The Google Book Settlement: a survival aid for UK authors

The Amended Google Book Settlement agreement, if accepted by the court, would affect the rights in every printed book* published on or before 5 January 2009 in the UK, Canada or Australia. All printed books published in the US and registered with the US Copyright Office on or before the specified date would also fall within its scope. (Note that not all US publications are registered with the Copyright Office.)† It will apply to books that have not hitherto been digitized by Google, and authors who have not, so far, had any of their works digitized, as well as those who have.

> It will apply not only to book-length works but to any work contained in a book that is not by the book's main author, including works in anthologies and other multi-author collections. It will apply to illustrations in cases where the owner of the rights to the illustrations also has rights in the book, as author, co-author or publisher. Periodicals are excluded from the definition of 'book', and comic novels are defined as periodicals and also excluded. Graphic novels, however, fall within the scope of the agreement.

The amended agreement was filed with the court on 13 November 2009 and received preliminary approval (a procedural matter) on 19 November. There is a new opt-out deadline, 28 January 2010, and this is also the deadline for objections and amicus letters. The final fairness hearing will be on 18 February 2010. It is possible that the agreement may be rejected by the court, but it would most unwise to rely on such an outcome. It is also possible that the agreement may be further amended before it is accepted, but if this happens, there is no guarantee that there will be another opt-out period.

Once the opt-out deadline on 28 January is past, authors' options for action will narrow sharply.

UK authors (and foreign authors whose works have been published in the UK, Canada, Australia or the US) have the following choices:

a) to opt out of the settlement (by 28 January)
b) to register their works (by 31 March, 2011, if they wish to claim the one-off payments)
c) to take no action

Authors who opted out before the previous opt-out deadline (4 September) do not need to opt out a second time. Authors who have opted in and registered their works now have a chance to change their minds and opt out. Conversely, authors who opted out may now opt in, if they like the (slightly) amended agreement any better than they did the original one.

Under the terms of the settlement, authors who take no action by 28 January will be 'opted in' by default, and will be deemed to be bound by the terms of the settlement agreement, without further possibility of opting out. Their options under the settlement are to opt in by registering their works (which may be done at any time) or to continue to take no action. Unless claimed by another rights-

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* Defined in the settlement agreement as 'a written or printed work that as of January 5, 2009… had been published or distributed to the public or made available for public access as a set of written or printed sheets of paper bound together in hard copy form' (Amended Settlement Agreement, 1.19).

† The US Copyright Office has an online database that records all works registered since 1978 and gives the place of first publication: see http://cocatalog.loc.gov/.

holder (such as the publisher) their works will be treated as 'unclaimed works' (popularly, and erroneously, known as 'orphans'). The settlement agreement permits Google Inc. to make commercial uses of all unclaimed books that it determines not to be 'commercially available' (see below), unless otherwise directed by the 'Unclaimed Works Fiduciary' (see below). These rights-holder(s) will receive no payments.

Authors who register their works or remain opted-in by default but who have any objections arising from the amendments to the settlement agreement may send a formal written objection to the court, or a letter expressing their objections, or may get a lawyer to advise on and draft an objection on their behalf. It should be noted that even if their objections are disregarded, they will remain bound by the terms of the settlement.

Authors who opt out of the settlement have no formal right to send an objection to the court, but may send a letter if they wish. On my understanding, it is up to the judge whether or not to take such letters into account.

'An end-run around copyright law'

In most English-speaking countries, and perhaps especially in the United States, the GBS has been the subject of serious debate and huge controversy. The coverage of this debate in the UK news media has been for the most part limited and shallow. Only in the UK have all the main authors' organisations – the Society of Authors, the Writers' Guild of Great Britain (WGGB) and the Authors' Licensing and Collecting Society (ALCS) – expressed support for the settlement.

The ALCS and the Society of Authors have represented the settlement as setting up a collective licensing arrangement directly analogous to the arrangements by which, in the UK, the ALCS distributes the income from licenses for photocopying. However, collective licensing was devised as an answer to the problem of collecting and distributing small payments from numerous sources. The Book Rights Registry which will be set up as a result of the settlement if the agreement is accepted as fair by the court is a very different sort of organisation, since it will be established to process payments from only one source: Google Inc.

The US Department of Justice (DoJ), which has been highly critical of the settlement, has specifically rejected the claim that the Book Rights Registry will be just another collecting society, and also that the mechanism of a blanket licence and a collecting society is at all an appropriate answer to the emergence of Google Books. In a statement to the court it has observed that 'unlike music rightsholders who need the ASCAP/BMI organizations to detect the "fleeting" uses of their compositions on the airwaves, ... book authors and publishers have not shown that they lack a practical means to be paid for uses of their works in the absence of collectively negotiated pricing mechanisms'. In other words, it sees no reason why Google should not negotiate with authors and publishers individually, just like anyone else who wants to purchase licences to use in-copyright works.

Likewise, Marybeth Peters, the director of the US Copyright Office, has condemned the settlement agreement, saying, 'no factors have been demonstrated that would justify creating a system akin to a compulsory license for Google – and only Google – to digitize books for an indefinite period of time'; she has called it 'an end-run around copyright law'.

Here are some more comments on the settlement agreement, this time from writers' organisations in the English-speaking countries:

> The proposed settlement is grossly unfair to writers … Compared to the number and seriousness of the violations, the amount being offered by Google to each writer is ridiculously low … Putting the onus on writers to contact Google is also grossly unfair. Google is essentially saying 'we are going to steal your work and sell it under terms we dictate unless you tell us not to.' A corporation, no matter how powerful, shouldn't be able to profit from your work without first contacting you and obtaining your permission.
>
> — Larry Goldbetter, president of the National Writers Union (USA)

> We have asked the court to remove the "opt out" provisions that turn copyright upside down, or at the very least, to direct the removal of deadlines for opting out of the Book Search. Copyright holders should control their works.
>
> — Salley Shannon, president of the American Society of Journalists and Authors (USA)

- The "opt-out" mechanism proposed for the settlement contradicts the very foundation of copyright.
- The financial impact on authors could be significant because the settlement would effectively thwart any third-party system from competing with Google and offering alternatives to authors of out-of-print works.

> **SFWA believes that the proposed Google Book settlement is fundamentally flawed and should be rejected by the court.** … We advise all authors … to consult with legal counsel to ensure that they understand the precise meaning of the Google Book settlement, and the impact it may have on their own situation, should the settlement be approved.
>
> — Science Fiction & Fantasy Writers of America (SFWA)

- Authors should not lose control over their works because they fail to sign up in a registry in another country. This undermines copyright and offends the spirit of the Berne Convention, which prohibits registration as a condition of copyright.
- Settlement of the lawsuits against Google should deal only with Google's past wrongdoing. Google should not be entitled to digitize more works published prior to January 5, 2009 unless the rights holders sign up voluntarily with the Book Rights Registry.

> — Writers' Union of Canada

> The transparency which the public interest requires to be applied to a … monopoly of intellectual property is not apparent in the agreement. The first 17 pages, comprising definitions of words such as 'person', quickly tell a non-legal reader that the language setting out the rights, responsibilities and mechanisms of the agreement is a bewildering shift from ordinary meaning which all-but guarantees that the non-legal reader will give up the unequal task of understanding the rules governing digital book sales and earnings.
>
> — Australian Society of Authors

> Any grant of copyright by a New Zealand author must be subject to New Zealand law and the jurisdiction of the New Zealand courts. …
>
> Questions relating to the tax status of non-US authors are not addressed in the Proposed Settlement.
>
> — New Zealand Society of Authors

The amended settlement agreement now excludes all non-US books apart from those published in the UK, Canada and Australia. Google's press release states that 'After hearing feedback from foreign rightsholders, the plaintiffs decided to narrow the class to include only these countries, which share a common legal heritage and similar book industry practices.' However, New Zealand, where the Society of Authors sent a strongly worded objection letter to the court, and extracted a promise of support from their government, and India, where the government made diplomatic representations to the US, have been excluded. Both are common law countries. India has the third largest English-language publishing sector in the world, after the US and the UK.

