

MORE Q & A ON THE GOOGLE BOOK SETTLEMENT (August 4, 2009)

Here is a reminder of the critical dates:

Opt out deadline has been extended to September 4, 2009.

To remain covered by the settlement, you need do nothing.

The “fairness hearing” is scheduled to begin on October 7, 2009.

Claims for payment for digitization of works scanned up until May 5, 2009 must be made by January 5, 2010.

A book can be removed from all Google servers until April 5, 2011 and subsequently if not already digitized. Google will expunge its digital file of that book. Any or all uses by Google can be subsequently excluded, but your book will remain available to Google for internal research and development at Google.

To receive an inclusion fee, books and inserts must be registered within 5 years of the effective date of the agreement (not yet determined).

National Council will circulate a comment on the settlement very shortly with suggested points being considered for inclusion in the letter which it will send to the U.S. court for its consideration at the “fairness hearing”. Members’ views on these points will be welcomed. Any letter from the Writers’ Union to the U.S. court must be submitted by September 4, 2009.

A longer list of questions and answers went to TWUC members on May 19, 2009 and some additional questions are answered below. We have endeavoured to provide answers based on our understanding of our reading of the lengthy and complex settlement documents. Others may have different interpretations of some aspects of the settlement. **Please note that our own interpretation of one issue has changed (see Question #23, relating to statements in earlier Questions #5 and #10), although the practical consequences of this for books published in Canada are not very different.**

Question #23: Will my book be covered by the settlement even if it has been published only in Canada?

Probably yes, even if you have never authorized either your Canadian publisher or any other publisher to sell your book in the United States.

The settlement agreement says the settlement affects all persons who own a “U.S. copyright interest” in a book published by January 5, 2009 and its definition of “book” does not refer to any specific territory within which a book is made available to the public. Our first interpretation of this was that it only covered books available to the United States public by January 5, 2009. Almost all Canadian books would fall into this category since the U.S. Copyright Act defines “publication” very broadly, probably including foreign books found in libraries in the United States or even advertised in the U.S. without any shipment of books to U.S. customers. We are now of the view that the settlement agreement is intended to cover all Canadian and most other foreign books regardless of where they were published, as long as publication was by January 5, 2009. (See earlier Questions #5 and #10 where our answers assumed that publication had to be in the United States in order for a book to be covered by the settlement. However, our view that almost all Canadian books could be considered to have been “published” in the United States because of the United States’ broad definition of “publication” meant that most Canadian books would be covered by the settlement in any case.)

Question #24: Google will not make display uses of a book which is “commercially available” in the United States. But is my book commercially available in the United States if it is available only from my website or my Canadian publisher’s website in Canada? Is a P.O.D book commercially available?

These questions can’t be answered with certainty as they are only addressed very generally by the settlement agreement – books “for sale new through one or more then-customary channels of trade in the United States”. The settlement agreement says that availability of P.O.D. (print on demand) copies does not necessarily mean a book is commercially available. This should be of concern to foreign rightsholders because Google will be entitled to make display uses (see Question #5) of books that are “not commercially available”. There is a dispute resolution mechanism, which may involve arbitration, to resolve any disputes with Google over whether a book has been properly classified as “not commercially available”.

Question #25: Can I require Google to “remove” my book from their database or to “exclude” certain display uses if I have granted exclusive rights to my publisher?

Yes. Even though the default assumption is that “in-print books” are controlled by the publisher, either author or publisher can give this direction for removal or exclusion of such a book to the Book Rights Registry, which will in turn instruct Google. The settlement agreement contains elaborate rules for determining whether a work is in-print or out-of-print (see Question #26).

Question #26: Authors are usually entitled to revert rights in works that are no longer available from the publisher. What happens if a publisher disputes my right to receive all revenues from an “out-of-print” work?

The default assumption is that the author owns all rights to an out-of-print work other than an educational book, but this can be challenged by the publisher, who would have to provide evidence that the rights had not reverted or that there had been a buy-out of the author’s rights. If the conflict is not resolved, the Book Rights Registry provides a dispute resolution procedure, in most instances at the Registry’s expense.

