

**Q & A ON THE GOOGLE BOOK SETTLEMENT (May 19/09)
(with changes to Questions #5, 10, 12 and 21)**

The “opt out” deadline of the Google book settlement agreement has been postponed from May 5 until September 4, and the “fairness hearing” has been postponed until October 7, 2009. All other key dates remain the same.

The Writers’ Union of Canada has received numerous questions from members and others regarding the Google book settlement. We hope that our answers to your questions will be helpful in understanding the settlement and in making your own decisions. We encourage you to continue to send your questions to the TWUC office. We will do our best to answer your questions and our responses to the questions will be circulated to members and posted on the TWUC website.

The settlement agreement was negotiated by the The Authors Guild, Inc., Association of American Publishers, Inc. and Google Inc. to end the lawsuits that the Authors Guild and five major United States publishers (McGraw-Hill, Pearson Education, Penguin USA, Simon & Schuster and John Wiley) had brought against Google for copyright infringement in the United States. The settlement agreement is subject to court approval at a “fairness hearing” in New York. Most books written by Canadian authors and published on or before January 6, 2009 may be covered by the settlement.

Authors and publishers who wish to opt out of this settlement are required to do so on or before September 4, 2009.

To stay in the settlement, it is not necessary to do anything right now. If you stay in, you will still be able to decide later to remove your books from all uses by Google if you so wish.

There are differing opinions on whether it is better to opt out or to stay in the settlement. **TWUC National Council is of the view that most writers will benefit more by staying in the settlement than by opting out.**

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Question #1: Rightsholders can opt out of the settlement until September 4, 2009. What are the benefits opting out?

The main benefit is that you preserve your right to sue Google and the libraries that have provided books to Google to digitize. The terms of the settlement will not apply to you if either you or your publisher opts out.

Question #2: Will “opting put” guarantee that Google will not digitize my book?

No. Google has said that its current policy is not to digitize books that do not remain part of the settlement if, on the opt-out form, the author or publisher asks Google not to digitize them, but there is no guarantee. Google has not admitted that digitizing entire books infringes copyright – the stated intent of Google was to display snippets of text for its book search project as well as to digitize entire books no longer protected by copyright, i.e. books in the public domain. You would remain entitled to sue Google yourself if you were to opt out.

Question #3: My book is already digitized by Google. If I opt out, will they expunge the digitized copy?

No, but when you complete the opt-out form, you can ask Google not to display any contents of your book. It is Google’s current policy to honour this request although it has no legal obligation to do so. There is no guarantee that this policy will not change in future.

Question #4: My book has not been digitized by Google. If Google digitizes my book later, am I bound by the settlement?

Yes, unless you have opted out by September 4, 2009.

Question #5: What can Google do under the settlement if approved by the court?

Continue to digitize any book published in the United States and probably in most other countries before January 5, 2009. (*August 2 note: See Question #23, for explanation of the addition of the underlined phrase.*)

Make “display use” of books that are not “commercially available”. If a book is for sale “through one or more then-customary channels of trade in the United States”, Google will not display it unless authorized by a rightsholder. (The practical meaning of “commercially available” is unclear for books that can be ordered and shipped from Canada to U.S. customers.) Display uses are:

- Display a “preview” from a book (subject to restrictions, e.g. up to 20% of the book, no more than 5 adjacent pages, and not the last 15 pages of a novel) as a marketing tool to sell online access;
- Sell online access to a book (mostly books that are not commercially available);
- Sell subscriptions for electronic access to books to libraries and other institutions including corporations and governments;
- Display “snippets” (about 3 - 4 lines of text) from a book;
- Sell advertising in conjunction with the display of pages from a book not commercially available; and

- Display bibliographic information from a book, including title page, copyright page, table of contents and index.

Make non-display uses of books: full text indexing (without displaying text), geographic indexing, algorithmic listings of key terms for chapters, and internal research and development at Google.

Question #6: What are the benefits to me of not opting out and remaining in the settlement?

You may make a formal objection at the “fairness hearing” if so inclined, but must submit it to the court in writing on or before September 4, 2009. You cannot do this if you opt out.

You will receive a digitization payment (if your book was digitized on or before May 5, 2009) and a possible inclusion payment if your book is included in the institutional subscription database.

You may get a stream of revenues, likely to be modest, from commercial uses by Google.

You may remove any of your books completely (on a book-by-book basis) from all use by Google and all participating libraries or ask that any book not be digitized if you do so on or before April 5, 2011. After that date, if a book has not been digitized, you may ask that it not be digitized.

You may exclude any of your books from some or all display uses by Google at any time.

Question #7: Can you opt out with respect to certain books only?

No, if you opt out, none of your books are subject to the settlement.

Question #8: If I don’t “opt out” by the September 4, 2009 deadline, is there anything I can do later to preserve my rights?

You can subsequently remove your book from all Google servers by April 5, 2011.