I am not a lawyer, but a UK author and researcher. I have read the amended Google Book Settlement agreement and the attached documents and studied much of the extensive commentary that is freely available on the web. The following summary of the main provisions as they affect UK authors is provided with no guarantees: the settlement agreement is a complex and difficult document. My summary does, however, contain references to the relevant sections and subsections, which will not be found in the settlement notices or the summary circulated earlier this year by the ALCS. It is not a substitute for reading the agreement itself (which is probably best studied at the Public Index website [http://thepublicindex.org/], where the hyperlinks make it easier to navigate). Authors with valuable literary properties to safeguard would be advised to consult a lawyer.

I believe that short story writers, poets and essayists who have had work published in edited anthologies and multi-author collections should read the following summary with special attention. Under the settlement the treatment of such works ('inserts', as they are called in the agreement) is different in crucial respects from the treatment of books. It is not, for instance, possible for the author to arrange for their removal from Google's database. To the best of my knowledge, this information has not been well publicised within the UK.

Having studied the agreement closely, I elected to opt out in August, and having looked again at the amended agreement, I have no intention of opting in again. However, I am aware that every author's situation and outlook is different (something the Google Book Settlement agreement, with its one-size-fits-all provisions, markedly disregards). This document has been written not to persuade authors to opt out but to help provide the information they need in assessing the scope and detail of the settlement and weighing up their options. Which still remain open: for a short period only.

I shall begin with what the agreement describes as the 'benefits to the settlement class': the inducements to opt in.

One-off cash payment

A one-off payment from a 'Settlement Fund' is offered for each book or 'insert'* falling within the scope of the settlement agreement that Google has digitized without the permission of the rights-holder(s) (that is, under its Library Project) on or before 5 May 2009.

> Works digitized after that time will attract no payment (and we know that Google has gone on digitizing). Works digitized under Google's Partner Program with the permission of the publisher will also attract no payment. (Many authors are confused about the difference between the Library Project and the Partner Program. Some believe their books have been digitized by Google without permission, when it has been authorized by the publisher [who may or may not have had the contractual right to do so].)

Sums promised

The minimum sums promised are:

- $60 (£36) per 'Principal Work' (book or anthology, etc)
- $15 (£9) per 'Entire Insert' (short story, poem, essay, etc, in edited collection; forewords, etc)
- $5 (£3) per 'Partial Insert' (quotation or extract).

More may be paid out, depending on the number of claims registered. The maximum sums payable are:

- $300 (£180) per book
- $75 (£45) per 'Entire Insert'
- $25 (£15) per 'Partial Insert'.

Only one cash payment will be made per work, no matter how many times it has been digitized or how many books it appears in. If a payment is made for a book, then no additional payment will be made for any portion of it used as inserts. If there is a soft cover and a hard cover edition, only one payment will be made, even if they have different ISBNs.

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* An 'insert' is a work contained in a book in cases where the copyright-holder of the insert is not also the copyright-holder of the book itself: forewords, afterwords, introductions, prologues, epilogues, entire works included in anthologies, essays, poems, short stories, letters, song lyrics, etc. A 'partial insert' is a work of this kind that is not complete in itself, such as a quotation or excerpt. (Amended Settlement Agreement 1.54; 1.75; 1.102)

No claim for an insert may be made if permission was granted for its online use in the book in which it appears, unless the permission had ceased to be in effect after 1st June, 2003.

Who receives the money

In cases where the rights to the book have reverted from the publisher to the author, the money will be paid to the author in full; likewise in cases where the book is in print but the rights are owned by the author.

In cases where a book is in print and under licence to a publisher, the money will be paid to the publisher who will pay the author 'the appropriate splits or royalties as may be specified in the author-publisher contract for the Book or as the parties may otherwise agree'. Payments to the author will 'flow through the royalty statements of the Publisher': in other words they will be off-set, presumably, against any advance outstanding.

In cases where a book is out of print but still under licence to a publisher, the payment will be split between author and publisher. In the case of books published before 1987, 65% will go to the author and 35% to the publisher; for books published during or after 1987, the split will be fifty-fifty. Payments will be separately remitted.

I can find no statement anywhere about who is to receive the payments for inserts, and no statement about whether, or how, these may be split.

Whether a book is 'in print' or 'out of print' will be determined as follows. Google will initially determine whether a book is 'commercially available': that is, offered for sale new anywhere in the world to purchasers in the US, Canada, the UK and Australia. On this basis it will be initially classified as in-print or out-of-print. A rights-holder may assert that a book classified by Google as not commercially available is so in fact, but Google may challenge the classification through the disputes procedure. A rights-holder may also challenge the classification of a book as in-print or out-of-print, in which case it will be resolved with reference to the contract.*

Deadline for claiming

In order to receive the cash payment, works must be claimed by midnight on 31 March, 2011.

Timing of payments

No payments will be made until one year after the 'Effective Date' of the settlement (the date the settlement is approved by the court, or the date when all appeals are exhausted). The agreement envisages that payments will be made within three years of the effective date.

> [Amended Settlement Agreement, 1.31; 1.53; 2.1(b); 3.2(d); 5.1; 13.1(d)(ii); 13.4; Attachment A (Procedures Governing Authors and Publishers), 3.1; 3.2; 5.5; 6.2; 8.1; Attachment C (Plan of Allocation), 3.2]

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* Chiefly, by determining whether the rights have, or could have, reverted, or whether the publisher is in process of bringing out a new edition, and the edition appears within twelve months. Any dispute will be settled through a process set out in Attachment A (Author-Publisher Procedures).

A major obstacle to obtaining payment

In order to claim this payment, UK authors will need to obtain an Individual Taxpayer Identification Number (ITIN) from the US Internal Revenue Service. This is a complicated, expensive and time-consuming process. It would require first obtaining a letter from Google Inc., and then notarized photo-ID, issued with an apostille. It appears that as a rule, either a passport or a driver's licence with a photo are required, and the original document must either be entrusted to the post or personally taken to the US Embassy in London.

The alternative is to pay double tax: the US tax office will take 30% of the payment before it is remitted, and then it will be subject again to income tax in the UK.

So a UK author will see little or no profit from applying for the one-off cash payments, unless he or she has an ITIN already, or Google has digitized quite a number of his or her out-of-print works.

The database for claiming works is reportedly hard to use

Meanwhile, in order to claim works it is necessary to wrestle with Google's online claims database. A number of authors and publishers who have claimed their works or attempted to claim them have reported on the considerable difficulties they have found. There are many errors, and the database sometimes freezes and has been known to crash. The process of identifying and claiming works is said to be excessively laborious. In the case of books that appeared in multiple editions, and short stories or poems that have been much anthologized, the administrative burden of claiming just a single work can be considerable. Prolific authors near the end of their careers, and authors' heirs, can face a crushing volume of entries. Laura Leslie, daughter of Philip K. Dick, found over 3,000 entries for works by her father, as she has described in a declaration to the court. US novelist Catherine Ryan Hyde provided the court with the following account of her attempts to claim her works:*

> When I first searched the database, I identified all of my works that I could find and claimed them as instructed in the Notice. A week later, when I went back to the Database, I discovered nine additional works that appeared unclaimed. When I finished claiming these additional works, the Database showed that my total number of claimed works had only increased by five. Similarly, over the past few months I have found anywhere from forty-two to sixty-nine of my works listed in the Database, with little decipherable information about how these works have been categorized. … The Database is also completely completely unworkable as to inserts. Despite the fact that I have published over fifty short stories, I discovered only one insert while searching the Database. Even more troubling, the Database could not provide me with any information that would help me to identify that insert.

The amended agreement contains a new clause committing Google and the Registry to 'improve the Settlement Website so as to facilitate the claiming of Books'. Google also agrees to 'use reasonable commercial efforts to correct errors in the Books Database' (13.3).

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* See http://thepublicindex.org/docs/objections/leslie.pdf; http://thepublicindex.org/docs/objections/hyde.pdf; and also the comments by David Langford at http://accrispin.blogspot.com/2009/07/victoria-strauss-its-official-doj.html?showComment=1247740079578#c5749149553898504600; http://accrispin.blogspot.com/2009/07/victoria-strauss-its-official-doj.html?showComment=1247833558040#c5378567506088598060

Further issues

Authors who claim their books and apply for the cash payment will be bound in perpetuity (so will their heirs and assigns) by the terms of the Google Book Settlement agreement. There are many reasons to think very carefully before accepting the terms of this long, complex, non-negotiable pseudo-contract. It contains much that is detrimental to authors' rights.

A point to note is that the GBS agreement proposes to pay the publisher for in-print books, and split the payment with the publisher for out-of-print but unreverted books, without any reference to whether the publisher has a licence that covers the relevant digital rights. Those rights are separate from print rights, and in the case of most older contracts they are reserved to the author (a point confirmed in the US by Random House v. RosettaBooks [2001]). This provision is evidently a sweetener for the big commercial publishers.

Payments to be made for the use of works in Google's book enterprise (Google Books)

Google Inc. will be authorized to continue digitizing any and all books published before 6 January 2009 by every UK author who does not opt out of the settlement by the end of 28 January 2010.

On a non-exclusive basis, Google may make the following commercial uses in the USA of books that it determines are not 'commercially available':

- placing advertisements on online book pages displayed by its book search service
- selling individual books in the form of
    a) access to viewing copies held online
    b) pages printed out from such a copy
    c) Print on Demand copies distributed by third parties*
    d) PDF or EPUB files or similar digital formats*
- selling subscriptions to a new Institutional Subscription Database of digitized works
- selling individual access to the database (or part of it) to consumers.*

Google can authorize sales through affiliate programmes and resellers.

It has also promised to provide limited free access to its database in US public libraries and not-for-profit institutions of higher education.

There is no obligation on Google to digitize each and every book that the settlement agreement authorizes it to digitize. And it may, if it wishes, exclude books it has digitized 'from one or more Display Uses for editorial or non-editorial reasons'. Examples of non-editorial reasons are given: 'quality, user experience, legal … reasons'. I suspect the most likely reason would be defective scanning. There are many examples of poor-quality scanning among the files of public domain books freely accessible on Google Books.

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* Subject to the agreement of the Book Rights Registry and, for unclaimed books, the Unclaimed Works Fiduciary.

What rights-holders receive

Payments to rights-holders will be channelled through a new Book Rights Registry, and only rights-holders who register will be paid. Google promises to pay the Registry 63% of revenues from the specified products and services (the figure is arrived at by allocating a nominal 70% to the rights-holders, then slicing off 10% to cover Google's 'operating costs'). Under the amended settlement agreement a different revenue split for a book classified as 'commercially available' may be negotiated between Google and the rights-holder(s); if they cannot agree, either side may withdraw the book from sale.

The Registry will retain a percentage of the money passed on to it by Google for its running costs. It has been estimated that this is likely to be between 10% and 20%. However, the directors are not bound over this in any way at all: there is no cap on the amount that may be retained.

Rights-holders, then, should expect to receive at most about 53% of any income earned by the use of their books. If the Registry turns out to be expensive to operate, they may receive a great deal less.

No money will be paid in respect of income from advertising on search results pages; Google will keep all of that.

Authors of inserts will receive nothing from the sale of books in which their poems, short stories, etc, appear; nor will they receive any fees for advertisements served alongside their works.

Pricing

The default price at which individual books are sold to consumers will be determined by Google's pricing algorithms.

A different price may be set by the registered rights-holder(s), as follows. If a book is in print and the publisher and author agree to authorize its sale to consumers, the publisher has the right to decide the price and negotiate a revenue split with the author. In the event that the author objects to the pricing, he or she has the right to remove the book from the database or exclude it from sale (see below). If a book is out of print but the rights have not reverted to the author, either the author or the publisher may set the price; the Registry will then 'notify the other party, if such a party has been identified', and if they put in 'a timely objection … the Registry will maintain the higher of the prices specified until the parties can agree on a new price for Consumer Purchase'.*

The Registry may authorize Google to make special offers of particular books, subject to the approval of the registered rights-holders. Google may also offer discounts. It is at the discretion of the Registry to decide whether or not Google must make up the revenue it pays in respect of discounted works to the full amount of the list price. There is no limit of any kind on the discounts Google may offer.

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* I cannot find that 'timely' is defined at this point.

Institutional Subscription Database

For works included in the Institutional Subscription Database, an 'inclusion fee' is to be paid, 'targeted at'

- $200 (£120) per book
- $50 (£30) per 'Entire Insert'
- $25 (£15) per 'Partial Insert'.

The total to be paid for all inserts that are taken from a single work is capped at $500 (£300).

There is a special provision relating to inserts where the contract with the author or editor of the book specifically mentions database use: in such cases the insert may attract a larger payment, depending on the terms of the contract.

If an inclusion fee is paid and the rights-holder(s) subsequently direct that the work be removed from Google's database, or excluded from the Institutional Subscription Database, the fee must be returned.

In order to receive an inclusion fee, a rights-holder must have registered the work within ten years of the Effective Date (see above for that).

In addition to the inclusion fee, subscription usage fees will be paid for each book. It will be based on factors such as the number of times users view it and how much of it they view, whether it is copied or printed, and its 'Settlement Controlled Price', that is, its price as determined by Google's algorithms, and not by the rights-holder. No subscription usage fees will be paid for inserts.

Who receives the money

The income from books will be paid to the rights-holders on the principles described above in connection with the one-off cash payments from the Settlement Fund.

Timing of payments

No payments for advertising uses or the sale of individual books will be made until one year after the 'effective date' of the settlement (the date the settlement is approved by the court, or the date when all appeals are exhausted). If there is a dispute between author and publisher over whether the book is in or out of print, payment will be delayed until the dispute is resolved.

Subscription usage fees will not be paid until ten years after the Registry receives the first payment from Google for an Institutional Subscription. Inclusion fees may begin to be paid after five years, if the Registry has received sufficient funds from that source.

No auditing of Registry payments to rights-holders

The Registry may arrange for an independent auditor to audit Google. Google may arrange for an auditor to audit the Registry, but solely in connection with the disbursement of unclaimed funds (paid for the use of books that have not been registered by the rights-holder) and of any funds

mistakenly paid for public domain books. There is no provision for anyone to audit the payments made by the Registry to registered rights-holders.

> [Amended Settlement Agreement, 1.1; 1.31; 1.35; 1.51; 1.52; 1.91; 1.117; 2.1(a); 2.2; 3.2(b); 3.2(d)(i); 3.3; 3.4(b); 3.7(e); 3.14; 4.1; 4.2; 4.4; 4.5; 4.6(e); 4.7; 4.8; 6.1; 6.3(d); Attachment A (Procedures Governing Authors and Publishers), 5.4; 5.5; 6.1(c); 6.2; 8.1; Attachment C (Plan of Allocation), 1; 2; Attachment I (Notice of Class Action Settlement), version attached to original agreement, 8B]

Costs of running the Book Rights Registry

The Registry will establish and maintain a database of rights information, which will track the ownership of the rights in every book and insert, and details of which uses have been authorized by the rights-holders. The data will be complex, immense in volume, and will need to be continually updated. It is an ambitious project, and likely to prove expensive. Concerns have been raised about the extent to which the costs of funding the Registry will cut into the payments that flow from Google towards rights-holders.

