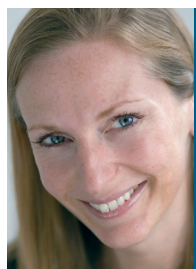


Google Library Project settlement agreement



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ON 28 OCTOBER 2008 THE AUTHORS GUILD, THE Association of American Publishers and Google announced that they had reached a potentially groundbreaking settlement dealing with Google's much-publicised 'Library Project', which involved Google digitising publications without prior permission from the rights holders. Although the settlement only covers the US, it will, if adopted by the US courts, have a significant impact upon all UK authors and publishers who have a US copyright interest.

BACKGROUND

In 2004 Google announced that it had entered into agreements with several US libraries to digitise books and written materials held in those libraries' collections. To date, Google is reported to have already digitised more than seven million books, including millions of books that are still in copyright in the US. American Google users are able to search Google's digital database and view 'snippets' from the digitised materials.

In 2005 the Authors Guild and, separately, various publishers filed lawsuits objecting to Google's digitisation of copyright content without the express consent of the rights holders. Following three years of litigation, the settlement reached on 28 October 2008 aims to resolve the issue by allowing Google to continue the Library Project while giving rights holders the right to opt out of the scheme or to receive compensation and participate in revenues earned going forward.

WHAT IS THE CURRENT STATUS OF THE SETTLEMENT?

As the case is a class action, court approval of the settlement is required before it becomes effective. At the time of writing, the settlement is still subject to the approval of the US courts in June 2009.

WHO IS AFFECTED?

If the settlement is approved by the US courts, it will bind the parties to the *Author's Guild* action. (The separate lawsuit brought by five publishers against Google in respect of issues identical to those settled in *The Authors Guild, Inc et al v Google, Inc* [2008] will also be dismissed.)

The key point to note is that, as a class action, the settlement will also affect everyone who is a member of the 'class', even though they had not been a party to a claim against Google.

The class consists of all persons (and their heirs, successors and assigns) who own a 'US copyright interest' in a 'book' or 'insert' as at 5 January 2009. All persons in this class will be bound by the settlement

unless such persons opt out of the settlement in accordance with a defined opt-out procedure.

A person will own a US copyright interest in all books or inserts in which it owns (or has an exclusive licence to) copyright protected by US law. A US copyright interest will apply to a publication where it has either been published in the US; or has been published in the UK, or another country that has copyright relations with the US, whether through the Berne Convention for the Protection of Literary and Artistic Works 1886 or another treaty.

In broad terms, a 'book' is defined as a written or printed work that (as at 5 January 2009):

- has been published or distributed to the public (with the authority of the US copyright owner);
- has been registered with the US Copyright Office (unless the work was first published outside the US, in which case registration is not required);
- is subject to a US copyright interest; and
- is implicated by one of the categories of use covered by the settlement.

'Insert' is defined similarly to a book, save that (in broad terms) an insert refers to particular material (such as forewords, quotations, tables and so on) that is contained in a book.

WILL UK-BASED AUTHORS AND PUBLISHERS BE AFFECTED BY THE SETTLEMENT?

As noted above, under the terms of the settlement, an owner of a US copyright interest in a book or insert as at 5 January 2009 will be able to participate in the terms of the settlement. This will include any works that are protected under UK copyright laws.

A UK author (and their heirs, successors and assigns) will be a member of the settlement class as long as they have not completely assigned the copyright in the works to a third party. Similarly, a UK-based publisher, or an owner/exclusive licensee of the copyright work will be covered by the settlement and will be able to either opt out or participate in the revenue streams offered by Google.

IS REGISTRATION WITH THE US COPYRIGHT OFFICE NECESSARY?

If the copyright work was first published in the US, or was published simultaneously in the US and another country, it must have been registered with the US Copyright Office prior to 5 January 2009 if the rights holder wishes to participate in

WHAT IS THE DEFAULT POSITION UNDER THE SETTLEMENT IN RESPECT OF IN-PRINT AND OUT-OF-PRINT BOOKS?		
Status	Default position	Rights holders' rights
Out of print	Google may use out-of-print books and inserts for 'display uses' (defined in the main article, below)	Rights holders may opt out at any time from some or all uses
	Google may use out-of-print books and inserts for 'non-display uses' (defined in the main article, below)	Rights holders may only opt out of use of their out-of-print books for non-display uses if they remove their books from the scheme by April 2011
In print	Google may not use any in-print books or inserts for any display uses	Rights holders can authorise Google to use in-print books or inserts at any time
	Google may use any in-print books or inserts for any non-display uses	Rights holders may only opt out of use of their in-print books for non-display uses if they remove their books from the scheme by April 2011

the settlement. If the work was not registered by this date, the rights holder will not be party to the settlement, but can initiate separate proceedings against Google for any unauthorised use of the copyright work. The work will need to be registered at the US Copyright Office before any legal proceedings begin.

If the copyright work was first published outside the US, no registration is needed.

WHAT ARE THE POTENTIAL EFFECTS OF THE SETTLEMENT?

Compensation

The settlement obliges Google to make cash payments to the rights holders of all of the books and inserts that Google will have digitised as at 5 May 2009 without the requisite rights-holder authorisation. The cash payment for a book will be a minimum of \$60 for a principal work (up to a maximum of \$300). Smaller cash payments will be made in respect of unauthorised digitisation of entire or partial inserts. In aggregate, Google has agreed to pay a minimum of \$45m in such cash payments.

Registry

If the settlement is approved by the US courts, then one of its principal effects will be the establishment of a not-for-profit Books Rights Registry. The Registry will be responsible for:

- maintaining a database of relevant rights holders;
- recording rights holders' requests regarding use (or non-use) of their books and inserts; and
- administering payments to rights holders for use of their books and inserts.

The initial costs of establishment and operation of the Registry will be funded by Google, which has agreed to pay \$34.5m as part of the settlement. The intention is for the Registry to be entirely neutral and independent (although it remains to be seen how this will work in practice, given that most, if not all, of the revenue handled by and funding the Registry will derive from Google activities).

Uses

Google will be able to continue digitising affected books and inserts and will be able to exploit such digital copies in the US for the range of uses that are authorised under the terms of the settlement. These are known as 'display uses' (which the rights holder must expressly authorise) and 'non-display uses' (which are deemed authorised by the rights holder).

- Display uses include:
 - a) giving consumers online access to 'previews' of individual books, which they can then purchase online at prices set by the rights holder, or, at the rights holder's option, Google;
 - b) allowing sections of the book to be viewed, copied and printed;
 - c) selling institutional subscriptions to the database; and
 - d) allowing full online access to the book in certain public libraries.

Rights holders can authorise Google to exploit some or all of these uses, and will receive a percentage of the resulting revenue.

'Google will be able to continue digitising affected books and inserts and will be able to exploit such digital copies in the US for a range of authorised uses.'

- Non-display uses are uses that do not involve displaying any content from a book to the public, such as the display of bibliographic information, full-text indexing (without displaying the text) and geographic indexing of books. Rights holders may not exclude books or inserts from non-display uses (unless they opt out of the settlement in its entirety).

In addition, Google will be entitled to earn revenues from advertising on web pages dedicated to each book and make certain other uses as are agreed between Google and the Registry. All of the rights granted to Google under the settlement are non-exclusive and rights holders remain free to authorise third parties to exploit their works in any way (whether through the Registry or otherwise). If the rights holder does not wish to participate in the scheme, they may opt out by notifying the Registry.

Google will pay 63% of all revenues from such authorised uses to the Registry for the Registry to distribute to participating rights holders. Google will retain 37% of such revenue.

IN-PRINT AND OUT-OF-PRINT BOOKS

Whether a book is in print or out of print significantly affects what rights Google has to use the book and whether the rights holder will receive revenues from uses of the book. Google has invented its own definition of what amounts to 'out of print', rather than using an industry standard. According to the settlement, where a rights holder or a rights holder's designated agent is, at the time in question, offering the book for sale new through one or more then-customary channels of trade in the US, that book is commercially available and therefore in print. Books that are in copyright but are deemed not commercially available by Google are treated as being out of print and will be subject to the display uses without the prior consent of the rights holder and without participation in resulting revenues. A rights holder may appeal Google's classification of a book as out of print by following a procedure set out in the settlement.

WHAT WILL BE THE IMPLICATIONS FOR RIGHTS HOLDERS IF THE SETTLEMENT IS APPROVED BY THE COURTS?

If the settlement is approved by the New York District Court in June 2009, a rights holder will be able to contact the Registry or search its online database in order to discover whether any of their works are affected.

If any content has been digitised by Google, the rights holder may decide to:

- 1) Remain part of the settlement. If the author and publisher both decide to remain part of the settlement, the book will stay on the database. The rights holders will be entitled to claim a cash sum for each work that was digitised without permission prior to the settlement. The rights holders will also be entitled to register to receive revenues from the Registry for the use of their books and/or inserts.
- 2) Opt out of the settlement. If either the author or the publisher notifies the Registry of their intention to opt out of the settlement, the book will be removed from the database. A class member who opts out will retain the right to sue Google (and the participating libraries) but will not be entitled to receive a cash payment. A class member who opts out will not be entitled to participate in any of the revenue models under the settlement (save that the rights holder would obviously remain free to try to re-negotiate inclusion back into the scheme at a later stage or negotiate a separate deal for inclusion of its books/inserts in the Google Library Project).
- 3) Remain part of the settlement and receive a cash payment for digitisation by Google prior to 5 May 2009 **but** remove books from the Google Library Programme going forwards.
- 4) Remain part of the settlement and receive a cash payment for digitisation by Google prior to 5 May 2009 **but** exclude books from one or more uses.

It is worth noting that an author or publisher can remove some books from the settlement but choose to leave others in the settlement.

KEY DATES

- If a book or insert was first published in the US (or simultaneously published in the US and another country) and the rights holder wishes such work to fall within the settlement, the rights holder must have registered copyright with the US Copyright Office prior to 5 January 2009.
- A class member can opt out of the settlement on or before 5 May 2009.
- If a class member wishes to object to or comment on the settlement, it may do so on or before 5 May 2009.
- Rights holders have until 5 January 2010 to submit claims for compensation under the settlement.

The Authors Guild, Inc et al v Google, Inc [2008] Case No. 05 CV 8136 (SDNY)

FURTHER READING

The settlement can be read in full at:

<http://books.google.com/booksrights/holders/agreement.html>

- If a rights holder wishes to exclude books from some or all of the uses permitted under the settlement, it can remove books from the database or direct Google not to digitise their books by no later than 5 April 2011.

COMMENTS

The settlement has been hailed as a victory for US consumers, who will have access to a massive range of books, including those that are hard to find or out of print. Potential benefits for rights holders include greater exposure for their works and additional revenue sources, and academic institutions and

public libraries will be able to greatly expand the resources that they offer.

However, if the settlement is approved by the US courts in June, its success will depend heavily upon the efficiency and administrative capacities of the Book Rights Registry and its ability to maintain true independence within a Google-centric system.

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