

The Google Settlement: International Implications

After three years of litigation in the U.S. 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 non-U.S. owners of U.S. copyright interests in books, have until September 4, 2009 to decide whether to opt out of the settlement. This article briefly summarizes the settlement's complex provisions in order to assist potential class members in deciding what action to take in connection with the settlement.

I. Overview of the Library Project and the 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. Many of the books in these libraries are not in English and were published outside of the United States. 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 in federal district court in New York.²

The settlement³ creates a mechanism for Google to continue scanning the full text of over 25 million books into its search index in exchange for:

¹ Jonathan Band is an intellectual property lawyer in Washington, D.C. The views expressed in this note are his own.

² Separate cases were filed in other countries, including France and Germany. For a more detailed discussion of the fair use arguments in the U.S. litigation, see [Raymond T. Nimmer, *Google Print Library Project - Unfair Use of Copyright*, CRi \(2006\)](#); [Jonathan Band, *The Google Library Project: Both Sides of the Story*, *Plagiarism: Cross-Disciplinary Studies in Plagiarism, Fabrication and Falsification* 1\(2\) \(2006\)](#).

³ 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*](#),

- payment to copyright owners, and
- provision of a variety of services, (see II. 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.⁴

The settlement will take effect only if the court approves it.⁵

1. Class Action Litigation

The litigation against Google took the form of a class action. A class action in essence is a legal fiction found in American civil procedure where a handful of class representatives bring an action on behalf of all members of a defined class. Typically, a few employees will bring an action on behalf of all similarly situated employees of the same employer, or a few purchasers of a product will bring an action on behalf of all other purchasers of the products. If the presiding judge decides to certify the class, then any settlement or judgment can be binding on all members of the class.⁶ Under the

<http://www.policybandwidth.com/doc/google-settlement-13nov08.pdf>. The text of the agreement can be found at www.googlebooksettlement.com.

⁴ Google will display the full text of these books for free.

⁵ 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.

⁶ A court must determine that: (1) the class is so large as to make individual suits impractical, (2) there are legal or factual claims in common (3) the claims or defenses are typical of the plaintiffs or defendants, and (4) the representative parties must adequately protect the interests of the class. In many cases, the party seeking certification must also show that (5) common issues between the class and the defendants will predominate 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).

Initially, the Authors Guild sued Google on behalf of all owners of copyrights in literary works contained in the library of the University of Michigan, one of the libraries that made in-copyright books available to Google for scanning. The litigation currently involves two subclasses of plaintiffs – authors and publishers of books in which they own a U.S. copyright interest. A U.S. copyright interest exists even in books never published in the United States if the book’s author is a citizen of a country that signed the Berne Convention.⁷ Thus, many authors and publishers who are not U.S. citizens are considered plaintiffs in this lawsuit and will be bound by the settlement, unless they opt-out of it or the judge rejects it. The choices available to all class members are discussed below in greater detail.

2. Territoriality

A country’s copyright law applies only within that country’s territory. This litigation concerns Google’s infringement in the U.S. of U.S. copyrights. Thus, the settlement resolves only this litigation concerning U.S. copyrights. Although the settlement through the class action mechanism applies to non-U.S. rightsholders, the settlement applies only to their U.S. copyrights.

Google will provide the expanded services permitted under the settlement just to users located in the United States. Users outside of the U.S. will only have access to the current Library Project service, which displays three “snippets” consisting of a few sentences of text in response to each search query. Pending litigation in other countries concerning this service will continue.

proceedings, as opposed to individual fact-specific conflicts between class members and the defendants and (6) the class action, instead of individual litigation, is a superior vehicle for resolution of the disputes at hand.

⁷ This assumes the work has not entered into the public domain. To determine whether a work is in the public domain in the United States, see www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

For example, a French author who publishes a book in France in 2000 has a copyright in the book in France and the U.S. (and every other country that signed the Berne Convention). He is a member of the class of plaintiffs in the U.S. litigation, and the settlement applies to his U.S. copyright in the book. Unless he opts-out of the settlement, Google will be able to make certain uses of the book in the U.S., for which he will be compensated if he registers appropriately. The settlement does not affect any copyright claims he may have against Google in France for its past and future display of snippets to users in France.

In other words, the settlement contemplates Google providing different services to users in the U.S. from users outside of the U.S. Google has not disclosed what technological means it will employ to exclude users outside the U.S. Nonetheless, it is safe to assume that some non-U.S. users will succeed in circumventing this protection. Continuing with our example, the French author could sue Google in France for the U.S.-directed uses of his book that some French users have obtained by circumvention. Google's liability likely would turn on whether the French court concludes that Google took adequate measures to prevent French users from accessing the U.S.-directed services.

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 U.S. 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.⁸ Google will pay for the Registry’s start-up costs.⁹

II. Google’s Services

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

- previews (see 1. below);
- consumer purchases (see 2. below); and
- institutional subscriptions (see 3. below).

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.

1. 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.¹⁰ 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.¹¹ For an in-

⁸ Settlement Agreement at 6.2(b).

⁹ *Id.* at 5.2.

¹⁰ The Preview service is discussed at section 4.3 of the Settlement Agreement.

¹¹ 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

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.

2. Consumer Purchase

Under the Consumer Purchase service, Google will allow consumers to purchase perpetual online access to the full text of a book.¹² Google will set the price algorithmically between \$1.99 and \$29.99 (with 80% of books below \$10).¹³ 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.

