

**The Authors Guild, AAP, Google Settlement:
Allan Adler, Vice President of the Association of American Publishers (AAP)
Speaks About the Settlement with CCC**

KENNEALLY: We are at the peak of summer, but we're already looking forward to important dates in the fall. Welcome. My name is Chris Kenneally. I'm Director of Business Development for the nonprofit Copyright Clearance Center, and I am continuing a series of programs that Copyright Clearance Center is presenting on the Google, Authors Guild and Association of American Publishers proposed settlement in the so-called Google Books case.

Joining me today is Allan Adler, who is Vice President for Legal and Governmental Affairs in the Washington, DC office of the Association of American Publishers, and welcome, Allan.

ADLER: Thank you, Chris. It's a pleasure to be speaking with you today.

KENNEALLY: Well, we appreciate you joining us, and I'm sure you've got some very important things to tell us about, in particular because AAP is one of the original plaintiffs in this very important case. And as our audience, I believe, knows, the reason we're here in July talking about all of this is that the original deadline for responding to the proposal of May 5th was pushed back to September 4th. And so I want to take that opportunity to ask you, what is AAP, and your partners in this settlement, the Authors Guild, doing at the moment to address the questions that rightsholders and others are asking about the settlement?

ADLER: Well, ever since the settlement agreement was publicly announced last October, we and the Authors Guild have been independently having a continuous stream of, I guess you'd say multiple conversations within our respective communities about the agreement. On the part of AAP, we have talked, of course, with our own members, with US publishers who are not members of the organization. But most of our time has been spent discussing the settlement with foreign publishers, because the scope of the settlement, although it's under US law, due to international copyright agreements, does reach works that have been published in the United States, even though they may have originated in their publication abroad. And so explaining the settlement agreement, and indeed, explaining the lawsuit that the agreement grew out of, has been virtually a full-time job.

KENNEALLY: Well, I can well imagine. The settlement documents themselves, which are available online, run into hundreds of pages. When rightsholders are asking you questions – and perhaps you want to break it down between the questions that are coming from US rightsholders and then perhaps for, very generally speaking,

the ones that are non-US – what are their concerns? And how do you summarize the benefits of the settlement for them?

ADLER: Well, initially the concerns, of course – and this applies to both US and foreign publishers – is they want to understand whether they are already covered by the settlement agreement. In other words, are they already members of the settlement class as it's defined in that agreement, or are there certain things they have to do to become members of the class. So we explain –

KENNEALLY: And, Allan, if I can – just because a lot of our members are not – or, sorry, our listeners, I should say, and even many of your members – are not attorneys, as you are, and a very experienced one too, but perhaps you want to just define very quickly what you mean by class. This is, of course, a class action lawsuit.

ADLER: That's right. And a class action lawsuit is a lawsuit in which a certain number of parties become plaintiffs in a case. They bring legal action against another party or group of parties with whom they have a common argument. Essentially, in this case, publishers generally and authors generally who are rightsholders to the books that Google was scanning and making complete copies of as part of its library project in the Google book search program all believe that this act by Google was an infringement of their rights. So when the lawsuit was filed originally by the Authors Guild, it was filed as a class action lawsuit, which meant that it defined as the plaintiff class all individual rightsholders of the books that were scanned by Google, because they all had the same common interest against the same party, which was the claim of copyright infringement.

KENNEALLY: So that would include authors and publishers.

ADLER: So that's right, originally included authors and publishers. Ultimately, when the publishers filed their suit, they filed a suit that was not a class action. It had five specific members of AAP who were plaintiffs in that case. But ultimately, as the settlement negotiation discussions were underway, and were wrapped up, there was an amended complaint filed with the court that made it clear that there would be two subclasses represented by the class action and the settlement agreement. It would be the authors who were rightsholders to scanned books, and it would also be the publishers who were rightsholders to scanned books.

