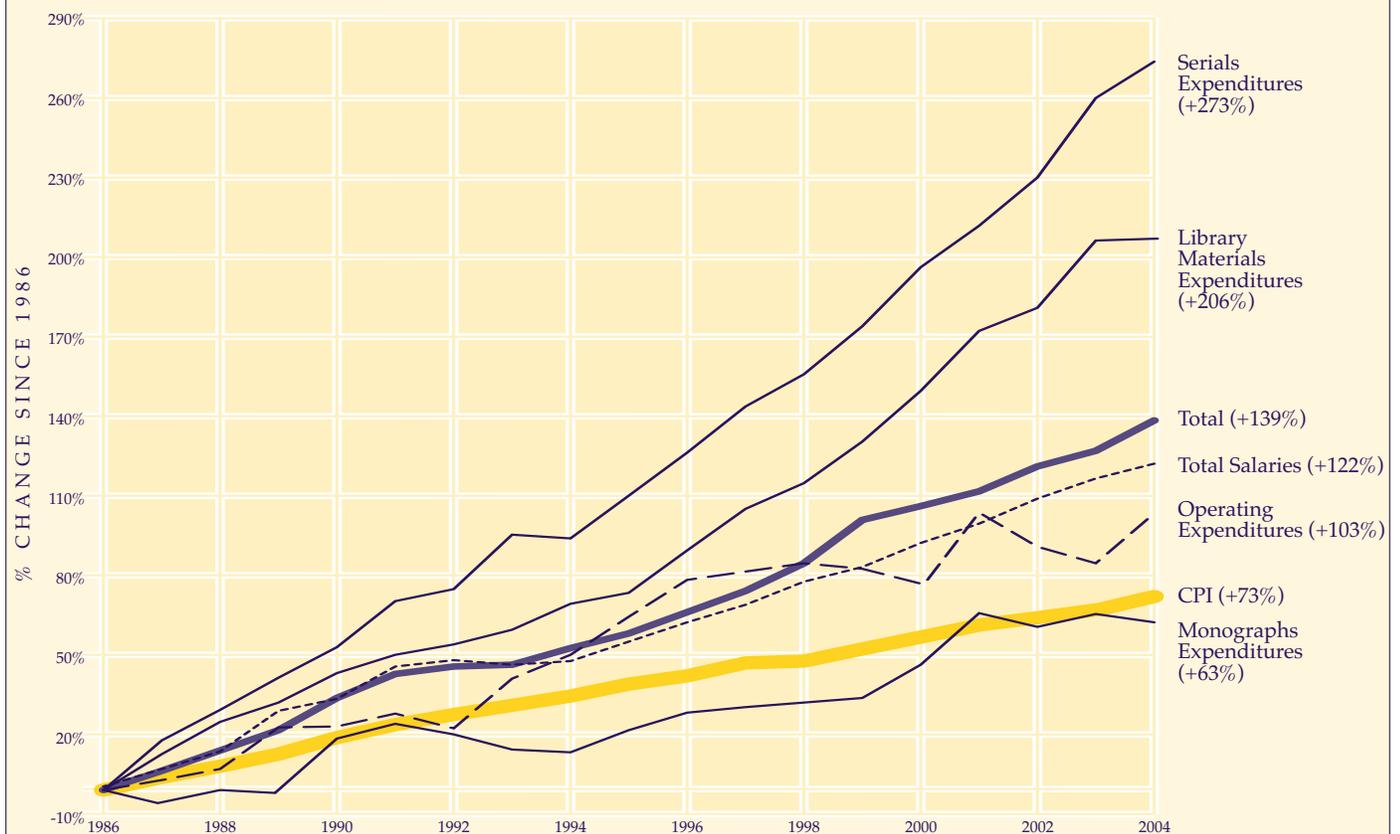
Of the three major components of total library expenditures, materials expenditures have risen the most rapidly since 1986, at an average rate of 6.4% per year. The other two components—salary and operating expenditures—have increased by 4.5% and 4.0% per year respectively. In 2003–04, median expenditures by ARL university libraries were \$8.2 million on materials, \$9 million on salaries, and about \$2.8 million on operations, which includes much of the technology infrastructure in libraries.

When looking at library spending trends, a growing portion of materials expenditures is directed to serials. In 2003–04, one-time monographic expenditures accounted for 22% of library materials expenditures, compared to

67% for serials; these percentages have moved in opposite directions since 1986, when monograph spending made up 41% of materials expenditures and serials comprised 55%. Serials expenditures have increased an average of 7.6% per year over that period, albeit a notable slow-down from the two-digit rates of increase that dominated the market a few years ago. With a median of more than \$5.5 million spent on serials in 2003–04 and an increasing portion of these expenditures devoted to electronic resources (30% of the library materials budget as of the latest count), libraries appear to be catering to their users' never-ending lust for delivery of information to the desktop. Issues related to the quality of the electronic content purchased or licensed by libraries, its long-term preservation, and the sustainability of these spending patterns are major challenges facing research libraries for the foreseeable future.

For more information, see Martha Kyrillidou and Mark Young, comps. and eds., *ARL Statistics 2003–04* (Washington, DC: ARL, forthcoming). The publication will be available this fall for \$80 to member libraries and \$160 to nonmembers (plus shipping and handling), and is available on standing order. To order, visit <http://www.arl.org/pubscat/order/> or ARL Publications at pubs@arl.org.

