

# Google Books Revisited: The Sinking Of The Print Publishing Industry

By Scott Bechtel and Susan Goldsmith

The print publishing world is changing rapidly. While more people are writing, the number of traditional publishers is shrinking fast, and the number of hardback editions is shrinking even faster.

Is the future *50 Shades of Grey*? E. L. James' work quickly shot to the top of the Amazon.com Kindle® best seller list, selling nearly 10 million each print and e-copies as of July 2012. The first in the trilogy has been sitting at the top of the *New York Times* best sellers e-fiction list for 21 weeks, but only 17 weeks in paperback, as of July 14, 2012. Another successful writer, Amanda Hocking, turned to print publishers only after achieving e-book success. Writers, like other artists, face a new digital market.

Printing presses gave birth to an industry in which people found, funded, and produced books in hard cover and then paperback. Literary agents fed publishers, and together they were the doorway to the marketplace. Similar to other IP commercialization models, in exchange for a copyright license or transfer, publishers gave writers advances, provided an editor, and managed physical production, sales and distribution. This system worked until software replaced nearly every person in the production chain.

It is only a matter of time before reference materials and textbooks are viewed solely on screens. The venerable *Encyclopedia Britannica* ceased printing in 2010 but is updated and searchable on line. For academia and professionals, scientific and engineering textbook publishers have opened online book databases. This is a subscription model in which a reader pays a flat price to access any technical book in the database. There are many advantages over print, including universal indexing, and users love them; but for authors, royalties have shrunk. The print edition might still be for sale at a high price, but no one is buying it. A fair share of the database viewers will probably be worth pennies, not dollars. While there may be many would-be novelists, query if academics are going to produce more esoteric works under the new regime.

One successful author of scientific texts expected, based upon sales of prior works, to make about \$8,000 during the first year of his new print edition, when libraries, corporations, and professionals make purchases. The new book was included in a database with others. Quarterly subscription sales from the database were reported to be about \$1.3 million, but his "apportioned" share, calculated according to the contract's requirement "in good faith," amounted to just over \$100. In the future, will he self-publish, not publish at all, or wait and hope that bigger powers or market forces address the issue for similarly situated authors?

Database compilations have been on the minds of publishers and authors at least since the decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001). Contract language did anticipate some technological changes, even if the authors did not understand what they were signing. Older contracts were silent, leaving publishers to argue that broad contract terms cover new digital business methods, or in the alternative, they may re-negotiate with individual authors (or their estates).

For example, some legacy contracts had "half rate" royalty clauses providing that any form of the work other than the bound,



English-language, U.S. version would bear half the royalty percentage otherwise due. Originally intended to account for added costs of items like translation, audio recording, and foreign distribution, these clauses arguably justify far lower (not higher), publisher shares for English-language, electronically distributed digital file formats.

Adding injury to insult, some of these contracts also included "revised edition" terms requiring an author to produce a second or subsequent edition on publisher demand. If an author declines or fails to produce the newer edition, the work may be given a facelift under a "derivative works" clause, and recycled under a new ISBN number. In extreme cases, the original author's credit is removed entirely. Some of these contracts permit the publisher to pay the "new author" first, offsetting royalties due to the original author, so there may not be any "excess" royalty due to the original author.

Like music and movies, digital publishing also suffers from piracy. Sites with pirated e-books have sprung up, and ironically, print copy piracy also exists. At least one online "publisher" within U.S. borders is using digitized works to offer bound copies of out-of-print books using print-on-demand technology. Books can also be cobbled together by combining "see inside" scans from multiple sales sites. In one such case, a "publisher" was sent information about the infringement, having been traced to a rural home office. The pirated version arrived absent the original cover art. The publisher responded to the allegation with a demand for detailed documentary proof of copyright ownership, showing knowledge of the game.

However, in that case and many others, individual damages did not justify litigation costs. Multiple plaintiffs are required to make the cases worthwhile. The Author's Guild case against Google, whose settlement was rejected, was certified as a class action, but Google is apparently appealing the ruling. In addition to the Google Books case, several plaintiffs filed suit in 2011 against a partnership of universities. Plaintiffs include the Authors Guild, the Australian Society of Authors and the Québec Union of Writers, claiming that digitizing, archiving, copying and publishing the protected works without the authorization of rights holders amounts to copyright infringement.

It will be a long time before many of the current issues are resolved by appellate courts. In the meantime, hypothetical questions will be answered with hard facts. Self-publishing is booming and nothing has curbed the appetites of novelists with plans to self-publish. A new generation of authors is putting every shade of literature into Amazon's "KDP" program. It might be the best agent of all. ■