So as I said at the outset, one of the things that we first had to do was explain to people that if they were, in fact, rightsholders for books that were published in the United States and were believed to still be under copyright – in other words, typically we're talking about works published after 1923 – they were presumptively members of the class, and were covered by the settlement agreement. And therefore, their choices were whether they wanted to remain members of the class.

They could opt out of the class, or they could remain members, and either exercise their rights as members under the settlement agreement, or if they had some concerns or objections about the settlement agreement, they could raise those issues with the court. So we had to explain that.

But then, of course, in order to make them understand the significance of those choices, we did have to explain to them, what does the settlement agreement, in broad terms, mean to them? And for the rightsholders whose works had been scanned by Google without their permission, it meant a number of good things. It meant, for one thing, that they would be able to see some money as compensation for that unauthorized scanning, to the extent that they stepped forward and claimed their works, identifying themselves as the rightsholders.

KENNEALLY: You're referring to the fee, I believe, that would be paid, \$60 or something that –

ADLER: That's right. That's right. But beyond that, of course, as rightsholders for the books, they would have options with respect to whether they wanted to have their books contained within the scope of the various access models that the settlement agreement would provide, for example, consumer purchase model, where people can purchase the ability to read these books online, or whether they wanted to participate in the institutional subscription model, whereby the whole collection of works that that Google had scanned would be subject to a subscription by, say, a university library, or a corporation, or a government agency. And to the extent that individual rightsholders' works are included within that subscription, they would benefit both from the exposure of their works to new audiences, and also possibly obtaining revenue from the subscription fees that would be developed.

So we explained to them that, basically, if you look at it in broad terms, the benefits to these rightsholders were that works that largely are now out of print, and therefore not commercially available to the public, would not only be rediscovered by the public in a fairly easy way because of the capabilities of the Google Book Search search engine capacity, but also, they would be able to get access to those books in a variety of different ways that would allow them to utilize the knowledge contained in those books that essentially was lost to them unless they had access to them in their obscure locations in the various libraries in which existing copies of those works might still be located.

We also explained to them that, with respect to the works that are in copyright and still commercially available, they would have complete control over whether or not those works would figure at all under the Google Books settlement. They could either decide to remove them completely, or to exercise options to make those works available as they chose.

KENNEALLY: Right, and so, in a nutshell, then, it's about availability and accessibility.

ADLER: And discovery.

KENNEALLY: And discovery.

ADLER: It's the ability for people to find out about works that had long since disappeared from the marketplace, and from the public eye. It's the ability to access those works, and it's the ability to make choices about whether or not rightsholders wanted to make Google Book Search yet another venue to sell their works to the public, in addition to the way they traditionally do in the book market.

KENNEALLY: And the settlement envisions creation of a new organization, the so-called Book Rights Registry. And earlier in this series, we spoke with Michael Healy, who is expected to become the first Director of that, and is already, in his own role currently as the Director of the Book Industry Study Group, providing some input and some very important background as a librarian and a metadataician, if you will, in terms of creating all of that. But can you briefly tell our audience from AAP's perspective how the Book Rights Registry is expected to operate?

ADLER: Well, the Book Rights Registry is going to be a not-for-profit entity that is being established under the laws of New York State, and will exist with a board of directors who will be composed entirely of representatives of the author and publisher communities. And the Book Rights Registry is going to have the ability to essentially act as an agent for the rightsholders of books in dealing with whether those books are going to be included in the various access models provided for under the settlement agreement, and how they will be specifically included within those access models.

