

TOPIC:**THE GOOGLE SETTLEMENT AND HIGHER EDUCATION: IMMINENT DEADLINES****INTRODUCTION:**

After three years of litigation over Google's alleged copyright infringement in its ambitious Library Project, Google and the representatives of two classes of plaintiffs -- authors and publishers -- announced a settlement on October 28, 2008. Class members, which include many higher education institutions and their faculty members, have until **May 5, 2009** to decide whether to opt out of the settlement. This NACUANOTE briefly summarizes the settlement's provisions in order to assist potential class members in deciding what action to take in connection with the settlement. [\[1\]](#)

DISCUSSION:**Overview of the Project and Settlement**

In essence, the Library Project involved Google borrowing books from major research libraries and scanning them -- even those still protected by copyright -- into its search database. Google argued that the fair use doctrine allowed it to scan copyright-protected books and display "snippets" of them in response to search queries. Publishers and authors disagreed and sued Google for copyright infringement.

The settlement creates a mechanism for Google to continue scanning the full text of over 25 million books into its search index in exchange for:

- payment to copyright owners, and
- provision of a variety of services, discussed below.

The settlement:

- applies only to books published before January 5, 2009;
- does not apply to periodicals;
- does not apply to books first published in the United States that were not registered with the Copyright Office; and
- does not apply to books in the public domain because they are not protected by copyright. [\[2\]](#)

The settlement will take effect only if the court approves it. [\[3\]](#)

The Book Rights Registry

The settlement of copyright class action litigation might well have been the only feasible way to solve the central problem facing any effort to digitize the millions of existing books still in copyright: the tremendous amount of time, transaction costs, and uncertainty relating to clearing such an overwhelming number of rights. The settlement resolves the copyright claims against Google of all members of the publisher and author subclasses, including absent members. It does so by creating a Book Rights Registry to manage the copyrights owned by class members for the books subject to the settlement, while also allowing Google to

continue to use those books in certain specified ways and subject to certain limitations. The Registry's board will be divided equally between publishers and authors. Google will pay for the Registry's start-up costs.

Google's Services

The settlement allows for Google to offer three primary services to users in the U.S.:

- previews;
- consumer purchases; and
- institutional subscriptions.

The settlement establishes "default rules" with respect to these services, which will apply unless the copyright owner elects to vary the rules with respect to a particular title. Different default rules apply to in-print and out-of-print books. For out-of-print books, the default rule is that Google can make a book available in all three services. For in-print books, the default rule is that Google cannot make any of a book's text available in any of the three services.

Previews

Under the Preview service, all users in the United States will have the ability to search Google's entire search database for digitized books responsive to their queries for free. For an out-of-print book, the standard default rule is that Google may display up to 20% of the book's text. However, for different categories of books (e.g., fiction vs. non-fiction), Google may display a different number of pages per response. [4] For an in-print book, the default rule is that Google may not display any of the book's text; it may display only bibliographic information and front material, such as the title page, the copyright page, the table of contents, and the index.

Consumer Purchase

Under the Consumer Purchase service, Google will allow consumers to purchase perpetual online access to the full text of a book. Google will set the price algorithmically between \$1.99 and \$29.99 (with 80% of books below \$10). [5] In-print books will not be made available for consumer purchase unless the copyright owner elects to "opt in" with respect to his or her book.

Institutional Subscriptions

Google will offer institutions an annual subscription to view the full text of all books in the institutional subscription database (ISD). The institutional subscription could become an invaluable research tool in the higher education context, because it will allow faculty and students to access the full text of millions of book from their computers. [6] However, Google and the Registry have not yet agreed on a price for the subscription. The price, which will be based on full time equivalent (FTE) users at the institution, potentially could place a serious burden on library budgets.

Other Services

The settlement allows the offering of two additional services. First, Google may provide free public access to the full text of the books in the ISD on a limited basis through public libraries and higher education institutions. Public access service will be available at only one terminal in each public library building. At community colleges, Google may provide one public access terminal for each 4,000 FTEs; at four-year colleges, Google may provide one public access terminal for each 10,000 FTEs.

