

E-PUBLISHING LEGAL UPDATE
PUBLISHERS' RIGHTS, ORPHAN WORKS AND THE GOOGLE COPYRIGHT
LITIGATION

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I. Copyright and Significant Pre-Google E-Publishing Cases.

A. Basic Copyright. Congress has the power “... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” (U.S. Constitution, Article I, § 8, ch. 8).

Original Works - Copyright protection exists in original works of authorship fixed in a tangible medium of expression, from which the work can be perceived, reproduced or communicated. Works of authorship include literary works.

Exclusive Rights- Under Section 106 of the Copyright Act, copyright ownership provides the owner of a literary work with the exclusive rights: (i) to reproduce the work in copies or phonorecords, (ii) to prepare derivative works based on the work, (iii) to distribute copies by sale, ownership transfer, rental, lease or lending, and (iv) to perform and publicly display the copyrighted work.

¹©2009 Lloyd L. Rich and Jon R. Tandler. This outline and the information herein is summary only, and is qualified in its entirety by reference to the applicable court decisions, and in the matter of the Google litigation the actual proposed Settlement Agreement, as amended, and its terms, definitions, attachments and the requirements of the Settlement Administrator.

This Outline was originally presented on November 14, 2009 at the Publishers Association of the West 2009 Annual Publishing Conference in Tucson, Arizona. The authors updated the Outline as of December 1, 2009 in order to report on the proposed changes in the Google settlement filed with the court on November 13, 2009. Events which occur after December 1, 2009 may render inaccurate or otherwise impact the information presented herein.

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B. **Tasini, et al. v. New York Times Company, Inc., et al., 533 U.S. 483 (2001).**

1. In 1993 six free lance authors brought suit against The New York Times Company, Newsday, Inc., Time, Inc. (print publishers), University Microfilms International and Mead Data Central Corp. (electronic database publishers).

2. The print publishers licensed rights to copy and sell articles to LEXIS/NEXIS. The Times also had licensing agreements with UMI to reproduce the Times materials on two CD-ROM products, one text only and one image based. These two products were searchable in a manner similar to LEXIS/NEXIS; *importantly, retrieved articles were published and accessible on a standalone basis with no links to other articles, graphics or format appearing in the original print publications in which the articles appeared.*

3. The agreements by which the print publishers contracted with the authors for their articles, did not transfer copyright or grant the publishers the right to publish the articles in electronic databases.

4. The authors filed suit alleging their copyrights were infringed when, as arranged and fostered by the print publishers, LEXIS/NEXIS and UMI placed the articles in their electronic databases.

5. The defendants claimed they were permitted to electronically reproduce the authors' works under Section 201(c) of the Copyright Act, which provides as follows:

Section 201(c) - Contributions to Collective Works. Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. *In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.*

6. The Court held that Section 201(c) did not permit the copying - the electronic publishers infringed the authors' copyrights by reproducing and distributing the articles in a manner not authorized by the authors or the Copyright Act. The Court stated that Section 201(c) serves to restrict the publisher's copyright in its collective work to enable a writer to retain exclusivity over the copyright in his/her original work and thus further exploit it.

7. The Court's majority opinion, presciently, also stated that authors and publishers may “*enter into an agreement allowing continued electronic reproduction of the Authors' works; they, and if necessary the courts and Congress,*

may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution.”

C. Faulkner, et al. v. National Geographic, et al., 409 F. 3d 26 (2d Cir. 2005).

1. In 1997 National Geographic produced “The Complete National Geographic” (CNG); this was a CD ROM set containing each monthly issue of the Magazine, as originally published from 1888 through 1996.

2. Faulkner and other freelance photographers and writers sued National Geographic and other parties on the grounds that the CNG electronically reproduced the print magazines that had included their works, without their permission or consent.

3. Based on the CNG using the same selection, coordination and arrangement of the individual contributions as displayed in the original print works and what the user sees is an electronic replica of pages of the Magazine, in this case the court determined that National Geographic’s use of the plaintiffs’ works was privileged under Section 201(c).