You can exclude your book from any particular display uses (see Question #5) at any time, e.g. selling a digital copy, though if you wish Google to sell an out-of-print book, you must also allow it to be included in library subscriptions as well. (See Question #21).

After April 5, 2011, you cannot exclude your book from non-display uses (see Question #5) or from a special research database available only to certain researchers for linguistic

or computational analysis, development of indexing and search techniques and the like (which do not involve display of works).

Question #9: Why did the Authors Guild in the United States and the five publishers who were suing Google agree to settle their lawsuits for copyright infringement against Google?

Google claims that digitizing books for the purpose of displaying snippets is “fair use”. The concept of “fair use” under United States copyright law permits substantial reproduction of a work without authorization from the rightsholder if certain tests are met with respect to the nature of the use, the amount used with respect to the whole work, the amount it constitutes of the work in which it is used, etc. Neither Google nor the Authors Guild and the publishers could be certain of winning and neither wished to leave this determination of “fair use” to the courts. Another factor was the cost of continuing the litigation.

Question # 10: Although my book has never been published in the United States, I have discovered that it has been digitized by Google. Why is this, since this settlement only applies to the United States?

(August 2 note: See Question #23 for a related comment. It seems that the settlement agreement covers all Canadian books whether or not ever published in the United States.)

The United States Copyright Act has a very broad definition of “publish”, so your book published in Canada will be considered to have been “published” in the United States if it has been distributed in the United States, even if there is no American edition of it or no distributor in the U.S.

Even if your book is not distributed formally in the United States, it was probably found in one of the research libraries which have co-operated with Google by providing books for digitization.

Question #11: What if I opt out and my publisher doesn’t? Or what if my publisher opts out and I don’t?

Google has said it will not include any book in its digitization program under the settlement agreement if either author or publisher opts out. However, many publishers have become “Google partners” and have signed their own agreement with Google. An author may also do this, but will not normally have the same bargaining power as a publisher with many more titles.

Question #12: If I stay in the settlement, how will I be paid by Google?

(August 2 note: See Question # 35 for a different view on this. Your publishing agreement may not cover the Google situation at all so what the publisher should pay you would be negotiable.)

You will claim payment through the Book Rights Registry, which is being set up as part of the settlement.

It will be assumed, for the purpose of payment, that the publisher holds the rights to a commercially available book and that the author holds the rights to an out-of-print book. The Book Rights Registry will pay the publisher in the case of a commercially available book and the publisher will pay you in accordance with the book publishing agreement between you. The Book Rights Registry will pay you for an out-of-print book if rights have reverted. If rights have not reverted, it will pay both the publisher and the author (50% to the author for books published in or after 1987 and 65% for books first published earlier).

Your publisher will receive all revenues from the Book Rights Registry if you have assigned your copyright to the publisher (e.g. as happens frequently with educational books) for both in-print and out-of-print books. If your publisher has become a Google partner, Google will pay the publisher directly. In both of these instances, the publisher will pay you your share as provided in the book publishing agreement between you and the publisher. This obligation to pay the author is not part of the Google settlement.

Question #13: What is the Book Rights Registry?

The Book Rights Registry resembles a “collective society”, which collects and distributes royalties for copying to rightsholders who sign up with it. It is different from a collective society because Google rather than the Book Rights Registry will grant licences under the court-approved settlement. It is possible, however, that the Book Rights Registry will deal with entities in addition to Google and grant licences to them for uses of the books that rightsholders have authorized.

The Book Rights Registry will have a board with an equal number of authors and publishers.

Question #14: Why has my publisher become a “Google partner”?

Your publisher’s agreement with Google may authorize Google to provide greater access to users of Google’s services outside the United States.

In its partner agreement with Google, a publisher may prohibit certain uses by Google, will likely only allow limited downloads for promotion purposes and may restrict other uses as well. (These prohibitions and restrictions are also permitted under the settlement agreement, i.e. where there is no partner agreement.)

If your publisher is a Google partner, the settlement agreement does not apply to your book unless rights have reverted to you, provided you did not opt out, until rights revert to you in future. (Note: Your publisher may have the continuing right, following reversion, to receive money from existing licences including future revenues from Google. This will depend on the wording of your agreement with your publisher and its partner agreement with Google.)

Question #15: My publisher is a “Google partner”. How does this affect me? Why has my publisher asked me to “opt out”?

Unless or until rights have reverted to you, your book will be governed by the “partner agreement” between the publisher and Google. Google will pay any revenues collected for your book to your publisher, and your publisher will pay you a share in accordance with the publishing agreement between you and the publisher.

If your publisher has become a Google partner, you do not need to do anything. It will be your publisher, not you, that will have the right to deal with Google and make any decisions regarding an exclusion from a Google use or the extent of any Google use. (Note: The publisher cannot grant Google a right the author has not granted to the publisher.)

If your Google-partner publisher requests you to opt out of the settlement, you should *not* do so if you hope to benefit from the settlement later on - if and when rights revert to you from the publisher. Google will pay all future revenues from out-of-print books to the author if rights revert. (See note at end of Question #14.)