3. Institutional Subscriptions

Google will offer institutions an annual subscription to view the full text of all books in the institutional subscription database (ISD).¹⁴ 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 books from their computers.¹⁵ However, Google and the Registry have not yet agreed on a price for the

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.

¹² The Consumer Purchase service is discussed at section 4.2 of the Settlement Agreement.

¹³ 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.

¹⁴ The Institutional Subscription service is discussed at section 4.1 of the Settlement Agreement.

¹⁵ 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.

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.

4. 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.¹⁶ Public access service will be available at only one terminal in each public library building. At associate 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.¹⁷ 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.

III. Incentives to Participate

1. 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.¹⁸ Participating libraries must sign an agreement with the Registry that simultaneously releases the libraries from liability for infringement and highly constrains

¹⁶ The Public Access service is discussed at section 4.8 of the Settlement Agreement.

¹⁷ The Research Corpus is discussed at section 7.2(d) of the Settlement Agreement.

¹⁸ Participating Libraries are discussed at section 7.2 of the Settlement Agreement.

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.¹⁹

2. Revenue Sharing

Copyright owners that register with the Registry can receive several forms of compensation.²⁰ First, Google must pay between \$60 and \$300 to the owner of each book scanned prior to May 5, 2009.²¹ 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.²² Non-U.S. owners must register with the Registry if they seek to receive this compensation.

IV. The Choices Before Non-U.S. Owners

The settlement creates many opportunities and challenges for non-U.S. owners of U.S. copyright interests in books. The threshold decision is whether to opt out of the settlement.

1. “Opting Out”

¹⁹ 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.

²⁰ Compensation issues are addressed in section Article V of the Settlement Agreement.

²¹ 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. The owner must register with the Registry by January 5, 2010, in order to receive this fee.

²² 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.

All class members, including non-U.S. owners, have until September 4, 2009, to opt out of the settlement.²³ A publisher or author who does not formally opt out of the settlement by that date will be bound by the settlement. As a result, the owner will release Google from copyright claims relating to the Library Project, and will not be able to pursue his or her own litigation against Google in the U.S.²⁴

2. Right to Sue v. Revenue

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

3. Control over Titles

Moreover, if a copyright owner stays within the settlement, he has significant control over Google's use of individual titles in which he may have a copyright interest. The owner can remove a specific title from all uses, while allowing Google to display other titles.²⁵ Furthermore, the owner has the ability to change the default rules with

²³ The opt-out deadline was originally May 5, 2009, but the judge pushed it back by four months in response to requests by several authors.

²⁴ To opt out, a copyright owner must go online on or before September 4, 2009 at <http://www.googlebooksettlement.com>, and follow the instructions to opt out; or send written notice by First-Class Mail, postage prepaid, postmarked on or before September 4, 2009 to the Settlement Administrator, at:

Google Book Search Settlement Administrator
c/o Rust Consulting
PO Box 9364
Minneapolis, MN 55440-9364

²⁵ In order to remove a title from all uses, the owner must notify the Settlement Administrator by April 5, 2011. If an owner does not remove a title by that deadline, he

respect to a particular title. For example, for an out-of-print book, the owner can instruct Google to exclude a title from consumer purchase and or to display less text 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 copyright owner plans on filing his own infringement action against Google.

4. Filing Comments with the Court

Copyright owners have another choice to make by September 4: 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.²⁶ 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.²⁷

Non-U.S. owners may have both principled and practical concerns with the settlement. As a matter of principle, they may resent Google's use of their books without their permission, and the class action mechanism that would enable Google to do so. Indeed, some have suggested that forcing a non-U.S. author to opt out of the settlement to

still will be able to exclude the book from specific services. However, the book will be included in Google's search database, and Google will be able to display bibliographic information concerning the book in response to search queries.

²⁶ For a detailed discussion of the arguments concerning approval of the settlement, *see* comments filed by the American Library Association, the Association of Research Libraries, and the Association of College and Research Libraries, available at: <http://www.arl.org/bm~doc/googlebrieffinal.pdf>.

²⁷ 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>.

prevent Google's use is a formality prohibited by the Berne Convention and the TRIPs Agreement.²⁸ However, because the opt-out arises from a general procedural requirement in the context of a specific copyright enforcement litigation, the World Trade Organization is unlikely to treat the opt-out as a formality. Requiring an owner to opt-out of the settlement of one infringement action in order to preserve his right to sue Google independently is no more a formality than requiring an owner to file a complaint and comply with the other Federal Rules of Civil Procedure to enforce his copyrights. Stated differently, the opt-out is not a formality that creates a copyright. Rather, it is a procedure the owner must follow if he wants to reject one remedy in favor of another.

A non-U.S. owner may have the practical concern that users outside the U.S. will circumvent the geographical restrictions placed by Google and access his content. Such access is unlikely to have any negative financial impact on the author. The non-U.S. user at most will have free access only to the preview. To get access to the full text, the user will have to purchase the book, in which case the author will benefit if he registers with the Registry. Furthermore, the book will be available for consumer purchase only if it is out-of-print, meaning that the author currently is receiving no revenue from its sale.

On the other hand, non-U.S. copyright owners might see the settlement as a model for similar settlements in their countries, whereby they can receive some revenue for out-of-print books. And as lovers of books, they might view the settlement as a means of making books more useful and relevant to a new generation that obtains most of its information from websites.

²⁸ Under the Berne Convention and GATT-TRIPs, a copyright comes into existence at the moment of creation, and the author need not follow formal statutory procedures such as attaching a copyright notice to the work or filing a registration with a government office.