D. Random House, Inc. v. Rosetta Books, LLC, 283 F.3rd 490 (2d Cir. 2002).

1. Rosetta Books contracted with several authors to publish certain of their titles in digital format over the Internet. In February 2001 Rosetta Books launched its e-book business, offering the digitized titles for sale. Random House filed a complaint accusing Rosetta Books of committing copyright infringement and tortiously interfering with the contracts Random House had with certain of its authors.

2. Random House alleged that the phrase in its form agreements “in book form” means to faithfully reproduce the author’s text in its complete form as a reading experience and that, since e-books concededly contained the complete text of the work, Rosetta could not also possess those rights. Random House also claimed that the non-compete clauses in the authors’ contracts granted it broad, exclusive rights in their work. Random House requested the court to grant a preliminary injunction that would prevent Rosetta Books from publishing e-books of the Random House titles.

3. The court ruled in favor of Rosetta Books and denied Random House’s request for a preliminary injunction. Relying on the language of the contracts and basic principles of contract interpretation, the court found that the right to “print, publish and sell the work[s] in book form” in the contracts at issue did not include the right to publish the works in the format that has come to be known as the “e-book.” “To print, publish and sell the work in book form” is understood in the publishing industry to be a “limited” grant. The “new use” — electronic digital signals sent over the Internet — is a separate medium from the original use — printed words on paper.

II. **Orphan Works.**

A. **History.**

Works are given copyright protection the moment they are written. There may be no way to find authors to seek their permission to republish their material. The penalties for infringement are high. Therefore, there is a lot of material that cannot be republished because the authors are essentially not locatable. That is, the cost to locate them, if they can even be located, is often too high to justify the use of the work. Factoring in the term of copyright protection (life plus 70 years), a large amount of work is likely to be unrepublishable for over a hundred years and possibly lost altogether.

The issue of “orphan works” (a term used to describe the situation where the owner of a copyrighted work cannot be identified and/or located by someone who wishes to make use of the work with permission of the copyright owner) has become more prevalent in recent years. Even where the user has made a reasonably diligent effort to find the owner, if the owner is not found, the user faces uncertainty – she cannot determine whether or under what conditions the owner would permit use.

Where the proposed use goes beyond an exemption or limitation to copyright, the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, however remote, that a copyright owner could bring an infringement action after that use has begun.

Concerns have been raised that in such a situation, a productive and beneficial use of the work is forestalled – not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license – but merely because the user cannot locate the owner.

Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work. Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.

B. **Identification problems.**

Digital technology has made it easier for a work/part of a work to become separated from ownership and permissions information, both by accident and bad faith actors.

There have been significant changes in copyright law. Copyright law has moved away from a highly formalistic system as copyright protection has become automatic. Copyright registration is now optional and is only required to bring an infringement action. Copyright notices on works are no longer required. The term of copyright protection has been increased: the 1909 Act provided protection for 28 years plus a 28 year renewal (maximum protection was 56 years); the 1976 Act now provides protection for the life of the author plus 70 years.

C. Changes in ownership or circumstances of ownership.

Copyright is a form of property and therefore it may be transferred through many hands. This occurs by the transfer of a single work, mergers between companies and the acquisition of assets of entire company.

Multiple transfers often create problems for the owners themselves as the owner may be simply unaware of what they own.

This problem worsens if (i) a work is out-of-print as there is no incentive for an owner to resolve the matter or respond to requests from potential users, (ii) the copyright owner dies - how do you contact the estate to get the necessary permission, and (iii) publishers ceasing operations.

D. Difficulties researching copyright information.

Conducting searches can be costly, time-consuming and non-productive.

E. Legislation to Resolve Orphan Works Problem.

Legislation initially proposed in 2006 in U.S. as Orphan Works Act but it did not pass. Legislation is now pending again; Senate passed bill in September 2008 but passage still waiting in House. Some other countries have move comprehensive Orphan Works statutes than the U.S. (which has none at this time).