Question #16: My publisher is a Google partner and my book has been digitized by Google, but my contract with my publisher does not grant electronic rights to the publisher. What should I do?

It is Google’s assumption that the publisher controls the rights to an in-print book.

Before calling your publisher, check to see what your contract says about promotion as well as the grant of rights and list of reserved rights. If the publisher has no right to deal with electronic rights even for promotion purposes, you should decide whether or not you wish use by Google to continue. Then point out to the publisher that you had retained digital rights and ask the publisher to remove your book from the arrangement with Google or suggest an amendment to your contract, maybe only to allow the publisher or its licensees (including Google) to use limited extracts of the work (e.g. up to 20% or one chapter) for promotion purposes only.

You can also make a request that Google move your book from the partner program into the settlement agreement program or remove your book altogether (if published prior to

1992) from its partner program. Google will decide whether to honour your request. The settlement agreement assumes that books published before this date, unless amended, did not address electronic rights. If Google does not oblige, your remedy would be to sue your publisher.

Question #17: My publisher has sent me an addendum to my contract to cover “electronic and other related rights”. Am I obliged to sign this or should I do so?

No, you are not obliged and you certainly should not unless the royalty you are being offered for ebook sales is considerably higher than your royalty on your book in print or volume form to allow for the fact that the costs of producing an e-book are much less than producing a print book.

Do not amend your contract to give your publisher all electronic rights without first consulting the TWUC office. Electronic uses are still very much in flux, business models are new and experimental, and the royalties offered authors are mostly too low to be fair.

If you have not granted electronic rights to your publisher, we believe (but will check) that you should be able to sign up yourself with the Book Rights Registry and receive all benefits and exercise all rights under the settlement yourself (unless you opted out by September 4, 2009).

Question #18: Do books need to have been already scanned by Google to be eligible for the compensation?

There will only be compensation for digitizing your book if it was digitized by May 5, 2009. Books digitized after this date will not receive the payment – likely to be \$60 – because such digitization will be authorized by the settlement agreement. However the settlement agreement provides for other payments.

The Book Registry will pay inclusion fees to rightsholders from revenues received from Google for sales of subscriptions to libraries and other institutions. The target fee is \$200 per book that has not been excluded by either the author or publisher.

Question #19: I have contributed plays and short stories to an anthology digitized by Google. The editor of the anthology is listed as the editor. Will Google pay me or the editor?

You should be paid for the digitization of each of your contributions that has not already been paid for as part of another book by you digitized by May 5, 2009. Such contributions (text of an entire essay, short story, song, poem etc.) are called “inserts”. The minimum payment for an insert is \$15. The editor should also receive payment for his or her introduction, foreword, afterword etc., which will also be treated as an insert.

There would be payment for a “partial insert” (an excerpt from an entire work) of \$5.

There will also be minimum inclusion fees for inserts of \$50 or \$25 (for a partial insert) in a book that is included in institutional subscriptions, to a maximum of \$500 for inserts from any one work regardless of how many books it appears in.

No usage fees are payable for inserts, for example, if online access is sold to a book that includes an insert or partial insert by you.

You can choose to exclude your inserts from all “display uses” by Google, but you must exclude all of your inserts, and not just some of them. They could still be used for non-display uses (see Question # 5). There is no time limit on exclusion of inserts.

Question #20: If I opt out now, can I opt in later?

No, you cannot opt back in at a later date. In theory you may be able to become a “Google partner” later and negotiate your own terms with Google. This is obviously easier for a publisher with many books than for an author with just a few books.

Question #21: If I remain in the settlement now, can I opt out later?

No, you must opt out by September 4, 2009, but you can remove your book later or exclude it from display uses (see Question #8 above). (*August 2 note: September 4, not September 5, is the correct date.*)

Question #22: Does the Google settlement agreement extend to Canada?

No. The Google settlement is applicable only to the United States. Google Book Search is available worldwide, but on a more restrictive basis. Outside the United States it has not so far provided full text of books that are protected by copyright. Canadian users, including library patrons and researchers, will be blocked from accessing copyright books in digital form from Google, except where authorized by Google partner agreements covering Canada. Nor will Canadian users be able to purchase online access to copyright books from Google under the settlement agreement.

Canadian consumers may be unhappy that they are unable to download books from Google as easily as American consumers can under the settlement and may pressure rightsholders to make their works more easily available either through Google or otherwise. There may also be increased pressure on the Canadian Government to provide more availability under our Copyright Act. This would be to the detriment of most rightsholders unless digital access to books is licensed and paid for.

The Google settlement agreement is a complex document but we will endeavour to answer any further questions sent to us. For more information you can go to the Google Book Settlement website, which includes an extensive FAQ section and is found at <http://www.googlebooksettlement.com> or to the website of the Authors' Guild <http://www.authorsguild.org/advocacy/articles> and click on Settlement Resources Page. Callers from Canada may also communicate questions to the Google Book Search Settlement Administrator toll free at 1-888-356-0248.