

Legal Updates & News

Legal Updates

The Google Book Settlement: Opt-Outs and Objections Due May 5, 2009

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The May 5, 2009 deadline to opt out of or file an objection to the much-publicized Google class action book settlement is rapidly approaching. Authors and publishers with a U.S. copyright interest in one or more books (or in copyrighted material contained within a book), including non-U.S. authors and publishers who distribute books in the U.S., should make sure they are sufficiently familiar with the settlement to make an informed decision as to whether to participate. Those who have significant business interests in the marketing and distribution of books in the U.S. will want to study the terms of this complex settlement in detail. Only those who do not opt out of the settlement are permitted to object to the settlement.

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The settlement has been preliminarily approved by the court and is subject to final approval at or after a fairness hearing that is currently scheduled for June 11, 2009. Due to the far-reaching nature of the settlement, it is likely that objections will be filed, giving rise to the possibility of additional proceedings to address the objections.

The complete settlement and class notice summarizing its terms are available at www.googlebooksettlement.com. The settlement website also includes general information about the settlement process, a form for opting out, access to claims forms, and contact information for the settlement administrator.

The following is a quick overview of the more than 300-page settlement. There are many details not touched upon here that could affect an author or publisher's decision to remain in the settlement, opt out, or file an objection. In addition to reviewing the class notice and settlement itself, those with substantial interests at stake may wish to seek legal advice in contemplating their options.

What is the settlement about?

The Google book settlement is the result of a class action filed in 2005 against Google in the United States District Court for the Southern District of New York, *Authors Guild of America v. Google Inc.*, No. 05 CV 8136 (JES) (S.D.N.Y.), as well as a related case filed by five publisher plaintiffs, *The McGraw-Hill Cos. v. Google Inc.*, No. 05 CV 8881 (JES) (S.D.N.Y.). The cases grow out of the Google Library Project, announced by Google in 2004, pursuant to which Google entered into agreements with a number of libraries to digitally copy the books in their collections. Without obtaining authorization from

copyright owners, Google has already digitized more than seven million books, including millions of books protected by U.S. copyright law. Google users are able to search the digitized books and view portions of them via the Google Book Search facility.

The plaintiff authors and publishers sued Google for copyright infringement based on the reproduction, distribution, and display of their works digitized through the Library Project and used by Google without authorization. Google has sought to defend its actions as fair use pursuant to 17 U.S.C. § 107. The court did not rule on any issue of liability or Google's fair use defense before the settlement was reached.

In light of Google's pervasive presence and the broad impact the class settlement will have on authors, publishers, and the U.S. book industry, some view the settlement as quasi-legislative in nature. Concerns have been voiced by some about whether the settlement gives Google too much market power; the administrative burdens and costs imposed on authors and publishers to claim books and maintain up-to-date rights information; the impact of the settlement on traditional contractual relationships between authors and publishers; the treatment of unclaimed (or "orphan") works under the settlement; the resolution of non-U.S. authors' and publishers' claims through the class action mechanism (which is unknown in other countries); and the sheer complexity of the settlement.

Who is covered?

The settlement class includes all owners, as of January 5, 2009, of U.S. copyright interests in "Books" or "Inserts" (as defined by the settlement – see below) that are implicated by Google's past or future activities addressed in the settlement, including heirs, successors, and assigns of such interests. (A "U.S. copyright interest" means a copyright or an exclusive interest protected by U.S. copyright law.) The settlement class, in turn, is divided into an author sub-class and a publisher sub-class. It is possible for several parties, such as an author, co-author, publisher, and/or an author's heir, to have copyright interests in the same "Book" or "Insert." Even though the settlement only settles claims arising under U.S. law, parties outside the U.S. are included in the settlement class if they have Books or Inserts that are protected under U.S. copyright law with respect to implicated uses. Thus, notice of the settlement has been published in many countries around the world.

What is covered?

The settlement settles claims arising out of the digitization and use of Books and Inserts. Under the settlement, a "Book" is a written or printed hard copy work consisting of bound sheets of paper that was published or distributed to the public under the authority of the work's U.S. copyright owner on before January 5, 2009. If it is a U.S. work, it has to have been registered with the U.S. Copyright Office by January 5, 2009; for non-U.S. works, U.S. registration is not required for it to be covered by the settlement. As defined in the settlement, "Books" do not include periodicals such as newspapers, magazines or journals, works that primarily consist of musical notation and lyrics (i.e., sheet music), personal papers, public domain works, or government works. These excluded works are therefore outside the scope of the settlement.

The settlement also includes a category called "Inserts." "Inserts" are essentially works included within Books (or in public domain or government works) that are separately copyrighted and owned, such as forwards, afterwards, essays, poems, lyrics, quotations, tables, charts, graphs, and children's book illustrations. Notably, however, the term "Insert" excludes pictorial works such as photographs, maps, paintings and illustrations (other than children's book illustrations). Accordingly, even if copied and used by Google through the Library Project, these excluded works – like periodicals and the other types of works listed above – are also outside the reach of the settlement.

How does the settlement work?