Question #27: Is poetry included in the Google Book settlement?

Yes, individual poems that have appeared in other authors’ books, as well as poetry books, are covered by the settlement. A poem which appears in a book written or edited by another author is covered by the settlement as an “insert”. (See questions #19 and 29 for information about “inserts”).

Question #28: Are magazines and magazine articles included in Google Book settlement?

Google has entered into partner agreements with some magazines. Since September 2008, magazines have been included in Google Book Search, but magazines are not covered by the Google Book settlement. The settlement deals only with books, because the lawsuits between Google and the Authors’ Guild and between Google and five major publishers dealt only with books. Journals and newspapers are also excluded from the settlement.

An article first published in a magazine (or another publication) that later appears in a book would be covered by the settlement and is considered to be an “insert”, unless the author has written the book in which the insert appears. (See questions #19 and #29 for information about “inserts”.)

Question #29: What are “inserts”?

Inserts are works or parts of works included within a book published on or before January 5, 2009, including poems, forewords, letters, quotations, songs and children’s book illustrations but not including other illustrations or photographs. You cannot claim an additional digitization payment for an insert which is taken from a book that you have written or edited yourself.

Payment for the digital scanning of an entire insert (e.g. an entire story or poem rather than an excerpt from it) without permission is \$15 and for a partial insert is \$5. These payments for inserts are considerably less than payment for a book. You can only

claim once for the digitization of an insert even if it has appeared in several books. “Inclusion fees” are also paid for inserts included in subscriptions, \$50 for an Entire Insert and \$25 for a Partial Insert. However, no ongoing Usage Fees (based on revenues from sales, subscriptions and advertising) are paid for inserts (unlike for books).

Question #30: What is an “orphan work” and what do orphan works have to do with the settlement?

An “orphan work” is a work where the rightsholder cannot be found. Canada’s Copyright Act refers to such a work as a published work with an “owner who cannot be located”. If the rightsholder cannot be found after a reasonably efforts have been made, the Copyright Board may grant a licence to an applicant for a specific use in Canada. The United States’ Copyright Act does not have any provision to deal with this issue, which is important to authors and publishers who may wish to use such a work or excerpts from it. If this aspect of the Google Book settlement is approved by the court, Google will be entitled to license some uses of orphan works in the United States. (See Question #31.)

Money paid to the Book Rights Registry by Google for licensing uses of orphan works (other than subscription revenues), if not claimed within 5 years by their unlocatable rightsholders, will go first to the expenses and reserves of the Book Rights Registry, next to other rightsholders who have earned revenues from Google during the same reporting period, and finally to non-profit entities that would benefit rightsholders and the reading public.

Question #31: What are the “monopoly” or “anti-trust” concerns being raised by the U.S. Justice Department?

There are at least two likely concerns, one related to orphan works.

Google will have a non-exclusive right to license most works covered by the settlement. This means that a rightsholder who signs up with the Book Rights Registry can still license others to do what Google can do under the settlement. However, when the rightsholder of a work is unknown or cannot be found, only Google would be able to license that “orphan work” without any fear of being sued for copyright infringement. This gives Google the equivalent of an exclusive licence for millions of works whose owners have not signed up with the Book Rights Registry.

With millions of works already digitized and court approval to continue to build its vast database, Google would have an enormous advantage over potential competitors, who could be deterred from endeavouring to offer similar services. Without competition Google would be in a position to charge unreasonably high prices or – a particular concern to writers - censor certain works by declining to make them available.

The settlement also has a “most favoured nation clause”. This means that the Book Rights Registry would have to offer the same deal to Google if the Registry were ever to want to make a more favourable arrangement with another aggregator of digital content, and this would decrease the likelihood of such a company being able to break into the market and compete with Google.

Question #32: Can a rightsholder opt out and still object to the settlement?

No, you have to remain in the settlement if you wish to make an objection to the court. (See Question #33.)