Components of the pending legislation

1. Study of current copyright registration system.
2. Voluntary owner registry.
3. Reasonably diligent search effort.
4. Usage of an "orphan work" must be identified by a symbol
5. Attribution required
6. When an owner appears. New Users - rights of owner restored. Existing Users - should be permitted to continue using orphan work with reasonable compensation to owner, which should represent the amount the user would have paid to owner if had engaged in negotiations before infringing use occurred. Injunction possible but only if work had not been transformed. Statutory damages/attorney fees are precluded for "good faith" users of orphan works.

F. Google Copyright Litigation.

Because of its broad treatment of books which are out of print (*not Commercially Available*), the proposed litigation settlement for Google's Library Project and Book Search

programs authorize digitization of orphan works without the permission of their copyright owners; this is an essential element of Google Book Search. We should emphasize that an out of print book is not necessarily an orphan work. An OOP book can have a copyright owner (it often does), who is locatable and who may have registered that work for copyright. For those works, however, which are out of print (*not Commercially Available*) the copyright owners of which cannot be located (if you will, “*OOP orphan works*”), these works are included in the settlement if they meet other criteria for inclusion. The “Google Litigation” section that follows discusses how these orphan works will be treated under the amended settlement agreement.

Will Google become the new legal guardian of orphan works? Many critics of the initial Google settlement agreement were concerned that the settlement provided Google with too much power and control over orphan works. We will see if this concern still exists with the proposed amended Google settlement.

III. The Google Litigation - The Authors' Guild, Inc., Herbert Mitgang, Betty Miles, Daniel Hoffman, Paul Dickson, Joseph Goulden, The McGraw Hill Companies, Inc., Pearson Education, Inc., Penguin Group (USA), Inc., John Wiley & Sons, Inc., Simon & Schuster, Inc. and Association of American Publishers, Inc. v. Google Inc.

A. **History.** In 2004 Google developed the Google Library Project (the GLP), to license books and other works from libraries and other sources to digitize and include them in Google Book Search; the GLP includes both books in copyright and public domain (PD) books. Among benefits participating libraries were to receive under the GLP, they would have their collections submitted to Google scanned, digitized and returned to them electronically.

As examples, among many popular titles originally submitted for the GLP by participating libraries, were *The Elements of Style*, *The Art of Happiness*, *The Joy Luck Club*, *Lonesome Dove*, *1776*, *Truman*, *John Adams*, and *Bush at War*.

Google Book Search (GBS) is the program by which Google, having digitized works through the GLP and the Google Partner Program, transmits online, information from works, and portions of and in some cases all of the digitized works.

In 2005, in two class action lawsuits led by The Authors' Guild and the Association of American Publishers, plaintiffs commenced copyright infringement suits against Google, on the basis that Google did not have the rights to digitize, provide excerpts from, or otherwise use the copyrighted materials from the libraries. Nor did the libraries have the right to grant Google the right to scan and digitize the works. In particular, plaintiffs were (and are) of the position that these acts violated the copyright owners', or their exclusive publisher licensees', exclusive rights of reproduction, copying and display under Section 106 of the Copyright Act. The lawsuits were filed in the United States District Court for the Southern District of New York and remain pending today. The parties entered into settlement discussions and over a two-year period negotiated and structured a complex settlement agreement which impacts the author, publishing and copyright communities.

The settlement requires court approval, after fairness hearings and comments by interested persons. Several author groups, academicians, the Department of Justice and the United States Copyright Office weighed in, commented on and opposed certain aspects of the original proposed settlement; this caused the parties to the litigation to extend the dates for the judicial fairness hearings and to restructure and renegotiate certain terms.

On November 13, 2009, minutes before a midnight deadline, the parties filed an amended settlement agreement intended to address many of the comments and concerns raised. On November 19, 2009, the court granted preliminary approval of the proposed amended settlement agreement and set February 18, 2010 for the final settlement/fairness hearing. Other updated dates, along with the settlement's material amended terms, are set forth below.

B. What and Who is Included in the Proposed Settlement? All “Books” and “Inserts” (as these are terms are defined immediately below) are included in the proposed settlement.

