

Dear TWUC Members,

As you know, the "Fairness Hearing" for the Google settlement was postponed at the request of the U.S. Authors Guild, the Association of American Publishers and Google so that the litigants could address various objections made to the settlement agreement and present an amended settlement that would be more likely to receive court approval. The amended settlement agreement was filed late yesterday evening, November 13, with the U.S. District Court for the Southern District of New York. The complaints about the settlement filed with the N.Y. Court included a Statement of Objections signed by the Union 's National Council members.

Representatives of the Authors Guild flew to Toronto on October 19th to discuss National Council's Statement of Objections. Marian Hebb, Deb Windsor and I met with them and explained further our concerns. The Guild representatives outlined some amendments to the settlement with Google that were under consideration and made it clear that they would like the Union 's support for the amended settlement agreement and to be able to inform the Court.

The amended settlement agreement now covers only books registered in the United States or published in the United Kingdom , Canada and Australia . It is the works from these countries that are most often found in the collections of American libraries. Rightsholders of other books will not be covered by the settlement, but will have the right to sue Google for digitizing their works, as will U.S. , U.K. , Canadian and Australian rightsholders who opt out. We understand that for administrative reasons the parties decided to cut down on the scope of the settlement. As a result, U.K. , Canadian and Australian authors and publishers will be allowed greater participation in the governance of the Book Rights Registry. We have learned that approximately 15% of the books published on or before January 5th, 2009 and digitized by Google on or before May 5th, 2009 were published in Canada . Some revenue from the use of unclaimed Canadian books will eventually go to literacy-based charities in Canada .

National Council did not see the amended settlement agreement before it became public; however we were able to review a list of proposed changes. After discussion we concluded that the Writers' Union was unable to provide the requested endorsement before yesterday's filing of the amended agreement and application for preliminary approval. We also concluded that we would not be able to assist the Authors Guild in finding an author to be the class representative of Canadian authors.

The Authors Guild, the American publishers and Google have addressed many of our stated objections in the amended settlement agreement. The changes include:

- **Book Rights Registry Governance.** The governance structure of the Book Rights Registry ("Registry") now includes board representation for U.K. , Canadian and Australian authors and publishers. An independent "fiduciary" will be appointed, with court approval, to represent the interests of Rightsholders of unclaimed books ("orphan works") and make decisions regarding them.
- **Registry to Monitor Book Use for Rightsholders Outside the U.S.** Because Google Book Search is unavailable to users outside the U.S. , the Registry will be responsible for verifying the correct implementation of the display and pricing preferences of rightsholders residing outside United States . The Registry will also attempt to provide a means for rightsholders to do this themselves.
- **Extension of Cash Payment Deadline.** The deadline to claim books for cash payments has been extended to March 31, 2011. (This payment, which is a minimum of \$60 per book and a maximum of \$300, is only for books digitized on or before May 5th, 2009.)

- **Commercial Availability Provisions.** It has now been clarified that if a book is offered for sale new to a U.S. buyer by a seller anywhere outside the United States, it is considered to be commercially available rather than "not commercially available". Google is authorized to make "display uses" of books classified as "not commercially available", subject to rightsholders' rights to remove their books or exclude them from specified display uses. Google will not display books that are commercially available, unless authorized by the rightsholders. Display uses include institutional subscriptions, consumer purchases and public access at libraries and elsewhere. This clarification concerning availability outside the United States is therefore very important.
- **New Revenue Models.** Potential new uses will be restricted to print-on-demand, file downloads and individual consumer subscriptions. Rightsholders who have claimed their books will now be notified directly regarding any new use agreed on by Google and the Registry and be given an opportunity to exclude their books. Whether any such new use will extend to orphan works will be decided by the fiduciary.
- **Non-discrimination Clause (i.e., the "Most Favored Nations" clause benefiting Google).** This clause, which meant Google's prices were unlikely to be undercut by other sellers who might make agreements with the Registry, has been eliminated. This is intended to open up competition in the digital marketplace and to create additional opportunities for authors and publishers.

There are however important issues that National Council will continue to discuss:

- **Orphan Works.** Books already digitized by Google will become "orphans" if the rightsholders do not sign up with the Registry in order to claim them. No provision has been added to the amended settlement agreement that would require rightsholders to sign up before further works can be digitized and licensed by Google. Consequently many more orphan works will be added to the Google database. Since foreign authors are much less likely to know about the Registry and to sign up, their books are more likely to become orphans. However, the amended agreement partially addresses the orphan work issue by requiring (i) the appointment of the fiduciary to look out for the interests of the unlocated rightsholders and (ii) the Registry to hold the money collected for them for 10 years. Additionally, 25% of any money unclaimed after 5 years will be allocated to finding unlocated rightsholders. Representation on the Registry's board from Canada, Australia and the United Kingdom may lessen the particular concern about foreign orphan works.
- **Libraries.** Public libraries and non-profit higher educational institutions should pay a licensing fee to have terminals available for public access, even if they choose to provide free access to their library patrons on such terminals. These library patrons will have to pay for each page that they print out from such a terminal, but the lack of access fees for their institution could create expectations in Canada that would erode copyright protections here.

Next steps. The amended settlement notice will be advertised again and rightsholders will have a chance to make further objections where changes have been made or to make statements of support. Rightsholders will have a second opportunity to opt out. Those who previously opted out will have an opportunity to opt back in, and may wish to do so in order to have their works included in some or all uses by Google, or in order to remove their books entirely from all uses. Once again, this is a decision that rightsholders will make individually. A new deadline will be set for opting out and there will be no need to opt out a second time if you do not wish to be covered by the settlement. The New York court will also set a new date for the Fairness Hearing.

The Google settlement agreement is a complex document that took several years to negotiate after Google was sued by authors and publishers in the United States for copyright infringement because it

was digitizing entire books without permission in order to display snippets. The dispute goes back to 2004 when Google announced its library digitization project and by the time the settlement was announced at the end of October 2008 it had already digitized several million copyright books without permission. The planned creation of the Book Rights Registry to sign up rightsholders and distribute revenues for some uses of books no longer commercially available, as well as the provision in the settlement allowing Google to make digital versions of such out-of-print books available for purchase, has the potential to change the landscape of the book industry. Continuing litigation might also bring significant changes. For example, if further litigation results in an expansion of the scope of "fair use" for copyright works in the United States, there will likely be increased pressure on legislators in Canada to expand what we call "fair dealing" under our own copyright law.

National Council will continue to review these changes and their implications on behalf of TWUC members. As in the past, we will continue to provide you with relevant updates and answer any questions sent to us. Please remember that a long list of previous questions and answers are on the Union website as well as our Statement of Objections www.writersunion.ca

I would like to take this opportunity to thank members of National Council for their substantial efforts on this important file; in particular, Alan Cumyn, our first vice chair. Deborah Windsor has done a wonderful job on our behalf, as has Marian Hebb, our legal counsel, whose dedicated work merits our special thanks.

Erna Paris
Chair