Second, the settlement permits "non-consumptive research" by "qualified users" on the "Research Corpus," the set of all digital copies made by Google in the Library Project and hosted by selected institutions. Non-consumptive research involves computational analysis of the books, and does not include research relating to the intellectual content of the books. Users are qualified through relevant institutional affiliation or

demonstrated capability and resources to conduct non-consumptive research.

The Participating Libraries

Fully participating libraries will provide Google with in-copyright books to scan into its database and in exchange will receive a digital copy of each book they lend to Google. Participating libraries must sign an agreement with the Registry that simultaneously releases the libraries from liability for infringement and highly constrains what they can do with their digital copies while the books remain in copyright. Participating libraries must also comply with extensive security and record-keeping obligations. [7]

Revenue Sharing

Copyright owners that register with the Registry can receive several forms of compensation. First, Google must pay between \$60 and \$300 to the owner of each book scanned prior to May 5, 2009. [8] Additionally, Google must provide 63% of the revenue it generates through advertising, institutional subscriptions, and consumer sales to the Registry. The Registry will then distribute the revenue to the copyright owners. [9]

The Choices Before Higher Education Institutions

The settlement creates many opportunities and challenges for higher education institutions and requires these institutions to make hard decisions. Institutions with special collections that might be of interest to Google must decide whether to become participating libraries. When Google begins to sell institutional subscriptions, institutions will have to consider whether to purchase subscriptions. But institutions have a more pressing decision to make: whether to opt out of the settlement.

“Opting Out”

Many higher education institutions have a copyright interest in books and thus are potential members of the settlement class. [10] **The opt-out date is May 5, 2009.** Any such institution that does not formally opt out of the settlement by that date will be bound by the settlement. As a result, the institution will release Google from copyright claims relating to the Library Project, and the institution will not be able to pursue its own litigation against Google. [11]

Right to Sue v. Revenue

Conversely, if an institution does opt out, then it can pursue copyright claims against Google, but its books will not be included in the services Google will provide under the settlement, and it will not receive its share of the revenue these services generate. However, even if the institution opts out of the settlement, it can still participate in the Partner Program Google offers copyright owners. Thus, the institution can still grant Google a license to make its books available to the public on terms agreed upon by Google and the institution.

Does your Institution own the Copyright?

At the same time, an institution can participate in the Partner Program only with respect to books for which it clearly owns the copyrights. Accordingly, if the institution opts out of the settlement, the set of titles in which the institution's ownership is unclear might not be eligible for inclusion in either the Partner Program or the services available under the settlement. [12] Conversely, if the institution does not opt out, those books with unclear copyright ownership will fall within the settlement.

Control over Titles

Moreover, if the institution stays within the settlement, it has significant control over Google's use of individual titles in which it may have a copyright interest. The institution can remove a specific title from all uses, while allowing Google to display other titles. Furthermore, the institution can decide whether a title is available for consumer purchase and how much text Google displays under the preview service.

Significantly, the institution can direct Google to change how to use a particular title at any time, thereby allowing the institution to experiment with different services. Given this high degree of control and flexibility, there appears to be little advantage to opting out of the settlement unless the institution plans on filing its own infringement action against Google.

Filing Comments with the Court

Institutions have another choice to make by May 5: whether to file comments with the court urging approval or rejection of the settlement. The settlement has stimulated extensive debate since its announcement. Some feel that the settlement allows for the creation of a research tool of truly historic importance and can lead to renewed interest in out of print books. Others feel that the settlement confers an information duopoly on Google and the Registry and replaces copyright law with a private commercial arrangement. [\[13\]](#) Different critics have condemned all the parties to the negotiations -- Google, the publishers, the authors, and the participating libraries -- for capitulating to the adverse parties. [\[14\]](#)

CONCLUSION:

Higher education institutions are likely to feel particularly conflicted. On the one hand, their faculty and students might benefit greatly from the ability to search and read the full text of millions of books, and some of the out-of-print books in which they have a copyright interest might gain a second life. On the other hand, the absence of competition might allow Google and the Registry to demand a very high price for the institutional subscription. Additionally, as a matter of principle, educators might have preferred the creation of a digital library by the government or a consortium of research libraries – and the settlement does not preclude them from still pursuing this – but they recognize the practical difficulty of securing the resources and the legislative copyright exception necessary for such an endeavor. In the end, many educators likely will conclude that the settlement, with all its imperfections, is worthy of approval. [\[15\]](#)

AUTHOR:

[Jonathan Band](#)

RESOURCES:

Other Materials/Resources:

- [Google Book Settlement.](#)

FOOTNOTES:

FN1. For a more detailed discussion of the settlement's provisions, see Jonathan Band, *A Guide for the Perplexed: Libraries and the Google Library Project Settlement*, <http://www.policybandwidth.com/doc/google->

[settlement-13nov08.pdf](#).

FN2. Google will display the full text of these books for free.

FN3. Under the Federal Rules of Civil Procedure, a court must review a class action settlement to ensure that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C).

FN4. For most non-fiction works, Google generally may display no more than five adjacent pages at a time. Additionally, Google must block the two pages before and after any five-page display. In contrast, for works of fiction, in any given response, Google may display 5% of the book or fifteen adjacent pages, whichever is less. Google must also block the final 5%, or at least the final fifteen pages. No display is allowed of anthologies of drama and fiction by multiple authors, or collections of poetry or short stories. And for dictionaries, drug reference guides, encyclopedias, price/buyer guides, quotation books, test preparation guides, and thesauri, Google will provide only a "fixed preview" -- it will display the same pages regardless of the user query, up to 10% of the book.

FN5. A consumer will be able to print out up to 20 pages with one command; cut and paste up to four pages with one command; and make book annotations.

FN6. An authorized user will be able to print out up to 20 pages with one command; cut and paste up to four pages with one command; make book annotations; and provide links to e-reserve or course management systems.

FN7. The libraries at the University of California, the University of Michigan, the University of Wisconsin, and Stanford University have announced that they will be participating libraries under the settlement.

FN8. Google must provide the Registry with at least \$45 million to distribute for these scans. The amount each owner receives will depend on how many owners register with the Registry.

FN9. The settlement contains a complex plan of allocation the Registry must follow. Once it has collected sufficient revenue from Google, the Registry will pay each registered owner an inclusion fee of \$200. Additionally, the Registry will pay owners usage fees based on how many users access a particular book.

FN10. An institution might be an author of a book by virtue of the work made for hire doctrine and thus own the copyright in the book. An institution might also be the owner or exclusive licensee of the copyright in a book it has published. Thus, an institution can be a member of the author subclass, the publisher subclass, or both. Faculty members who have written books in which they have retained a copyright interest are members of the author subclass and thus also must decide by May 5, 2009 whether to opt out of the settlement.

FN11. To opt out, a copyright owner can go online on or before May 5, 2009 at <http://www.googlebooksettlement.com>, and following the instructions to opt out.

FN12. For example, an agreement between a scholar and an academic press might not specify which party holds the electronic publishing rights. Or the parties cannot locate a copy of the agreement and therefore do not know whether rights assigned to the publisher reverted to the author when the book went out of print.

FN13. <http://online.wsj.com/article/SB123819841868261921.html>

http://www.nytimes.com/2009/04/04/technology/internet/04books.html?_r=1&ref=todayspaper

FN14. Instructions on how to file comments with the court are available at:

<http://www.googlebooksettlement.com/help/bin/answer.py?answer=118704&hl=en#q16>.

FN15. The court cannot modify the settlement; it can either approve it or reject it. To be sure, the court can reject the settlement, but indicate what modifications would be necessary to gain its approval. The parties then would decide whether to accept the modifications, or continue to litigate the case.

Permitted Uses of NACUANOTES Copyright and Disclaimer Notice

**NACUANOTES Homepage | NACUANOTES Issues
Contact Us | NACUA Home Page**

"To advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve."