

Legal Update from Brian Flagler

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Publishers Settle With Google But a Legal Digital Library May Be Coming Soon

By Brian Flagler and Craig Gipson

Seven years after filing a lawsuit against Google for its book-scanning project, publishers have reached a settlement with the technology giant. Although the parties have made their peace, on its face the settlement appears to change little in the way they do business. Still, AAP and the publishers involved seem relieved that the prolonged legal battle is over. "We're very pleased because the settlement acknowledges the rights and interests of copyright holders and publishers, and whether they're going to make their rights available," AAP chief executive Tom Allen told *The New York Times*.⁽¹⁾

Many of the settlement details are confidential so its impact may not be immediately known. One item has been released regarding the availability of scanned files to publishers. For publishers electing to have their works included in the Google database, *Publisher's Weekly* reported that they may also choose to receive a digital copy of their scanned books.⁽²⁾ Google director of strategic partnerships Tom Turvey told *PW* that publishers will have "broad" rights to exploit the scanned files commercially and make them available through other search engines. How broad those rights are is a part of the confidential settlement, but for publishers participating in the Google Books Partner Program who have not yet digitized all their works, it may be worth contacting Google to learn if the offer of a free scanned file applies to them. The Google Partner Program and Library Project remain largely the same. Partners may continue to notify Google of books they do not want included in the Library Project and non-Partners may do the same along with information confirming ownership of the selected titles.

The confidential nature of the settlement leaves major questions unanswered, such as the fate of orphan works under Google's Library Project and whether Google paid publishers to resolve the suit. But the answer to the largest legal question affecting publishers may be coming into focus: is the scanning of copyrighted works for the purpose of creating a digital database or library infringement? A federal court became the first to weigh in on October 10, ruling against the Authors Guild and finding that the scanning of copyrighted works for the HathiTrust digital library was fair use.

The fair use question is by no means settled but the HathiTrust ruling places Google in a stronger position against the authors; the Authors Guild may still appeal the HathiTrust case and its separate lawsuit against Google continues. Before the HathiTrust decision, New York law professor James Grimmelmann noted that for publishers, Google is now a partner in the ebook ecosystem rather than a "disruptive force," but for authors there was less incentive to settle. Following the lopsided defeat to HathiTrust, however, Grimmelmann estimates the likelihood of the authors settling with Google increased substantially.⁽³⁾

With the weight of the HathiTrust case on Google's side, publishers wanting to prevent certain books from being included in the Google Library Project

should act sooner rather than later. If legal precedent establishes that Google's scanning program is protected by fair use, Google may not be as willing to allow titles to be exempted in the future.

(1) Claire Cain Miller, Google Deal Gives Publishers a Choice: Digitize or Not, *The New York Times*, http://www.nytimes.com/2012/10/05/technology/google-and-publishers-settle-over-digital-books.html?_r=1 (October 4, 2012).

(2) James Grimmelmann, Google and Publishers Settle; Authors Soldier On, *The Laboratorium*, http://laboratorium.net/archive/2012/10/04/google_and_publishers_settle_authors_soldier_on (October 4, 2012).

(3) James Grimmelmann, HathiTrust Wins, *The Laboratorium*, http://laboratorium.net/archive/2012/10/10/hathitrust_wins (October 10, 2012).



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