EXPENDITURE TRENDS IN ARL UNIVERSITY LIBRARIES, 1986–2004



Source: *ARL Statistics 2003–04*, Washington, DC: Association of Research Libraries, 2005.

INITIATIVE TO RECRUIT A DIVERSE WORKFORCE

Jerome Offord, Jr., Program Officer for Training and Diversity

ARL AWARDS STIPENDS FOR GRADUATE LIBRARY EDUCATION

The Association of Research Libraries (ARL) Initiative to Recruit a Diverse Workforce, funded by the Institute of Museum and Library Services and 52 ARL member libraries, offers a graduate education stipend of up to \$10,000 to attract students from underrepresented groups to careers in research libraries. The Initiative reflects the commitment of ARL members to create a diverse research library community that will better meet the new challenges of global competition and changing demographics. In addition to the stipend for attending graduate library school, ARL's enhanced Initiative to Recruit a Diverse Workforce consists of a mentoring relationship as well as leadership development training and career placement assistance. Participants agree to a minimum of a two-year working relationship with an ARL library upon graduation.

Nineteen new Initiative participants were recently selected for the 2005–2007 class. These participants are listed below, along with their graduate schools:

Marissa Alcorta, University of Arizona
Miriam Bridges, University of Maryland
Emilyn Brown, Pratt Institute
David Fernandez-Barrial, Catholic University of America

Jocelyn Jaca, University of Alberta
Lanell James, University of Michigan
Latanya Jenkins, Drexel University
Janelle Joseph, University of Arizona
Jason Beatrice Lee, San Jose State University
Deborah Lilton, University of Alabama
Douglas Lyles, University of Pittsburgh
Yasmin Morias, University of Toronto
Phuongkhanh Nguyen, San Jose State University
Liladhar Pendse, University of California, Los Angeles

Megan Perez, University of North Carolina at Chapel Hill

Flora Rodriguez, Pratt Institute
Claudia Sueyras, Florida State University
Kelvin Watson, North Carolina Central University
Valerie Yazza, Kent State University

Background

The Initiative commenced in 2000 when ARL member libraries created and financed it in order to establish an endowment for recruiting minority librarians; ARL awarded four stipends that year. In 2001, the program focused on enhancing the base fund by seeking grants and other contributions. ARL awarded four additional stipends in 2002. In October 2003, the Initiative received IMLS funding, which significantly augmented the member-financed endowment.

Progress

With IMLS funding, ARL developed an infrastructure for the Initiative that provides grantees with the following programmatic components:

- a stipend of \$10,000 over two years (awarded in increments of \$2,500 per semester);
- a mentoring relationship with a former participant in ARL's Leadership and Career Development Program;
- leadership development via the Leadership Symposium (held in conjunction with the American Library Association's Midwinter Meetings);
- hosted visits to Harvard College Library and Purdue University Libraries; and
- career networking and development.

Prior to receiving IMLS funding, the Initiative awarded stipends to a total of eight minority graduate students. With IMLS funding, 34 additional students have been awarded stipends—15 who started the program in the fall of 2004 and the 19 starting in the fall of 2005.

Nine past recipients of stipends have graduated and started their professional careers in ARL libraries:

Michelle Baildon, Boston College Libraries
LaVern Gray, University of Tennessee Libraries
Jolie Ogg Graybill, University of Nebraska–Lincoln Libraries
Stephanie Joseph, University of Iowa Libraries
Teresa Miguel, Yale Law Library
Donna L. Nixon, University of North Carolina Libraries
Verna L. Riley-Broome, University of Illinois at Urbana-Champaign Library
Allison M. Sutton, University of Illinois at Urbana-Champaign Library
Carlette Washington-Hoagland, University of Iowa Libraries

ARL hopes these nine librarians are the first of many new minority librarians in ARL libraries. The Initiative has a goal of placing 60 minority librarians in ARL Libraries by 2008.

For more information about ARL's Initiative to Recruit a Diverse Workforce, visit <http://www.arl.org/diversity/init/> or contact Jerome Offord, Jr., Program Officer for Training and Diversity at jerome@arl.org.



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ARL CALENDAR 2005

<http://www.arl.org/arl/cal.html>

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|---------------|--|
| October 6–7 | The Future of Government Documents in ARL & Regional FDLP Libraries
<i>Seattle, WA</i> |
| October 25–27 | ARL Board and Membership Meeting
<i>Washington, DC</i> |
| October 28 | Managing Digital Assets: Strategic Issues for Research Libraries
<i>Washington, DC</i> |
| November 4–5 | New Ways of Listening to Library Users: Tools for Measuring Service Quality
<i>Washington, DC</i> |
| November 8–10 | Library Management Skills Institute I: The Manager
<i>Los Angeles, CA</i> |
| December 5–6 | CNI Fall Task Force Meeting
<i>Phoenix, AZ</i> |

ONLINE LYCEUM

Can't make it to our in-person events? Take a look at our Online Lyceum Web-based course offerings at <http://www.arl.org/training/lyceum.html>.

ARL MEMBERSHIP MEETINGS 2006–2007

- | |
|--------------------------------------|
| May 16–19, 2006, Ottawa, Ontario |
| October 17–20, 2006, Washington, DC |
| May 22–25, 2007, St. Louis, Missouri |
| October 16–19, 2007, Washington, DC |

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