KENNEALLY: And then the access models are the ones you really referred to –

ADLER: That's right. And additionally, the Rights Registry is going to play a very important role in dealing with the problem of so-called orphan works. I've already indicated that largely the two different categories of books under the settlement agreement are those that are commercially available, which are sort of the ones that are still in print, and the ones that are not commercially available, essentially those books that have gone out of print. And within the category of books that have gone out of print, there is a subcategory that people generally refer to as orphan works. Those are books that, generally speaking, are – rights are held by rightsholders who cannot be contacted or located, or in some cases even identified today, for purposes of obtaining permission for people who want to make certain uses of those works that would require permission. For example, if they wanted to reintroduce them into the marketplace, implicating the reproduction and distribution rights of the rightsholders, they would need permission to do that. But in many instances, they

can't find the rightsholder, or can't identify who they are, so that's raised the notion of these books being considered orphans, in the sense that even though they are there for people to want to make use of them, the uses can't be made safely without the risk of copyright infringement liability, unless you're able to identify and contact the copyright owners for permission.

So one of the things the Book Rights Registry is going to be doing, which is really revolutionary, is it's going to be beating the bushes, essentially looking for those rightsholders to come forward to the Registry and claim those books, so that we will reduce the universe of orphan works, bring books that previously could not be used by third parties because they couldn't get the necessary permissions from rightsholders, and bring them back into the world of books that can actively be traded in the marketplace, with permissions from the rightsholders, allowing third parties to make whatever uses they might want to of those books.

And this is going to be something that we think is very valuable. As you know, Congress for the last six years has been considering orphan works legislation to try to deal with the problem of the universe of orphan works out there. But the book settlement, through the Registry, is going to be able to affirmatively act to reduce the number of orphans that exist, and to bring those books back into the world of exploitation by both readers and rightsholders.

KENNEALLY: Well, we are speaking right now with Allan Adler, who is Vice President for Legal and Governmental Affairs for the Association of American Publishers, and this is part of the ongoing Copyright Clearance Center series on the Authors Guild/AAP Google settlement. So I guess, Allan, the next thing to do is to just ask you about the reported inquiry that the US Department of Justice is making about this proposed settlement. They're looking into the potential for antitrust implications. What's your reaction at AAP to that inquiry?

ADLER: Well, it's not really surprising that there is such an inquiry, for two reasons. One is the institutional reason, which is simply that we have a new administration in Washington, a Democratic President elected, and that means that the Justice Department, particularly its antitrust division, is going to take a somewhat different view of its responsibilities than did the antitrust division of the Justice Department under the previous Bush administration. Republicans and Democrats, as you may know, tend to have very different views of antitrust law, and generally speaking, the Democratic administrations have been much more activist in their enforcement of antitrust law. And we all saw that when the newly appointed head of the antitrust division gave a speech a few months back indicating that they would be more active than their predecessor. And they even indicated the types of cases that they would be looking at, which included some of the cases involving the dotcom world. And it shouldn't surprise people that Google, which is one of the major

players in that world, is someone who comes within the radar of the Justice Department.

But apart from the institutional concern, of course, the fact is that this proposed settlement is really unprecedented in its scope and nature. Unlike other class action settlements, that usually resolve an issue involving consumer concerns or complaints about a particular product or service, and the case ends when there is a settlement agreeing to either reimburse them or give them some other compensation to mitigate their complaint, what we have here is not only a settlement agreement that will resolve the pending litigation, but it's designed deliberately to establish and create a going forward model for publishers and authors and other rightsholders in books to work with one of the giants of the online world to move books online for purposes of providing access to a new readership. And so this is unprecedented, and it isn't surprising to us that the Justice Department would want to take a look at it.

KENNEALLY: And it's important to emphasize here that, in fact, this is a proposed settlement. It has yet to be reviewed and accepted by the court. And I know that the new President and CEO of AAP, Tom Allen, has published an open letter, which is available online at your site, publishers.org. And he speaks to the potentials if the settlement is not approved. Do you want to just briefly tell us how AAP sees that?

