

BRIEF SUMMARY OF THE GOOGLE BOOK SETTLEMENT

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Google's mission to organize the world's information: In 2004, Google launched an ambitious project to digitize the entire collections of books from several major university libraries, without seeking permission of authors or publishers. It copied not only public domain works, but also works protected by copyright. Google also made a copy of each file for the participating libraries. It made the entire contents of the digitized books searchable through its Google Book search engine. If a user's search terms appeared in a public domain book, the user could view the entire contents of the book. For books still in copyright, Google displayed only "snippets" of text showing the search terms. Google asserted that this practice of scanning copyrighted books and displaying snippets of the text to users was a "fair use" under the U.S. copyright law.

Class action law suit filed on behalf of publishers and authors: In 2005, the Authors Guild and the Association of American Publishers brought a class action lawsuit for copyright infringement. After several years of litigation and negotiations, the parties announced a proposed settlement of the lawsuit in October 2008. Because the litigation is a class action, the proposed settlement affects the rights of publishers and authors even though they are not parties to the lawsuit. The proposed settlement must be approved by the court before it becomes final and binding on all class members.

Proposed settlement affects all owners of a U.S. copyright interest in books: The Google Book settlement affects virtually every U.S. book publishing company, as well as many publishers outside the U.S. It also affects authors and their heirs. The class is broadly defined to include all persons who, as of January 5, 2009, own a U.S. copyright interest in a book (or certain insert material) that is implicated by a use authorized by the settlement (i.e., scanning a book or displaying excerpts). The settlement excludes books not registered with the U.S. Copyright Office, unless the book was first published outside the U.S.

The proposed settlement agreement is extremely complex -- the agreement, appendices and attachments total over 300 pages. The documents can be found at www.googlebooksettlement.com. The proposed settlement authorizes Google to continue operating Google Book Search without fear of a lawsuit from any member of the class of authors or publishers. It requires Google to pay authors and publishers who choose to participate in the settlement a minimum of \$60 for each book Google has digitized. It also sets up a mechanism for Google to share future revenues with authors and publishers. Google will distribute to rightsholder 63% of all revenues it earns from the sale of institutional subscriptions, online access to books, and advertising; it will retain 37%. All payments and revenue sharing will be administered by an independent not-for-profit entity known as the Book Rights Registry to be set up for the benefit of the rightsholders under the terms of the settlement agreement. In return,

authors and publishers release Google from any liability for its conduct of scanning books and displaying excerpts without permission.

Display of excerpts of in-print and out-of-print books: Rightsholders will be able to control whether and how much a book is displayed by the search engine. They will have the option to request that one or more books be removed from the Google Library Project altogether. They will also have the ability to manage the display uses that Google makes of their books.

The majority of the 7 million books scanned by Google are in copyright, but out-of-print. The proposed settlement treats out-of-print books and in-print books very differently with respect to the material displayed to a user. Unless the rightsholder specifically permits it, excerpts of in-print books will not be available for preview. In this way, the settlement departs from Google's previous practice of showing snippets for books in copyright unless the copyright owner instructed otherwise. Previews of out-of-print books, however, will be available unless the rightsholder specifically prohibits it. There are detailed rules relating to what constitutes a preview, but in general a preview will allow a searcher to view up to 20% of a book, though it will not allow the user to print or cut and paste the material.

Publishers and authors might both be rightsholders for a single book, and the proposed agreement has detailed measures for dealing with the allocation of payments between authors and publishers and the possibility of conflicting instructions from rightsholders. This aspect of the settlement raises potentially difficult issues relating to reversion rights.

The settlement is not limited to U.S. authors and publishers. Authors and publishers outside the U.S. can receive compensation for books that have been digitized by Google so long as their country has copyright relations with the U.S. (only a very few countries do not, including Iran, Iraq, Afghanistan, Ethiopia, and a few others).

Deadlines for important decisions: All authors and publishers need to make the threshold determination of whether to participate in the settlement. Any rightsholder who believes the infringement of its rights is not adequately addressed by the settlement must "opt out" in order to preserve the right to take action against Google individually. Rightsholders had until **September 4, 2009** to opt-out. Any author or publisher who did not follow the procedures to opt-out will be bound by the terms of the settlement. In other words, if a rightsholder does nothing, it is governed by the settlement and cannot bring a separate claim against Google for infringement. Rightsholders also have the right to stay in the class and submit objections to or comments on the settlement. Objections or comments were required to be submitted before **September 8, 2009**.

A rightsholder claiming a cash payment for books digitized by Google must do so by **January 5, 2010**. Rightsholders can request Google not to digitize one or more of their books, or to remove the book if it has already been digitized. Such requests must be made by **April 5, 2011**. After that date, Google will honor "do not digitize" requests if it has not already digitized the book.

Publishers and authors have many choices to make under the agreement, and some of those choices must be made before specific deadlines. These choices will determine whether a rightsholder participates in the settlement, whether and how its books will appear in Google Book Search, and whether it will receive any payments under the terms of the settlement.

Opposition to the Settlement: The proposed settlement has met with resistance from some quarters. The National Writers Union has opposed the settlement, as have other writers groups. The three main library associations, though not opposing the settlement, have expressed concerns and urged rigorous court oversight of the implementation of the settlement. Particularly vociferous are the objections by Microsoft, Amazon and Yahoo, who complain of the unfair competitive advantage the settlement will provide to Google. One of their concerns is that the settlement will vest Google with monopoly power over the digitization of out of print books, and in particular with respect to orphan works (i.e., works for which the copyright still exists but the owner is unknown or cannot be located). The U.S. Department of Justice has also filed a statement with the court objecting to the settlement. Despite its objections, the DOJ recognized that there could be public benefit from a settlement of the case and recommended that the proposed settlement be modified to address the competitive concerns. Among its recommendations was that the parties should find a way to “provide some mechanism by which Google’s competitors could gain comparable access to orphan works.”

Many have expressed the view that the terms of the settlement agreement, if approved, by the court, would amount to private legislation affecting the rights of millions of rightsholders without the involvement of Congress. On **September 10, 2009**, Congress held a hearing on the issue of the effect of the Google settlement. Of particular interest was the testimony of the Register of Copyrights, Marybeth Peters, who took a dim view of the proposed settlement. She testified that “in the view of the Copyright Office, the settlement proposed by the parties would encroach on responsibility for copyright policy that traditionally has been the domain of Congress.” However, legislation dealing with orphan works has been on Congress’ agenda for several years, and nothing has been enacted. As Rep. Zoe Lofgren (D – Ca.) stated at the hearing, the settlement was “the private sector achieving what we failed to achieve” in terms of orphan works.

After the DOJ weighed in, the parties indicated to the court that they will work toward amending the deal to address the DOJ’s objections. In light of these developments, the court has postponed the fairness hearing on the proposed settlement which had been scheduled for **October 7, 2009**. The revision process will undoubtedly take months, so don’t expect a complete resolution anytime soon. It remains to be seen how this will affect the dates previously set in the agreement.

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