Question #33: How do I object to the settlement?

If you wish to object to the settlement agreement or comment on it, you must not opt out. You can only object or comment if you remain part of the author sub-class class that will, subject to court approval, be covered by the settlement agreement. Your statement of objection should include the grounds for the position you assert.

Any objection to any or all of the settlement agreement must be sent to the Office of the Clerk with copies to legal counsel for the author sub-class, the publisher sub-class and Google at the addresses provided in the Notice to Authors and Publishers Outside the United States, which is Attachment I to the Settlement Agreement found on the Google settlement website. Go online to <http://www.googlebooksettlement.com> to get their addresses. (If you have trouble finding this contact information, contact the Writers’ Union office for help.)

Question #34: Can I make a claim and get paid for unauthorized digitization of my book by Google and still prohibit Google from making use of that book?

Yes, if you have not opted out, you can claim payment for books digitized – a minimum of \$60 for each book digitized without permission by May 5, 2009 (and up to \$300, depending on how many claimants there are) and later remove your book from all Google servers, if you do so by April 5, 2011.

Question #35: Who receives the payments from Google?

The Book Rights Registry will be paid by Google and will in turn pay the rightsholders who have signed up with the Registry. Both author and publisher may hold rights in the same book.

The default assumption of the settlement is that the publisher is the only rightsholder to be paid for educational books as well as for works where the author has completely assigned copyright including commissioned works and works by employees, referred to in the United States as “works made for hire”. The Book Rights Registry will pay the publisher for such works. It will also normally pay the publisher for trade books that are commercially available.

For books that are “not commercially available”, the default assumption is that the books are out of print and rights have reverted to the author. In this case, 100% of any revenues from these books will normally be paid to the author. However, if rights of an out-of-print trade book have not reverted to the author, the Book Rights Registry will pay 50% to the publisher and 50% to the author for books published in or after 1987. For books first published earlier than 1987, the author will receive 65% and the publisher 35%.

A publisher who is paid by the Book Rights Registry must pay the author, either as agreed with the author or in accordance with the publishing contract. Note that your publishing contract may not have a provision that covers the sharing of revenues such as these revenues from Google; for example, sale of an ebook downloaded from Google is not the same as an ebook sold by your publisher, nor is it a subsidiary license granted by your publisher. This may make it necessary for you and your publisher to agree on an appropriate split of these revenues.

(In Question #12, we referred to the publisher paying the author “in accordance with the publishing contract between them”. We are now of the view that most publishing contracts probably do not have a provision that would be applicable to money received under a court-approved settlement of this sort and it is reasonable for an author to insist on being paid at least 50% of Google proceeds from the Book Rights Registry.)

If your publisher is a Google partner for the United States (some publishers will be partners only for Canada), the settlement arrangements are not applicable to the licensing revenues your publisher receives directly from Google (rather than from the Book Rights Registry).

Question #36: If I do not opt out, do I have to opt in?

No, if you do not opt out, you are covered by the settlement if it is approved by the court. You can later require Google to remove your books or exclude some uses, even if the rights in your book have not reverted to you from your publisher.

Question #37: What happens if I do not opt out?

Nothing happens except that you will lose your right to sue Google and the libraries who have participated with Google by providing their books for scanning, but only with

respect to uses authorized by the settlement. Google will not become legally entitled to digitize your book but this does not guarantee that Google will destroy any digitized copy that it has made or that it will not in future digitize your books that were published by January 9, 2009. If you opt out, neither you nor Google is bound by the settlement agreement. (For the benefits of not opting out and remaining covered by the settlement, see Question #6.)

Question #38: How do I opt out, if I decide to do so?

You can go online to <http://www.googlebooksettlement.com> and follow the instructions or mail written notice by first class mail, postage prepaid, and postmarked on or before September 4, 2009:

Google Book Search Administrator
c/o Rust Consulting
P.O. Box 9364
Minneapolis
MN 55440-9364

You don't need to give any reason for your decision.

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.