ADLER: That's right. Most people focus on questions of whether or not Google is given too much power with respect to the books that are covered by the settlement agreement, or whether or not there are going to be questions of other players being able to get into the marketplace for those same works, particularly the works that are no longer commercially available. But the reality is that if people stop for a moment and consider what the situation would be like if we didn't have this settlement, for one thing, the litigation would continue to go forward, draining resources both from the author and publisher community, and ultimately would probably reach a fairly narrow decision by the Supreme Court on the application of the Fair Use Doctrine to the scanning of books that Google was engaged in.

And I don't think anyone believes that the decision that would ultimately resolve this litigation would be one that would ultimately resolve all of the questions about what can be done with books by third parties who are not rightsholders without seeking the permission of rightsholders, if they want to digitize those books, if they want to distribute or provide access to digital copies of those works, or if they want to put those works online and provide access to them in that venue. So, for one thing, the litigation would continue. It would continue with a great deal of resources being used, and probably would reach a result that would not ultimately resolve many of the issues that are of interest to the stakeholders.

Beyond that, there is also the concern about the uncertainty that would be left for authors, publishers, and other rightsholders about who else might decide to take the same chances that Google did in going ahead and scanning these works in their entirety, and using them in support of a commercial enterprise, without first obtaining permission from the rightsholders. So there's a great deal of uncertainty that would still be there, that would be vexatious for the rightsholder community. It would delay their implementation of plans to move books into the digital world, and into the online world, and also would leave questions about what other major players – for example, like Amazon – would continue to gain ground in the book market without any real competition from other players of equal size.

So, overall, I think there were – Tom was correct in his essay, in asking people to consider not only the benefits that come from the agreement, but all of the uncertainty and the risk that are avoided if the agreement is approved rather than being disapproved.

KENNEALLY: Well, that strikes me as the note that you've been sounding throughout our conversation here, which is that this is very much a matter not only about past transgressions, but about future possibilities. And so I'm going to ask Allan, as a final question here, to take out your crystal ball and look ahead five years, and give me some sense, from your perspective, as to how this is going to change the publishing business, the media, and the information society we live in. And I'll just point out that, in a previous life, you were an ACLU attorney, and very much concerned with information and the freedom of information. How do you think the settlement, if it's approved, will just improve the information society that we live in?

ADLER: Well, for one thing, it will test on a very large scale, and in a variety of ways, what consumers think about accessing the contents of books online. We already are familiar with the fact that, as books appear in the marketplace in digital formats, there are a variety of ways in which they can be utilized. Books are used as audiobooks, books are used as eBooks, books can also be available to people as downloads from online Websites. But they could also be used by individuals by simply accessing them online without downloading them. The settlement agreement, at the moment, doesn't deal with the download questions. It only deals with online access. But it would establish the foundation and the predicate for experimentation with a variety of digital formats, and a variety of ways in which readers might access and use the contents of published books.

And this is something that, of course, the book publishing community has been very anxious about in recent years. Of course, there has not been an overwhelming demand in the marketplace to simply leave behind print books and move everything into the digital space. So publishers have had to keep one foot firmly planted in the world of traditional print publishing, while experimenting with a

variety of digital formats that allow people to utilize books with different functional capabilities that aren't available with print versions. And this is only going to hasten that experimentation, broaden the ability of people to try different means of accessing works and using them, and provide a variety of options, both for readers and for authors and publishers who have a common interest in making published books as widely available in the marketplace as possible.

KENNEALLY: Well, it certainly makes the world of copyright and book publishing a very exciting place to be, and it should stay that way for some time to come.

We have been speaking with Allan Adler, who is Vice President for Legal and Governmental Affairs for the Association of American Publishers, which is the US trade organization representing book and journal publishing industries. Allan, thank you so much for joining me today.

ADLER: It's my pleasure, Chris.

KENNEALLY: And indeed, our pleasure as well. This is Chris Kenneally with Copyright Clearance Center thanking you for joining us in another in our series of discussions about the Authors Guild/AAP/Google settlement seminar series. You can hear again this program and others in our series, including my interview with Michael Healy, online at copyright.com. Thank you again for joining us.

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