Under the amended settlement, “Books” are defined as written or printed works that as of January 5, 2009 (a) had been published in hard copy, (b) were subject to a Copyright Interest, and (c) (1) if published in the United States have been registered with the U.S. Copyright Office, and (2) if not published in the United States, either have been registered with the U.S. Copyright Office, or have been published in Canada, the United Kingdom or Australia. Books do not include periodicals, personal papers, works in which more than 20% of the pages of text contain more than 20% musical notations, public domain works, government works, and calendars.

Under the amended settlement, “Insert” is defined as the following content, if published in the United States and registered with the U.S. Copyright Office as of January 5, 2009, either as a standalone work or as part of another, registered work from which it was excerpted, and is either (A) contained in a Book if there is no person who has a Copyright Interest in such content as well as a Copyright Interest in the Book's principal work, (b) contained in a public domain Book, or (c) contained in a government work published or made available on or before January 5, 2009: textual content, such as forewords, afterwords, prologues, epilogues, essays, poems, quotations, letters, song lyrics, or excerpts from other Books, periodicals or other works, and tables, charts and graphs. Inserts do not include pictorial works, such as photographs, illustrations, maps, paintings, musical notations, or public domain works.

A “Copyright Interest” is the ownership, including joint ownership, of a U.S. copyright interest or an exclusive license of a U.S. copyright interest, in each case only if the interest is a use authorized or for which compensation is payable under the proposed Settlement.

Books and Inserts published and/or registered for copyright after January 5, 2009 are not included in the Settlement; these works will have the opportunity to participate in other digitized publishing programs of Google.

C. **The Settlement Class** consists of all Persons who, as of January 5, 2009 hold a Copyright Interest in a Book(s) or Insert(s). The Settlement Class consists of publishers and authors - a *Rightsholder* is a member of the Settlement Class who has not opted out of the proposed Settlement by January 28, 2010 (this date was extended from the original opt out date of September 4, 2009).

1. **“In-Print” Books and Display Uses.**

a) **In Print Books:** Google will not make “Display Uses” of Books unless Rightsholders of in-print books **affirmatively include** their Books in the Google Book Search program and grant Google Display Uses on the designated Claim Form.

(1) **Display Uses** include “Access Uses”, “Preview Uses”, “Snippet Displays”, and “Display of Bibliographic Pages”.

(a) **Access Uses** include viewing and annotating an entire Book, and printing and copying portions of the Book, subject to page number limitations. The uses include institutional subscriptions, consumer purchase of online access, public access at libraries and elsewhere.

(b) **Preview Uses** are designed as marketing tools and allow a searcher to view up to 20% of a book before making a purchase decision; Preview Uses are not intended to allow a searcher to copy and paste, annotate or print any pages from the Book.

(c) **Snippet Displays** allow a search to view a few lines of text with up to three **snippet** uses per user for the Book.

(d) **Display of Bibliographic Pages** means that users can see the Book’s title page, copyright page, table of contents and index.

b) In order to participate in the cash settlement for Books Google has digitized **on or before May 5, 2009**, the Claim Form must be submitted by March 31, 2011 (under the amended settlement, this date was extended from January 5, 2010); if such Rightsholders wish to remain in the proposed Settlement and further grant the right to make Display Uses, Rightsholders should submit the Claim Form as soon as possible although at this time there is no strict deadline for submission for Display Uses.

(1) Rightsholders of in-print Books can decide, on a title-by-title basis, to include one or more of their Books in any or all Display Uses by completing the Claim Form. Alternatively, Rightsholders have the right to completely remove their Books

from the GLP (that is, to have them deleted from all servers or sources from which Google or the participating libraries could make any uses), by making the necessary request not later than March 9, 2012 (the removal deadline for libraries' digital copies remains April 5, 2011). After this date and/or after submitting a Claim Form, the Publisher or the Author has the right to request Google not to digitize a Book only if it has not already been digitized.

c) The Publisher and Author of a Book that is in-print must, in the first instance, agree to include the Book in the GLP or it will not be digitized. They must also agree on the Display Uses. The Publisher must notify the Author of the Display Uses it is granting to Google.

d) If the Publisher and Author do not agree on the Display Uses, then Google will only use the Display Uses that have been agreed upon by the Publisher and Author unless the Book was created as a Work Made For Hire and thus Publisher owns the rights.

e) The revenues generated from Display Uses will go 63% to Publishers and Google will retain 37%. The Publisher will then pay the Author as per the publishing agreement.

f) Publisher can set the price of Book for individual purchasers. Google will set the price for Institutional Subscriptions.

2. **Out-Of-Print Books and Display Uses:** Except for the following, the procedures set forth above for in-print Books also apply to out-of-print Books.

a) Out-of-print Books will automatically be included in the Google Book Search program and included in all Display Uses **unless a Rightsholder expressly opts out** of the Settlement Agreement by January 28, 2010 (under the amended settlement, this date was extended from September 4, 2009).

b) Under the amended settlement, in categorizing whether a Book is in print or not (that is, whether the Book is “Commercially Available”), Google will determine whether or not it is available new by a seller anywhere in the world to a buyer in the United States, Canada, the United Kingdom or Australia. Google will not display a Book it classifies as *not* Commercially Available for at least 60 days after the date of that classification – Google will give the Book Rights Registry (the non-profit agency that will be organized to operate and administer the settlement on an ongoing basis (the “Registry”)) 60 days notice before it makes a Display Use of a Book that is not Commercially Available. This gives the Rightsholder time to challenge the classification before Google's Display

Use of the work. The Rightsholder can still turn off those Display Uses at any time.

c) If the rights to an out-of-print Book have reverted to the Author, then only the Author shall be considered a Rightsholder for such Book and the Publisher cannot submit a Claim Form for such Book.

d) Rightsholders of out-of print Books can decide, on a title-by-title basis, to exclude one or more of their Books from any or all Display Uses by completing a Claim Form.

D. Amended Settlement: Other Material Changes from Original Settlement.

The parties also agreed to revise the settlement to provide for:

1. deletion of a most favored nations clause for Google – this deletion enables the Registry to license unclaimed works (works owned by Rightsholders who have not registered with the Registry) to third parties without extending the same terms to Google;

2. the mechanism to set prices for consumer purchases which emulate a competitive market *without* regard to the pricing of similar products, rather than pricing *with* regard to how other similar Books are priced;

3. Rightsholders determining any price, including \$0, for a Book for consumer purchase and utilizing alternative licensing mechanisms for their works to be available for consumer purchase;

4. Rightsholders and Google, at either's request, may renegotiate the 63/37 revenue split for Display Uses for Commercially Available Books;

5. Google making Books available at any discount so long as it pays the same amount to the Rightsholder as if the Book had been sold at full price;

6. a limitation on potential new revenue models to be agreed upon by Google and the Registry to:

- print-on-demand (“POD”) (the sale of print copies of Books that are not Commercially Available),
- PDF file download (downloading of electronic copies of Books for electronic reading devices), and
- consumer subscriptions (individuals could access the institutional database).

These 3 uses would be in addition to the following 4 permitted uses: Institutional Subscriptions (Google providing to institutions online access

and viewing of an institutional database), Consumer Purchases (Google enabling a user to access and view online the full contents of a Display Book), Advertising Uses (Google including advertisements on page views and certain Book pages), and Public Access Service (Google enabling users at public libraries and not-for-profit educational institutions to search and view the entire institutional database);

7. the Registry having a specially appointed fiduciary to represent the interests of Rightsholders as to unclaimed Books and Inserts; and

8. the Registry using unclaimed settlement funds to locate Rightsholders - such funds must not be used by the Registry for general operations or reserves; rather, after unclaimed funds are held for 5 years the Registry may use up to 25% of the funds to locate Rightsholders and remaining unclaimed funds will be held for Rightsholders for at least 10 years; after that period, the Registry, subject to obtaining fiduciary and court approvals, may distribute them to literary – based charities in the United States, Canada, the UK and Australia.

E. Publisher Alternatives.

1. Publisher Opts Out of the Settlement.

a) Publishers and Authors must have expressly opted out of the proposed Settlement by January 28, 2010 (under the amended settlement, this date was extended from September 4, 2009); otherwise they are considered to be “Rightsholders”.

b) By opting out of the proposed Settlement Publishers and Authors will not receive any benefits from the Settlement; they will not be bound by its terms, including the release of claims against Google for the unauthorized digitization and electronic publication of Book.

c) Opting out may not be done on a per-title basis, but rather is a decision not to participate in the proposed Settlement at all.

2. Publisher and Author Participate in Proposed Settlement – Eligible to Receive Remuneration for “Display Uses.” As to Both In Print and Out of Print Books, the following procedures and Display Uses apply:

a) Publisher is automatically included in the Settlement if the Publisher has not opted out by January 28, 2010 (under the amended settlement, this date was extended from September 4, 2009).

b) Google will pay the Publisher a fee (a cash settlement of not less than \$60.00) for each of the Publisher's Books that were digitized without authorization on or before May 5, 2009, under a fee schedule based on the kind of work involved. To receive this payment the Publisher must submit

a Claim Form by March 31, 2011 (under the amended settlement, this date was January 5, 2010). Publishers who wish to remain in the Settlement and earn revenues from Google's Display Uses, should submit a Claim Form but currently there is no strict deadline for doing this.

c) A Publisher can learn whether its books have been or will likely be digitized as of May 5, 2009 through the online claiming process, which can be found at <http://www.googlebooksettlement.com>.

d) Payments under the Settlement for an already digitized Book will be made to the Publisher, who will then pay pursuant to the publishing agreement with the Author.

3. **Publisher does not Opt Out.**

a) If a Publisher owns a copyright interest in a Book, the Publisher need not do anything at this time to remain in the Settlement. *Remember - the September 4, 2009 (now extended to January 28, 2010) was an opt out date.*

b) If the Publisher submits the Claim Form, the Publisher will receive the benefits of the proposed Settlement if approved by the Court, and the Publisher's claims for copyright infringement against Google will be released and will be dismissed by the Court.

c) If the Publisher does not submit the Claim Form, Google will not make Display Uses for in-print Books and Publisher will receive no cash payments for settlement or from Google Display Uses. Google will make Display Uses for out-of-print Books.

F. **Other Aspects of the Settlement.**

1. The settlement is non-exclusive; Rightsholders who participate in the Settlement are **not** precluded from negotiating and entering into other arrangements for the electronic publication of their works.

2. The revenues generated from *Display Uses* will go 63% to *Rightsholders* and Google will retain 37%.

3. The Settlement establishes the Books Rights Registry, which will initially be funded by Google in the amount of \$34.5m. Among many other activities, the Registry will locate *Rightsholders* and coordinate payments to them. After initial funding, it will be funded by an administrative fee as a percentage of revenues.

4. Google will pay not less than \$45m for Books and Inserts that Google has digitized without authorization as of the opt-out deadline, under a fee schedule based on the kind of work involved. If more dollars are necessary to pay bona

fide claims, Google will put additional funds in the settlement. If less dollars are necessary, the dollars put in will be increased to the *Rightsholders* up to stated maximums. Payments under the settlement for an already digitized Book will be made to the Publisher, who will then pay as per the publishing agreement with the author.

G. Settlement Administration Website.

<http://www.googlebooksettlement.com> - this is the settlement administration website which has information with frequent updates about the settlement, the settlement agreement as amended, summary information, notices to the settlement class, and the various documentation and procedures governing the settlement.

As has been his practice during the course of this litigation and to his credit, Federal District Court Judge Denny Chin has kept the proceedings and the litigants moving forward. February 18, 2010 is the date set for the public fairness hearings. It is possible that the parties may yet amend the settlement again based on public comments. It is also possible that the settlement will be approved and finalized in its current form.

As stated in the first part of this Outline, in 2001 the United States Supreme Court in *Tasini* presciently stated that authors and publishers may (if necessary with the help of the courts and Congress), contractually agree to continued electronic reproduction and various distribution and remuneration models for authors' copyrighted works. The publishers and authors in the Google litigation have worked hard to arrive at a proper, albeit very complicated, program to do just that. Over time we will see what program and agreements are approved and placed into final form, and if finalized how that program works for publishers and authors in the future.