The settlement is the outcome of a three-sided, two-and-a-half-year negotiation among Google, the plaintiff authors, and the plaintiff publishers. It governs the rights of participating authors and publishers vis-à-vis Google and its partner libraries, as well as participating authors and publishers vis-à-vis one another (for example, in the case where an author and publisher both assert control of a Book for purposes of the settlement).

As part of the settlement, Google will pay \$34.5 million to fund the establishment of a not-for-profit entity known as the Book Rights Registry. The Registry, which is to be jointly managed by author and publisher representatives, will be responsible for collecting and managing ownership data, for locating and paying rightsholders, and for representing rightsholder interests under the settlement. While Google is to have access to Registry data, the Registry is permitted under the terms of the settlement to enter into licensing relationships with third parties (though the Registry may be subject to other constraints, such as antitrust considerations, and Google is protected under a 10-year “most favored nations” clause). The ongoing operating expenses of the Registry will be paid out of the revenues it collects before distributing payments to rightsholders. Payments received by the Registry from Google that are not claimed by authors or publishers after five years will be distributed to the claiming rightsholders, used to defray the Registry’s operating expenses or, in certain circumstances, donated to non-profit entities.

Copyright owners who remain in the settlement will be eligible to claim payment from a \$45 million settlement fund established by Google. Payment will be made for each Book or Insert that was digitized without permission on or before the opt-out deadline of May 5, 2009 and is properly claimed through the settlement’s claims procedure by January 5, 2010. The per-work payment will range from a minimum of \$60 to a maximum of \$300 per Book, depending upon overall number of claims for payment (the \$45 million fund is to be increased if necessary to meet minimum payment commitments). Payments will range from \$5 to \$75 for Inserts, depending in part on whether the Insert represents a complete work or an excerpt.

In addition, subject to further instruction from the rightsholder, the settlement gives Google the nonexclusive right to make certain uses of the rightsholder’s works going forward. Google may sell access to individual Books, offer institutional subscriptions to Books, and make other commercial uses of the Books and Inserts, including through placement of advertising. Revenues derived from uses permitted under the settlement and advertising uses tied to individual Books will be shared with rightsholders, with 63% going to the Registry on behalf of the rightsholders and 37% retained by Google. (There is no revenue sharing for advertising appearing on general Google search results pages.)

The specific uses authorized by the settlement are broken down into two main categories: “Display Uses” and “Non-Display Uses.” “Display Uses” include a variety of commercial uses: access and viewing of an entire Book, copying, printing and pasting portions of a Book, previewing limited portions of a Book, viewing “Snippet” displays of a few lines from the Book in response to a search query, and/or viewing bibliographic pages from the Book (title page, table of contents, index, etc.). Google may offer Display Uses through institutional subscriptions at educational, government and corporate entities, to individual consumers, and/or through public libraries. “Non-Display Uses” are uses that do not involve displaying Book content to the public, such as displaying only bibliographic information about the Book, full-text indexing (without displaying text), algorithmic listings of key terms, or internal research and development by Google.

For Books that are deemed to be “Commercially Available” (generally speaking, Books that are in print), the presumption is that Google may make Non-Display Uses of the work, but may not make Display Uses absent rightsholder authorization. For Books that are deemed not Commercially Available (i.e., out of print), Google presumptively may make both Display Uses and Non-Display Uses. Regardless of the classification of a Book as Commercially Available or not (which a rightsholder may challenge), assuming a rightsholder has claimed the Book as permitted under the settlement, the rightsholder may at any time instruct Google to include or exclude it from one or more Display Uses (except that a rightsholder who permits individual consumers to purchase access to an entire non-Commercially Available Book must also permit that Book to be accessed through institutional subscriptions). Insert owners are also permitted to request that their Inserts be excluded from Display Uses. In addition to choosing between Display and Non-Display Uses, a rightsholder who has claimed a Book can request on or before April 5, 2011 (or thereafter if the Book has not yet been digitized) that the Book be excluded from any further use by asking that it be removed from all servers and sources (other than back-up tapes or media) through which it is available to Google and its partner libraries.

The settlement also provides that Google will supply libraries that agree to digitize Books with a digital copy of the Books in that library’s collection, which may be used for specified preservation and research purposes. In addition, Google will combine all digitized Books into a “Research Corpus,” to be hosted at two or three separate sites and made available to qualified users for “non-consumptive research” (i.e., computational, linguistic, and other types of analysis that do not depend upon the intellectual content of

the Book).

Lastly, Google will pay a total of \$45.5 million to reimburse the author and publisher plaintiffs for their attorneys' fees and costs, and to establish a fund through the Association of American Publishers to serve the interest of authors and publishers.

What rights do I give up if I participate?

Those who do not opt out of the settlement will be releasing, through the "Effective Date" of the settlement (i.e., when the settlement has been finally approved and no further appeal is possible), all claims against Google and Google's library partners arising out of the unauthorized digitization of Books and Inserts and the use of digital copies of Books and Inserts in Google products and services in the U.S. Additionally, settlement participants will be releasing claims for the future use of their copyrighted works in the ways permitted under the settlement. Finally, by participating in the settlement, rightsholders are agreeing to arbitrate – rather than litigate – most issues that arise under the settlement, including payment and rights disputes.