> [Amended Settlement Agreement, 6.1(b)]

The Settlement Agreement overturns normal publishing arrangements

The Google Book Settlement reverses copyright law: it bestows on Google a blanket licence and relieves it of the responsibility it would otherwise incur for tracing individual rights-holders and negotiating licensing deals with each one. Instead, the administrative burden is transferred to the rights-holders. It is up to them to register their works and prove, if necessary, their ownership against rival claimants. Moreover, they will need to keep the rights information database up-to-date with changes of contact details and any transfer of rights to an heir or a third party.

In the case of books where the rights have not reverted, author and publisher must negotiate a mutually satisfactory arrangement: and this in a situation where their original contract may offer no guidance. Here again, as noted above, the agreement allocates payments and authority between publishers and authors without paying any attention to whether the publisher holds a licence that covers the relevant digital rights.

Under the standard arrangements of traditional book publishing the author is paid his or her agreed due and the publisher aims to make a profit out of the income that remains. The procedure laid down in the settlement agreement reverses this principle: Google Inc. will take its substantial (37%) slice off the top of the revenues earned by the books before any money flows to the Registry, which will take its slice, of unknown size, and only a share of whatever's left will come to the registered rights-holders.

Google has the last word on pricing

Google may give away books for nothing, or next to nothing, in perpetuity, or for as long as it likes, if it chooses to swallow the cost. Think this unlikely? There are informed observers who believe that one of Google's strategic aims is to destroy the 'payment for content' model of funding creative work and replace it with a 'free, funded by advertising' model: with Google as the chief or sole advertising broker. Giving books away free or very cheap would facilitate such a development.

Further points

For UK authors, problems arise over tax (see above).

As described above, the GBS agreement proposes to pay the publisher for in-print books, and split the payment with the publisher for out-of-print but unreverted books, without any reference to whether the publisher has a licence that covers the relevant digital rights.

No attention is paid to any contracts that exist between publishers or editors and contributors to anthologies or edited collections, or between authors and the owners or licensers of rights to quote long passages. Such contracts specify a particular print publication, and often specify a termination date, and/or territory restrictions, and/or a limit on number and size of editions. These rights are ignored: an attempt is being made to obliterate them.

'Creative Commons'

Under a clause added to the amended settlement agreement, a rights-holder may direct that his or her books be made available free of charge under a 'creative commons' or similar licence.

[Amended Settlement Agreement, 4.2(a)(i)]

Additional 'benefits to the settlement class'

Besides the one-off cash payments and the revenues that may ultimately derive from advertising, consumer sales and the subscription database, the agreement details two further 'benefits' that the 'settlement class' (authors and publishers) will obtain as a result of the settlement. The first is the establishment of the Book Rights Registry, to be initially funded by Google to the tune of $34.5 million. The Book Rights Registry will be controlled by the Association of American Publishers (AAP) and the Authors Guild, the two US bodies who have co-ordinated and funded the lawsuits against Google and who are named in the settlement agreement as 'Associational Plaintiffs'. However, under the amended agreement, the Board of Directors will have at least one author and one publisher representative from the UK, Canada, and Australia, as well as the US.

The second such 'benefit' is the payment of the fees and costs of the attorneys retained by the Authors Guild. Google's promise to pay these lawyers $30 million within ten business days after the date the settlement receives approval has provoked some comment.

[Amended Settlement Agreement, 2.1; 5.5]

The book search service

Some of the advocates for the settlement stress the promotional advantages of inclusion in Google's book database as one of the benefits of staying in. It may be questioned whether the chance to show up on searches conducted on millions of books will really do much to promote most titles. But, in any case, authors and publishers who opt out of the settlement may still take part in Google's Partner Program, under which it digitizes and displays previews of books with the consent of the rights-holders: that is, assuming they like the terms, which should be studied closely.

It should be noted that authors and publishers who participate in the Partner Program remain members of the settlement class under the Google Book Settlement unless they opt out by 28 January 2010. It appears that the terms of the Partner Program supersede those of the GBS agreement, but if in future any of them withdraw from the Partner Program they will find themselves bound by the terms of the settlement agreement unless they have opted out.

The GBS agreement contains nothing to prevent Google from manipulating the results of a book search in any way it chooses.

> [Amended Settlement Agreement, 17.9; Attachment I (Notice of Class Action Settlement), 2; 9C; 9D]

> Any author whose publisher has contracted with Google to include their book in its Partner Project would do well to ensure that at the time the rights revert, the publisher instructs Google to terminate or transfer the contract with the Partner Project, since at least one author has reported that Google Books has refused to acknowledge that since she now controls the rights to her books it ought to report to her.

The right to remove books from the database

Any registered rights-holder of a book may direct that the book should not be digitized, or if it has been digitized, that it should be removed from Google's database and the library copies. In the case of in-print books and out-of-print books that are still under licence both the author and the publisher have this right and either can exercise it. In the case of books that have reverted, the right is held by the author.

> A publisher who requests the removal of an out-of-print book that has not reverted must provide a reason; a wish to benefit the sales of a work with which it might compete will not be considered acceptable.

Note the following deadlines:

- April 5, 2011: requests to have a book removed from the digital copies held by the 'partner' libraries who supply Google with books
- March 9, 2012: requests to have a book removed from Google's own databases

Rights-holders of inserts have no right to request that their works be removed.

> [Amended Settlement Agreement, 1.126; 3.5; Attachment A (Procedures Governing Authors and Publishers), 5.1; 5.2; 5.3; 6.1(c); Attachment I (Notice of Class Action Settlement), 9E]

A point to note

Google promises only 'reasonable efforts' to comply with a request that a book should not be digitized.

It should be noted that when it first came under fire over its 'Library Project' (i.e. for digitizing books without permission), it promised then that it would not digitize books if the rights-holders specifically requested they refrain. However, there have since been complaints that these requests

have not always been honoured.* This is not entirely surprising. Google's digitization operations have never been very systematic. Some books have been digitized more than once.

Google is digitizing books all the time, and has made it clear that it plans to continue digitizing, regardless of what happens over the Google Book Settlement.

There is no guarantee in the settlement agreement that a book, once removed, will not be digitized again. A book that is digitized after the deadlines for removal cannot be removed from the database; it can only be excluded from display (see below). There is no exception made for books digitized in error following a request not to digitize them, nor for books that have been removed once, and later digitized again. There is also no obligation on Google to inform registered rights-holders after it has digitized one of their books.

Some of the authors who have already opted in to the settlement and claimed their books have done this in order to remove them from Google's database. They have concluded that this is the way to protect their control of their copyrights. Unfortunately, it cannot be assumed that this is a once-and-for-all, absolute process. To say the least of it, authors who wish to keep their works off Google's database, or at least to exclude them permanently from display, would be advised to keep a vigilant eye out for the appearance of newly digitized works of theirs, and even, quite possibly, newly digitized copies of books they have previously had removed.

Authors who have opted in to the settlement have lost the right to take action against Google in the US courts on matters arising out of it.

The settlement agreement contains what appears to be a very broad disclaimer of liability on the part of Google and the Registry for any lost profits or other damage.

> The only monetary damages provided for in the agreement are for breaches of the Security Implementation Plan or other actions leading to unauthorized access to works. Remedies would be limited to 'actual damages', and are capped.
>
> [Amended Settlement Agreement, 3.5(a)(i); 3.5(a)(iii); 8.3; 8.4; 8.5; 8.6; 10.1(a); 10.1(f); 10.1(g); 10.1(n); 10.2(a); 10.2(d); 10.2(g); 17.14]

The right to withdraw books from display or sale

Books will initially be classified as 'no display' or 'display' books, depending on whether Google determines them to be 'commercially available' or not. As described above, Google may make commercial uses of 'display' books. However, it undertakes that it will not do so 'until the later of the Effective Date [see above] or sixty … days after notifying the Registry that Google has classified such Book as not Commercially Available'.

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* http://googleblog.blogspot.com/2005/08/making-books-easier-to-find.html. Note the letter to the court from the American Psychological Association: 'Despite APA's explicit October 2005 instructions not to digitize any of its works, the facts demonstrate that Google continued to digitize hundreds of APA works.' (http://thepublicindex.org/docs/letters/apa.pdf). See also http://seekingalpha.com/user/293236/comment/299883.

A registered rights-holder may change the designation of a book to 'commercially available', but Google may then bring a challenge through the disputes procedure.

If Google makes an error and designates a book that is in print as 'not commercially available' and a 'display' book, the rights-holders' only remedy, if they can prove the mistake, is that Google must correct the classification.

As noted in the previous section, Google plans to continue digitizing, and there is no obligation on the company to inform registered rights-holders after it has digitized one of their books. It is apparently up to the rights-holder to find out and claim the book.

There is also no provision for directly informing rights-holders of a book's classification: 'The Books Database will identify whether a Book has been classified as a Display Book or a No Display Book'.

Any registered rights-holder of a book that has been classified as a 'display' book may change its classification to 'no display'. Alternatively, he or she may exclude it from specific 'display uses', subject to certain restrictions (see below). If the author and publisher of a book issue conflicting instructions, the request that will be followed will be the one that authorizes 'the fewest or most limited uses'.

> As with requests for removal, publisher who requests the exclusion from any or all 'display uses' of an out-of-print book that has not reverted must provide a reason for this; a wish to benefit the sales of a work with which it might compete will not be considered acceptable.

If a book classified as 'commercially available' is reclassified as out-of-print following a challenge from a rights-holder the Registry will instruct Google to change it to a 'display' book. However, if a book is re-classified as in-print it is up to the rights-holder(s) to expressly request that its classification be changed to 'no display'.

This last point should act as a tip-off to the wary that many of the default arrangements in the agreement are calculated to satisfy Google's commercial interest in having as many books as possible classified as 'display'. The Registry also has an interest in this, since it needs to cover its running costs.

Section 3.2(e)(i) states: 'The Registry shall be able to direct Google to change the classification of a Book to a Display Book or a group of Books to Display Books.' Section 6.7, more reassuringly, states that the Registry may not direct Google to change a book's classification, or take any other action with regard to a book or insert, ' that is contrary to such Book or Insert Rightsholder's express direction'. However, in the absence of an express direction from the rights-holder(s) it may be possible for the Registry to change any book to a 'display' book if it decides that the book is out of print. The whole matter is rather obscure, even by the standards of this remarkably confusing document. There is no apparent provision for the rights-holders of a book to be notified if such a change takes place.

At any point later than a year after the date of Final Approval of the settlement, Google may request the Registry to change the classification of a book to 'display', if it decides that a mistake was made in classifying it as commercially available, or if it decides that it is not commercially available at that time. From this point the Registry has 120 days to contact the rights-holder(s) and find out whether they want the book to remain classified as a 'no display' book. If the rights-holder(s) do not reply within the time specified, Google may change the book to a 'display' book, and make commercial use of it, without their explicit consent. The clause does not specify any particular methods by which the Registry must seek to communicate with the rights-holder(s).

In view of the various provisions just covered, it would seem prudent of rights-holders to keep a continual close eye on Google's database, to check that the classification of their books remains as they intend. In particular, it may be necessary to be attentive if a book goes out of print but there is no intention to change its designation from 'no display'.

In the case of books deemed to be 'in print' and 'commercially available', and initially classified as 'no display', the publisher may make an initial decision to allow some or all 'display uses'. The most likely reason for doing this would be to permit users of Google's Book Search service to access previews of the content, but the publisher may also authorize consumer sales and inclusion in the subscription database. The author must be notified, as well as the Registry, and the author then has thirty days to notify the publisher and the Registry if he or she does not authorize one or more of the requested uses. If the author objects, 'only the mutually authorized Display Uses shall commence'. If the author at any time changes their mind they may inform the publisher and the Registry.

There are various preview options; the default option allows a preview of 20% of the book, but no more than five adjacent pages, with other restrictions, but there are alternatives.

A registered rights-holder may at any time direct Google or the Registry to exclude his or her book, or part of it, from any one or more of the following: previews, advertising uses, consumer sales in various formats (online access, PoD, PDF/EPUB), the Institutional Subscription Database, a planned book-annotation feature, etc. However, it is apparently not possible to authorize the sale of a book in any format to individual consumers and at the same time withhold it from the Institutional Subscription Database. Moreover, if Google is authorized to make use of a book and a rights-holder subsequently excludes it from use (or removes it from the database) after Google has already sold online access to it, either to an individual consumer or through an institutional subscription, Google may continue to make it available to the purchaser as may be required to fulfil its obligations.

A registered rights-holder of an insert may at any time direct that all or part of it be excluded entirely from 'display uses': that means snippet display, preview and 'access uses': free or purchased online access, the Institutional Subscription Database, and sales in PoD or other formats. They will lose the $50 fee for inclusion in the Institutional Subscription Database (or they will have to return it), but they will safeguard the value in their works.

However, the registered rights-holder of a book (publisher, author or editor) can challenge the exclusion of an insert published in that book 'under law or contract rights': presumably, according to the principles of 'fair use', or under the terms of any contract signed by the rights-holder of the insert. In addition, if the rights-holder of the book is not registered with the book Rights Registry, Google can mount a challenge instead, on grounds of 'fair use'; likewise if the rights-holder is registered, does not wish to challenge the exclusion, but does not mind Google's doing so. Any dispute resulting from a challenge will be settled through the dispute procedures laid down in the settlement agreement.

In cases where a book has more than one registered rights-holder, and one of them directs that its classification be changed from 'no display' to 'display', or directs that it be excluded from 'display uses' entirely or in part, there is apparently no provision for the other rights-holders of a book to receive any direct notification of this.

> [Amended Settlement Agreement, 1.1; 1.31; 1.51; 1.52; 1.91; 1.108; 1.147; 2.2; 3.2(a); 3.2(b); 3.2(c); 3.2(d)(i); 3.2(d)(ii); 3.2(d)(iii); 3.2(d)(iv); 3.2(e); 3.3(a); 3.3(b); 3.3(e); 3.4(b); 3.5(b); 4.3; Attachment A (Procedures Governing Authors and Publishers), 5.1; 5.3; 6.1(c); Attachment C (Plan of Allocation), 1.2(e); Attachment F (Preview Uses)]

Monitoring

Under a clause added to the amended settlement agreement, the Registry will, if requested, undertake to monitor Google's pricing and display of books on behalf of rights-holders outside the US, to ensure that these conform to the rights-holders' instructions. They will also 'use commercially reasonable efforts' to set up an arrangement by which rights-holders may monitor their books themselves.

> [Amended Settlement Agreement, 6.1(f)]

Dispute procedures

All disputes between registered rights-holders and Google or the Book Rights Registry are to be heard by an arbitrator who will be chosen from a pool of arbitrators selected by Google and the Book Rights Registry. The place of arbitration will normally be New York, unless agreed otherwise, but rights-holders may request that the arbitration be held by telephone or videoconference.

The arbitrator's decision will be binding and cannot be appealed. A database of decisions will be maintained, by which arbitrators may be guided, but they will not be obliged to abide by precedents. This system has been criticised as likely to result in uncertainty and confusion.

The arbitrator's fees and costs are to be shared equally by the parties to the arbitration, each of whom must pay their own legal expenses. However, in the event that Google challenges the classification of a book as 'commercially available' and the arbitrator finds in favour of the rightsholder, then Google will pay the costs of the arbitration and rightsholder's costs and legal fees. Note that Google may challenge the exclusion of an insert on 'fair use' grounds, and even if the company loses, there is no provision for the rights-holder to be reimbursed his or her legal expenses, or share of the arbitration costs.

The original settlement agreement provides that if either of the following disputes arise between an author and a publisher and the parties cannot agree the matter should be referred to arbitration under the procedures laid down in the agreement:

- whether a book has reverted to the author
- the royalty to be paid to the author of an in-print book in respect of either the one-off cash payment or any revenues earned

Some US book industry experts have criticised these provisions on the grounds that a compulsory arbitration system would be likely to prove unfavourable to authors' interests.

The original agreement also provided that the following disputes be referred to arbitration:

- disputes between rival claimants to ownership of the same rights
- disputes between co-authors, or an author's heirs or assigns, over pricing, revenue splits, removal of a book, or its inclusion in or exclusion from all or some display uses

A new clause added to the amended settlement agreement states that 'with respect to any dispute between or among Rightsholders and Claimants, the parties to such dispute may elect to resolve such dispute in court or by such other dispute resolution procedure as they may agree'. However, this has also been criticised as offering only an appearance of change.* There is nothing here to compel a publisher to agree to submit a dispute to the courts. If the parties fail to reach agreement, either of them can still submit the dispute for arbitration under the procedures laid down in the amended agreement and Attachment A (the Author-Publisher Procedures).

In the case of a dispute over the appropriate royalty split, the side bringing the dispute to arbitration must pay the Registry a filing fee of $300 (£180). Half of this will be returned to them if they win.

The Author-Publisher Procedures provide that 'Publishers and Authors shall use commercially reasonable efforts to provide author-publisher contracts to assist the Registry (or Arbitrator) in classifying Books as In-Print or Out-of-Print and in resolving disputes brought pursuant to these Author-Publisher Procedures'. Is it 'commercially reasonable' to expect authors to keep the contracts of books that are long out of print? I know that many have not.

No attention is paid at any point in the agreement to the existence of the many print publications that have never been the subject of commercial contracts, or of permissions that have been granted on the basis of an informal understanding.

> [Amended Settlement Agreement, 3.2(d)(iv); 3.5(b)(ii); 9; Attachment A (Procedures Governing Authors and Publishers), 5.5; 6.3; 6.4;7; 11.3]

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* See comments by Edward Hasbrouck, co-chair of the Book Division of the National Writers Union, on his blog (http://hasbrouck.org/blog/archives/001781.html)

Moral rights

The moral rights of authors who are opted in to the settlement are waived. Moral rights are guaranteed under the Berne Convention, which defines them as:

> the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [the author's] honor or reputation (Article 6*bis*.1).

In the context of Google's book enterprise, this would cover the excerpting of works in 'page views', and the display of advertising beside a work (which could be held to be 'prejudicial to [the author's] honor or reputation').

[Amended Settlement Agreement, 10.1(b); 10.1(d); 10.1(f); 10.1(h); 10.1(j)]

Advertising

The placing of advertisements is controlled under the settlement agreement: for instance, Google may not place advertisements on pages, or use pop-ups. It may, however, use animated, audio or video advertisements.

Moreover, the agreement places no controls on the content of the advertisements, nor is there any scope for an individual rights-holder to state objections to certain kinds of advertisements (eg. anti-gay-marriage advertisements, which Google has carried in the past). The only option is to exclude a work from advertising uses altogether (and thus from any revenue from advertisements).

[Amended Settlement Agreement, 3.10(c)(iii)]

Trademarks

The rights of authors who are opted in to the settlement to sue Google over infringement of their trademarks are waived. This means that without fear of legal action Google could use an author's name, pen name(s) and/or series titles as AdWords, and offer them to him or her for sale, or sell them to rival authors.

It was reported in September that Google had begun 'direct mailing authors and agents to sign onto its AdWords service' using the database of contact information gathered through the settlement.*

[Amended Settlement Agreement, 10.1(b); 10.1(d); 10.1(f); 10.1(h); 10.1(j)]

Legal releases

The settlement commits authors to relinquishing any legal claims under US law against Google Inc and the libraries that supplied it with the books to scan.

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* http://twitter.com/lynnchu/status/3841871760

An entire clause is devoted to 'Mutual Releases by Insert/Book Rightsholder Releasors'. As I read it, it means that in return for their one-off cash payments, rights-holders of inserts waive all claims against the authors, editors or publishers of the books in which their inserts were published for any use that is made (or not made) of their works in Google's book enterprise. An author may have issued a licence to an editor or publisher that specified print publication only, or a single edition, or a limited time period: this clause wipes out those conditions. If the rights-holder(s) of the book that contains the insert remove the book from Google's database, or exclude it from display, the rights-holder(s) of the insert have no grounds for challenging this. Likewise, if the rights-holder(s) of an insert elects to exclude the work from display, the rights-holder(s) of the book it is in have no claim against them for choosing to do this, even though it may reduce their income from advertising and make the book less saleable (though section 3.5(b)(ii) gives them a right to challenge such exclusions on certain grounds, as described above).

It seems very possible that this particular 'release' clause might also be made to cover any claims an author might otherwise bring against other authors, editors of anthologies etc, and publishers for copyright infringements committed in the past (including any that have not yet come to light).

I note that the releases in the agreement only cover claims under US law. I do not see, on the face of it, how this release, wide-ranging though it is, can affect the rights issued, withheld or limited under a contract for a UK publication drawn up under UK law, or prevent an author taking action in the UK courts. But this is the kind of question that needs a lawyer.

[Amended Settlement Agreement, 10; see especially 10.1(a); 10.2(f)]

Effect of opt-out

The agreement states that if all the rights-holders who have a 'Copyright Interest' in a book or insert opt out of the settlement by the deadline then the agreement neither 'authorizes or prohibits' its use, no legal claims are relinquished, and the agreement will not apply to it.

'Copyright interest' is defined as '(a) ownership (including joint ownership) of a United States copyright interest or (b) an exclusive license of a United States copyright interest'.

In the case of UK publications where the US rights were reserved to the author and never licensed, it seems to be the case that no publisher can claim rights in the book. The agreement speaks only of 'an exclusive license of a United States copyright interest': in other words, a licence for the UK rights only does not give a publisher any right to claim a work under the GBS.

[Amended Settlement Agreement, 1.41; 17.33]

Nothing is said of books or inserts where the publisher who holds a licence for the US rights opts in and claims the work and the author opts out. I strongly suspect the omission is studied, designed to panic authors into believing that if they opt out and their publisher opts in, the publisher will take control of the work.

However, if an author opts out, it is hard to see how, even under US law, the settlement could confer any rights on the publisher, and through the publisher on Google Inc., that have not been previously conferred on the publisher by the contract between the publisher and the author.

The settlement purports to confer on Google a perpetual licence that covers database and online rights as well as a proposed scheme to sell Print on Demand and e-books (as PDF and EPUB files). In the case of a work where the author/author's estate still holds the copyright, it seems to me that in order to claim it under the provisions of the GBS a publisher would need to hold either a) an exclusive US licence to all rights, without any reservations, in perpetuity or b) an exclusive US licence that specifically covers all the relevant electronic/digital rights, including database and online rights, plus Print on Demand rights, again in perpetuity. Any provision in the contract for reversion of the rights would surely be a bar to the publisher's awarding a perpetual licence to Google. But these are points that need elucidating by a lawyer.

It should be noted that the case of Random House v. RosettaBooks (2001) established in the US that electronic rights are separate from print rights, and that a contract to publish a work 'in book form' does not confer electronic publishing rights on the publisher. This case confirmed that in the case of most older contracts these rights are not controlled by the publisher but are reserved to the author.

> US publication alone is not sufficient to bring a work within the scope of the Google Book Settlement agreement. It must also have been registered with the US Copyright Office. In the case of inserts, they must either have been registered as separate works or be part of a longer work that has been separately registered.

Some more legal issues

The addition of two UK authors, Maureen Duffy and Margaret Drabble, to the 'representative plaintiffs' is a gesture towards complying with the rules that govern class actions under US law. It does not seem to me that it can affect the position under international law (though I am open to correction).

Regardless of the emergence of the two 'representative plaintiffs', the GBS is still relying on the Berne Convention as a device for bringing non-US authors (and more specifically non-US publications) within the scope of the settlement. And this is legally inadmissible. The New Zealand Society of Authors set the matter out very well in the objection they filed with the court:

> The Berne Convention … provides for reciprocity of protection. It does not provide for reciprocity of burden. Whether one agrees or disagrees with the settlement, clearly it does far more than afford protections to authors. It sets up what has been referred to as an international licensing regime requiring affirmative action and expense by authors to understand it first of all and then to take steps even if they wish to opt out. Those are not reciprocal protections as envisaged by Berne and therefore it is not appropriate to use that treaty as a means to extend the settlement to non US authors.

I also explored aspects of this question in my paper 'The Google Book Settlement and European Authors'.*

UK authors who are concerned about the GBS should press the government to take this matter up with the US government as a matter of urgency. They should remind the government that it is a human rights issue. Article 17.2 of the Charter of Fundamental Rights of the European Union states that 'Intellectual property shall be protected.'

The objection from the New Zealand Society of Authors continues as follows:

> Given that Berne does not of itself bring New Zealand authors within the ambit of the settlement, it follows that the Court does not have jurisdiction over them. Any grant of copyright by a New Zealand author must be subject to New Zealand law and the jurisdiction of the New Zealand courts.

This must apply equally in the UK. In the case of a contract drawn up in the UK and subject to UK law, if a publisher tries to go beyond its terms in licensing rights to a third party, in this case Google, then surely there are legal remedies to be found in the UK courts. Even if it is a matter of the US rights: the important point would be that it is a UK contract.

In other words, if an author opted out, but his or her UK publisher opted in, and claimed his or her book on the grounds that they held a US licence for it, I think that unless they could show they also held a licence for all the rest of the relevant rights (see above) in perpetuity – since that is what Google is being awarded under the settlement – they would probably have a case to answer in the UK courts. But this, again, is a question for a lawyer.

I also think that if an author woke up in a few months time, having not opted out, nor claimed his or her works, and found that Google was making commercial uses of them with the connivance of the UK publisher, they could probably bring a case in the UK. Somehow I find it hard to imagine that the courts in Britain would look kindly on British authors' being 'opted-in by default',under a warped interpretation of the Berne Convention, by way of a private lawsuit conducted by third parties in a foreign country, into a perpetual contract of immense complexity, stuffed with clauses damaging to their interests. I think they would take account, also, of the fact that the settlement agreement has been heavily criticised in the US by the Department of Justice and the US Copyright Office. But these too are questions for a lawyer.

The future of Google Books

Google may in future hive off its rights and responsibilities under the settlement agreement to a division of the company or an affiliate. It may also assign the settlement agreement to another company, without the need for anyone's consent, either in connection with a merger, or the sale of all or most of the assets to which the agreement relates (such as the digitized book corpus). Any company to which the agreement is assigned will be bound by its terms.

> [Amended Settlement Agreement, 17.30]

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* http://thepublicindex.org/docs/objections/NZSA.pdf; http://www.gilliansprags.com/gbs/google_settlement.html

There is not space here to make a detailed examination of the business model outlined in the settlement agreement. However, a few points are crying out to be made.

In an article published in June, Tim Barton, President of Oxford University Press (USA), a supporter of the settlement, made the following observation:

> Google's core business is not e-book and database retailing, and it may be a reluctant entrant into this arena, having frequently stressed that it is not in the business of creating content. So why is Google willing to make a rumored $200 million investment in scanning and to tackle the practical issues involved in restoring to life so many books, when most publishers have eschewed that opportunity? Perhaps it is that Google is playing for advertising trillions rather than publishing billions. Investments that those seeking a return from publishing could not make are more understandable when potential global-advertising revenue streams are at stake.*

It should be noted that Google's vast income from advertising comes from aggregating vast numbers of small payments. Big publishers may be possibly be able to skim enough small payments off advertising served alongside preview pages from books on their backlists to make participating in Google Books worth their while. It seems to me unlikely that individual authors will make more than small change.

It may also be noted that Google's advertising profits will be unaffected by any amount of illicit file-sharing by users of its service. I discussed the high likelihood of piracy in my paper 'The Google Book Settlement and European Authors'.

Scott E. Gant, an author and lawyer, raises some key issues about the commercial proposals in the settlement agreement in the objection he filed with the court:

> All of the purported benefits to class members under the Proposed Settlement's commercial arrangement depend on the successful establishment and operation of the as-of-now non-existent Book Rights Registry. While the Proposed Settlement requires Google to make a monetary contribution to establish the Registry, the Agreement does not guarantee the Registry will operate as planned, or that future funding will be sufficient to ensure it can fulfill the functions described in the Proposed Settlement. In fact, the person widely expected to be the first Executive Director of the Registry if the Proposed Settlement is approved has acknowledged there is no assurance the Registry will not fail. What happens to class members if the Registry does not operate as planned? If the Registry does not make timely payments? If the Registry runs out of money? It appears that under the terms of the Proposed Settlement Google would retain all of the rights obtained from copyright owners by virtue of the Settlement Agreement, while copyright owners would have no apparent mechanism for redress or ability to rescind the transfer of their rights to Google.†

Finally, a recent interview with journalist Ken Auletta, who has just published a book on Google, contains an enlightening vignette of Sergey Brin, co-founder of Google and keen advocate of the Google Book Settlement:

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* http://www.oup.com/us/brochure/OUP_Inc_Google_Book_Settlement/

† http://thepublicindex.org/docs/objections/gant.pdf

> [Q]: Google co-founder Sergey Brin told you that "people don't buy books anymore" and that you should put your new book online for free. Your response?
>
> Auletta: When Brin told me this I asked him a series of questions. Who, I asked him, would pay me a salary to work on the book? Who would pay for my 13 trips to Google, including airfare, hotel and car? Who would edit the book? Who would do the book tour and marketing? Who would prepare the index? Who would do the legal vetting? By the end of my questions, Brin wanted to change the subject. The reason, I think, is that he has an innocent faith in the Internet and inadequate knowledge about how books are published.*

Quality issues

Google 'makes no guarantees … regarding the Digitization quality … of any Book or Insert'.

> [Amended Settlement Agreement, 17.10]

The poor quality of much of the scanning of the public domain books available for free download from Google Books is notorious. Blurred pages, missing pages, cropped pages, folded pages and snapshots of scanners' hands obscuring the text are all familiar problems. Google is said to have begun to address these defects; nonetheless, they are still serving up defective files. This is irritating even when they are being made available free of charge; it is not going to please paying customers. It seems all too possible that Google Books will spoil the market for quality scanned copies, while offering both readers and rights-holders a very unreliable service.

At the moment, apparently, it is a similar story with its free public domain EPUB editions. 'Google turns classic books into free gibberish eBooks' is a headline that appeared on the Computer Shopper website in August. It would seem from the article that the free e-books took the form of uncorrected OCR output. The journalist's conclusion: 'Until Google decides it's going to check the text after it's been through the OCR process, Project Gutenberg remains the best destination for free eBooks.'† Again, this kind of thing is not going to please paying customers.

Gillian Spraggs

Loughborough

3 December, 2009

Revised 29 December, 2009 (chiefly the first two paragraphs, which now go into more detail about the scope of the settlement)

This document may be found online at http://www.gilliansprags.com/gbs/GBS_survival_aid.html

Appendix 1: How to Opt Out

The filing of the amended settlement agreement initiated a new opt-out period which began on 13 November. It ends on 28 January 2010.

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* http://www.iwantmedia.com/people/people83.html

† http://www.expertreviews.co.uk/news/267379/google-turns-classic-books-into-free-gibberish-ebooks.html

Although it is clear from the amended agreement that the new opt-out period has already begun, the memorandum filed in support of it speaks of a '45-day Period to Object, Opt-Out Or Opt-In', beginning on 14 December.

> [Amended Settlement Agreement, 1.12; 10.2(b)(i); Memorandum in Support, G2; Order Granting Preliminary Approval, 17]

It appears that on 14 December Google will reinstate the facilities for opting out online at the settlement website (http://www.googlebooksettlement.com/) that were in operation before the previous opt-out deadline (4 September). It should be noted that those who opted out online this summer received no confirmation besides an on-screen message: not even an automatic email. At least one author found that the system crashed just before he reached the confirmation screen.

The other and to my mind safer way to opt out is by letter. The settlement notice (Attachment I) gives the following instructions for opt-out letters; these

- 'must be signed … by an authorized person'
- 'must state which Sub-Class you wish to opt out of (either the Author Sub-Class or Publisher Sub-Class)'

  In a letter to the court, Edward Hasbrouck, co-chair of the Book Division of the National Writers Union, stated that he believed this direction to be 'both incorrect and improper:

  > Since I am opting out of the proposed settlement, I am not subject to its purported division of the proposed class into sub-classes. In any case, it is possible that if I didn't opt out I might be found (under the vague and ambiguous definitions and the partially yet-to-be-determined decision-making procedures of the settlement, the outcomes of which I am unable to predict) to be a member of either or both the Author Sub-Class and/or the Publisher Sub-Class. Accordingly, I am opting out of both Sub-Classes, and of the settlement in its entirety.*

  It is, of course, perfectly possible to be both a publisher and an author: one of the many complexities that the settlement agreement, in its mad rigidity, disregards.
- 'must provide your name and address or, if you are an author's agent, must provide the name of the Author Sub-Class member on whose behalf you are acting (i.e., the person whose name appears as the author of the Book or Insert), and any pseudonym used to author the Books, if applicable'

  In a phone call to the settlement administrator in the summer, I confirmed that the address provided, while it has to be a proper contact address, does not have to be an author's home address. In my letter I used the address of my agent (after obtaining her permission).

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* http://thepublicindex.org/docs/opt_outs/Hasbrouck.pdf

- should be sent to the Settlement Administrator at the following address:

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

- should be sent 'by first class mail, postage prepaid …The postmark will determine the time of mailing'.

  A record of the time of mailing may be important; if the letter doesn't arrive by the opt-out deadline, it may be necessary to prove that it was posted before the deadline was reached. The instruction to use US first class mail obviously doesn't make sense in the UK. When I opted out in August, I sent my letter by fast certified air mail (Airsure). It took two weeks to arrive. At one point the US postal service appeared to have lost track of it. In a phone call to the administrator's office I was told that I could scan my letter and send it as an email attachment, which I did. The physical letter turned up eventually.

The settlement notice also requests that all authors and publishers opting out should provide the following information about the books and inserts in which they have rights: title, author, publisher and ISBN (if any). However, it makes the point that this is not a requirement. They do not require it because legally they cannot do this.

You do not have to list all your works to opt out of the settlement. You do not have to be trapped in the settlement just because your publishing history is far too complicated to sort out in a hurry (if at all).

However, if you wish to ask that your books should not be digitized, and that any that have been digitized should be removed from Google's database, you must specifically request this in your opt-out letter. It will not be enough just to say that you are writing to opt out.

The settlement website FAQ page states:

> Although Google has no obligation under the Settlement to comply with such request, Google has advised the Settlement Administrator that it is Google's current policy to voluntarily honor such requests, if the books or Inserts are individually specified, are in copyright, and the author or publisher has a valid and unchallenged copyright interest in their books and Inserts.*

You don't have to list all your works at the point when you request their removal. If you are pressed for time, and/or the matter is especially complicated, you can opt out, make your request for removal, and send a list of works to Google at a later stage. I confirmed this point in August in a phone conversation with the office of the settlement administrator.

At the head of my list of books I put the clause 'These instructions include but are not limited to the following publications: ', which I adapted from an opt-out letter I found on the web. This seemed to

* http://www.googlebooksettlement.com/help/bin/answer.py?answer=118704&hl=en#q18a

me to cover not only any publications I might have overlooked, but also the possibility that someone, somewhere, has reprinted some of my work without permission.

I understand that instead of having your works removed from the database, you can arrange instead to have them transferred to the Partner Program. I recommend reading the terms and conditions very carefully before deciding to do this.

The settlement administrator told me in August that if I expressly requested written confirmation by post this would be sent me. However, this promise has not been honoured; all I have received is an email, which I do not find acceptable. I am minded to write to the court at this point, to make certain that my opt out is properly filed. If I were to opt out now, I would certainly copy the letter to the court (not necessarily with the publications list attached, since that is not essential).

Some authors have chosen to opt out in letters to the court, which has filed their opt outs with the court documents. It would be advisable to copy any opt-out letters sent to the court to Rust Consulting, the settlement administrator, at the address above.

Letters to the court should be sent to

> Office of the Clerk,
> J. Michael McMahon,
> U.S. District Court for the Southern District of New York,
> 500 Pearl Street, New York, New York 10007, USA

They should be copied by email or 'first class mail' to the lawyers representing Google and the plaintiffs:

Counsel for the Author Sub-Class:

Michael J. Boni, Esq.
Joanne Zack, Esq.
Joshua Snyder, Esq.
Boni & Zack LLC, 15 St. Asaphs Road
Bala Cynwyd, PA 19004, USA
bookclaims@bonizack.com

Counsel for the Publisher Sub-Class:

Jeffrey P. Cunard, Esq.
Bruce P. Keller, Esq.
Debevoise & Plimpton LLP, 919 Third Avenue
New York, NY 10022, USA
bookclaims@debevoise.com

Counsel for Google:

Daralyn J. Durie, Esq.
Joseph C. Gratz, Esq.
Durie Tangri Lemley Roberts & Kent LLP,
332 Pine Street, Suite 200,
San Francisco, CA 94104, USA
bookclaims@durietangri.com

[Attachment I (Notice of Class Action Settlement), 15]

Appendix 2: How to Opt In and Claim Your Works

Authors may claim their works at the Google Book Settlement website: http://www.googlebooksettlement.com/.

A step-by-step set of instructions in PDF format has been compiled and made available by SF author Kristine Smith, chair of the digital rights management committee of Novelists Inc: http://www.nasw.org/mt-archives/pdf/Google_claim_instructions.pdf.

Any author who wishes to send a formal objection letter to the court should send it to the Office of the Clerk, and copy it to the counsels for the plaintiffs and Google (addresses in Appendix 1). Objections at this stage should address only the the provisions amending the original agreement. The deadline is 28 January 2010.

[Attachment I (Notice of Class Action Settlement), 16, 17; Attachment N (Supplemental Notice), p. 5]

Appendix 3: Unclaimed Works

The default opting-in of all rights-holders other than those who take action to opt out within a certain deadline has been one of the aspects of the agreement that has faced the fiercest criticism. The amended agreement makes two changes, neither of which go to the heart of the problem, which is the forced opt-in itself.

One is the appointment of an officer termed the 'Unclaimed Works Fiduciary', with certain powers over matters such as the pricing, display options, and commercial and advertising uses of the unclaimed books. He or she will be chosen by the vote of the Board of Directors of the Registry and will be subject to Court approval.

The other is the use of the revenues earned by the unclaimed books. After six years from the Effective Date, the Registry may use up to 25% of that money to attempt to locate the rights-holders of unclaimed books. After ten years any unclaimed funds will be distributed to charities in the United States, Canada, the United Kingdom and Australia 'that directly or indirectly benefit the Rightsholders and the reading public'.

It is hardly the most pressing issue, but it does seem to me that it would be ethically and perhaps legally unacceptable for UK charities to accept money that came from exploiting the intellectual property of UK citizens without their authorization, in an enterprise that would not be legal under UK law.

[Amended Settlement Agreement, 6.2(b)(iii); 6.3(a)(i)(3)]