

National Writers Union Google Book Settlement Analysis and Discussion of Issues

When thinking about how to respond to the pending deadline of **September 4, 2009** (which may be impacted by the pending antitrust investigation by the U.S. Justice Department), there are basically two alternatives: participate or opt out. What can you expect and what might be your next steps after you decide?

Procedural

By September 4, 2009, you must claim your Books and Inserts at www.googlebooksettlement.com and claim a payment for any Books and Inserts that were digitized on or before May 5, 2009.

YOU CAN PARTICIPATE AND STILL ENTER OBJECTIONS AS TO SOME ASPECT OF THE SETTLEMENT. For example, you can expressly state that you are agreeing to settle with Google for the express uses laid out in the settlement, but that you do not agree to any future “Commercial Uses,” regardless of the proposed approval of the registry. Google should be required to renegotiate with authors if they dream up new uses, particularly, but not limited to, opposing the sale of commercial subscriptions to copy shops. (Include your worst Google nightmare here.)

DO NOTHING. If you do nothing, you remain in the settlement and Books/Inserts published before January 5, 2009, will be included in the Google Book project. If you do want to participate and receive payment for any works that were digitized by Google on or before May 5, 2009, you will have until **January 5, 2010**, to submit a claim for payment for your digitized works. After that date you will not receive payment for the unauthorized digitizing of your Books/Inserts.

On October 7, 2009, (absent a postponement) the matter of approving the settlement will be before the United States District Court at 10 a.m., Courtroom 11A, 500 Pearl Street, NY, NY 10007. The Court will conduct a Fairness Hearing.

Assuming for the moment that the settlement is approved, you have until **April 5, 2011**, to request removal of your book from the Google book database. After April 5, 2011, your request to have your work removed will only be honored if your book has not already been digitized. If your work has been digitized, you may request exclusion, but not removal.

Your options as a copyright holder

| ISSUES | PARTICIPATE | OPT OUT |
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| <p>As a copyright holder who participates, you can object to the terms of the settlement.</p> | <p>Participating allows you to take advantage of the benefits of the Google Settlement, but yet also to have your objections heard. Objections must be submitted to the court and both parties. Objections will be considered before the court “blesses” the settlement. It is at least possible that the Court will appreciate that even though copyright holders are agreeing to participate, they are unhappy about the terms but feel there is no practical choice.</p> | <p>If you elect to opt out, although you cannot “object” within the meaning of that term in the Google Settlement, non-participating copyright holders do not waive any claims against Google. If you have the resources, you can file a lawsuit against Google for copyright infringement if your book/insert was digitized without your permission. Follow the instructions at www.googlebooksettlement.com to learn whether your work has been digitized by Google. Books published after January 5, 2009, are not included in this settlement.</p> |
| <p>Google will pay \$34.5 million to establish a Book Rights Registry,</p> | <p>Google will establish a Book Rights Registry, a nonprofit entity managed by a board consisting of at least 4 representatives of the Author Sub Class and 4 representatives of the Publisher Sub Class. The Registry will represent the interests of the rights holders in connection with the settlement as well as potential licensing deals with other entities. The Registry will maintain a database of contact information for authors and publishers, attempt to locate rightsholders, distribute payments to rightsholders, and assist in resolution of disputes between rightsholders. The Registry will receive payments from Google and distribute payments to authors and publishers. The ongoing administration, operations, and tax costs for the Registry will be deducted from the 63% share of revenue to authors and publishers. It is not yet clear how the proceeds of the commercial uses that Google will make will be distributed.</p> | <p>Those who opt out will foreclose Google from earning revenue on their works.</p> |
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| <p>Google will pay \$45 million to copyright holders whose works were digitized without permission prior to May 5, 2009.</p> | <p>To receive a cash settlement payment, you must file a claim by January 5, 2010. Depending on the number of claims submitted, a cash settlement will be between \$60 and \$300 for books, \$15 and \$75 for an entire Insert, and \$5 and \$25 for a partial Insert.</p> | <p>Those copyright holders who opt out will have the opportunity to license their works for digital sales independently of Google.</p> |
| <p>Google will pay \$30 million in attorneys' fees to the Author Sub Class.</p> | <p>No direct effect on copyright holder.</p> | <p>No direct effect on copyright holder.</p> |
| <p>Google will pay the Book Rights Registry 63% of the revenue received from Commercial Uses, including Institutional Subscriptions, Consumer Purchases, and Advertising Uses.</p> | <p>All payments will flow through the publisher to the author through royalty payments.</p> <p>If the out-of-print book was published prior to 1987, 65% goes to the author and 35% goes to the publisher. If the out-of-print book was published in or after 1987, the author and publisher will split the revenue 50/50.</p> | <p>Authors who do not participate will not be entitled to the benefits of the Google Book project.</p> |
| <p>Google has created its own definitions of whether a work is "Commercially Available" and "Not Commercially Available" in a manner that appears inconsistent with industry norms.</p> | <p>A work will be categorized as "Commercially Available" if that work is for sale through one or more customary channels of trade in the United States. It is not yet clear whether a work available only as a Print on Demand (POD) will be sufficient to prevent Google from categorizing a work as Not Commercially Available.</p> <p>A book is considered in print if:</p> <ol style="list-style-type: none"> 1. A title is in print consistently with the terms of the author/publisher agreement. 2. The author-publisher contract does not provide for reversion of rights to the author. 3. The publisher announces an intention to publish an existing or new edition of a | <p>If class members request removal of more than 200,000 books that Google deems Not Commercially Available, Google can challenge whether class members are the rightful owners of the works they have sought to have removed.</p> |

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| | <p>book and does so within 12 months.</p> <p>Either a publisher or author can request to have Commercially Available titles removed or excluded.</p> <p>Both the author and the publisher must agree on whether Google may make Display Uses of the work.</p> <p>If the publisher's and author's directions to Google are contradictory, Google will implement the more restrictive instructions.</p> <p>A book is considered out of print if:</p> <ol style="list-style-type: none"> 1. The rights have reverted to the author, in which case the author makes all decision and receives any payments from the Registry. 2. But if the rights have not reverted to the author, the publisher and the author are considered rightsholders. The Registry will remit payments separately to the author and publisher. | |
| Settlement results in providing Google with near global monopoly. | The mass distribution capabilities of the Internet and Google are working for you. | Lost revenue from subscription and consumer sales. Google has a tremendous reach to potential buyers. |
| The Book Registry will be comprised of authors and publishers who will work with Google to set prices and approve additional Commercial Uses. Google establishes Books Right Registry without competitive bidding. | The potential revenue that a copyright holder receives will ultimately be impacted by the price charged by Google. The Registry has responsibility to authorize discounts, and it is possible that there could be a substantial discount on Consumer Purchases of up to 40% of list price. | Copyright holders who choose to opt out will be competing in the remaining sales channels against Google and their pricing schemes. |
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| <p>The very nature of the settlement, that is, requiring authors to opt out, is contrary to the foundational principles of copyright law, which grants the copyright holder exclusive control over reproduction, distribution, display, and other basic rights. It is the user who must approach the copyright holder to request permissions, rather than the copyright holder approaching the user (Google) to say no.</p> | <p>Though the settlement does not set legal precedent as the copyright issues disputed in the litigation, e.g. copyright infringement by Google and whether such uses can be excused under the fair use defense, the settlement de facto sets a standard as a huge “deal” among authors, publishers, and Google. The settlement sets a low-market precedent for digital sales of content that will impact copyright holders going forward.</p> | |
| <p>There is little known about how members or the Registry will be selected.</p> | <p>Copyright holders have no right to audit the records of Google.</p> | |

If you need more information, Google has provided an extensive list of Frequently Asked Questions at www.googlebooksettlement.com.

Note: An ad hoc committee of the National Writers Union’s Grievance and Contract Division prepared this report. It was presented to the NWU’s Delegate Assembly in August, 2009. Nothing in this document is to be considered legal advice.

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