

Information about the Google Book Settlement

for any poet, short story writer, essayist or other writer who has had work published in anthologies or collections edited by other people

Google has been digitizing very large numbers of books without the permission of the copyright-owners and adding them to its book search index. In settlement of a class action law suit brought in the United States, the company has agreed to make modest one-off payments to the authors and publishers of in-copyright works digitized on or before 5 May 2009. The settlement agreement also contains a number of other, much more contentious, provisions.

Shorter pieces published in anthologies and edited multi-author collections are treated **far less favourably** under the settlement agreement than book-length works. This fact has not been well publicised within the UK.

Works affected

All printed books published in the UK, Canada or Australia on or before 5 January 2009 fall within the scope of the Google Book Settlement, as do all printed books published in the US and registered with the US Copyright Office on or before that date. Note that not all US publications are registered with the Copyright Office.*

'Inserts'

The settlement agreement applies the term 'insert' to any work contained in a book in cases where the author of the insert is not the same as the author or editor of the book. Complete poems and other works included in anthologies are termed inserts, as are short stories, novellas and essays in multi-author collections. A work of this kind that is not complete in itself, such as a quotation or excerpt, is termed a 'partial insert'.

[Amended Settlement Agreement 1.54; 1.75; 1.102]

All inserts in books published in the UK, Canada or Australia fall within the scope of the settlement. In the case of US publications, inserts will only fall within the scope of the settlement if they have been separately registered with the US Copyright Office, either as individual works or because they are excerpts from a registered book.

One-off payment

Inserts will attract a one-off payment of \$15–75 (£9–45), depending on the volume of claims. Quotations and excerpts (no matter how long) will attract a one-off payment of \$5–25 (£3–15). Only one cash payment will be made per work, no matter how many books it appears in. No claim may be made for an insert 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.

[Amended Settlement Agreement 2.1(b); 5.1; 13.1(d)(ii); Attachment C (Plan of Allocation), 3.2]

Rights granted to Google

As part of the settlement agreement, the plaintiffs (who are supported by the Association of American Publishers and the US Authors Guild) propose to grant Google permission to continue digitizing all and any books published on or before 5 January 2009 in the US, the UK, Canada and Australia. No one-off payment will be made in respect of any work digitized after 5 May.

* 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/>.

In addition, Google will be granted what amounts to a perpetual non-exclusive licence to exploit commercially in the US any of the books it digitizes that it decides are not 'commercially available'. Its plans include placing advertisements on online book pages displayed by its book search service, and selling individual books in the form of access to viewing copies held online, Print on Demand copies, and PDF or EPUB files. Limited free access to the database will be provided in US public libraries.

[Amended Settlement Agreement 1.1; 1.31; 1.35; 1.51; 1.52; 1.117; 2.1(a); 2.1(b); 2.4; 3.1; 3.3(a); 3.3(b); 3.14; 4.2; 4.7; 4.8; 10]

Proposals for distributing revenues

A share in any revenues earned by each book will be paid to the copyright-holders of the individual books (authors, editors, literary estates and publishers). No revenues will be paid to the copyright-holders of inserts. Authors of poems and short stories whose works have been published in anthologies and edited collections will receive nothing from the sale of those books.

They will also receive no fees for advertisements served alongside their works on 'preview' pages served up by Google Book Search. The default setting for anthologies and short story collections is 'no preview', but this may be changed at any time by the editor and/or publisher of the volume. The default setting for collections of essays appears to be the standard one: that is, in response to a search by a user, Google will serve up to 20% of a book's pages, but no more than five adjacent pages at one time. This might represent all or most of a short essay; moreover, the editor/and or publisher of the book has the option to increase the percentage of the book that may be previewed and remove the limitation on adjacent pages.

[Amended Settlement Agreement 4.3; 4.5; Attachment F (Preview Uses)]

Google also proposes to sell library subscriptions to a new Institutional Subscription Database of digitized books. For works included in the Institutional Subscription Database, an 'inclusion fee' is to be paid, 'targeted at' \$50 (£30) for an 'Entire Insert' (complete poem, short story or essay) and \$25 (£15) for a quotation or extract. 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 some such cases, the insert may attract a larger payment, depending on the terms of the contract.

In addition to the inclusion fee, subscription usage fees will be paid for each book, based on factors that will include the number of times that users view it and how much of it they view. No subscription usage fees will be paid for inserts.

In the case of inserts digitized after 5 May 2009, the one-off fee for inclusion in the Institutional Subscription Database will be all the payment the author has any chance of seeing. No fee will be paid until at least five years after the settlement is ratified by the court. There is no guarantee that subscription revenue will be sufficient to reach even the modest target sums.

[Amended Settlement Agreement 1.77; 1.78; 2.1(a); 3.7; 4.1; Attachment C (Plan of Allocation) 1.1; 1.2]

No option to remove inserts

Book authors who do not like the terms of the Google Book Settlement agreement have two choices at present: they can opt out of the settlement by 28 January 2010, or they can register their books and request to have the digital files removed from the databases held by Google and the 'partner' libraries

that have supplied it with books.* (They should be aware, though, that there is effectively nothing in the settlement agreement that prevents Google from digitizing those books again at a later stage.)

Authors of 'inserts' have no option to arrange to have these works removed from the databases. By not opting out of the settlement, the authors of anthologized poems and short stories are treated as though they have consented to these works' remaining in the databases. They will only be removed if the editor or publisher of the collection that contains them elects to have the entire book removed.

If these authors stay in the settlement, the only thing they can do to protect the value in their anthologized works and control their use is to register their ownership and direct that these works be excluded from 'display uses'. This is supposed to ensure that they will not be included on preview pages, or if a purchaser buys online access to an anthology or collection in which they were printed, or it is sold in Print on Demand, PDF, or EPUB form.

However, the copyright-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 copyright-holder of the insert. In addition, if the rights-holder of the book has not come forward, or does not wish to challenge the exclusion, Google can mount a challenge instead. Any dispute resulting from a challenge will be settled through commercial arbitration, which will normally be heard in New York. Even if the author of the insert wins the dispute, there is no provision for him or her to be reimbursed his or her legal expenses or share of the arbitration costs.

[Amended Settlement Agreement 1.1; 1.52; 3.5; see especially 3.5(b)(i); 3.5(b)(ii); 9; see especially 9.9; Attachment I (Settlement Notice) 9(E)]

Waiver

Under the settlement agreement, 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 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.

It seems possible that the 'release' clauses 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). However, it covers only claims under US law.

[Amended Settlement Agreement 10.1(a); 10.1(m); 10.2(f)]

Opting Out

The settlement agreement states that if all the copyright-holders who have a United States '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. In other words, a UK publication continues to enjoy the protection of US and international copyright law.

[Amended Settlement Agreement 17.33]

* By April 5, 2011, if they want a book removed from the digital copies held by the 'partner' libraries who have supplied Google with books; or by March 9, 2012 if they only want it removed from Google's own databases.

Nothing is said of books or inserts where a publisher who holds an exclusive licence for the US rights opts in and claims the work and the author opts out. However, if an author opts out, it is hard to see how 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 publisher's contract would presumably need to cover all the relevant electronic/digital rights in the work. Any provision in the contract for reversion of the rights would surely be a bar to the publisher's awarding a non-terminable licence to Google.

Authors (and literary estates) who fail to opt out of the settlement by 28 January 2010 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.

I am not a lawyer, but a UK scholar, poet and translator. I have been driven to research the Google Book Settlement and circulate information to other authors since I discovered that the summaries and other advisory documents published by the settlement's supporters were inadequate and in places misleading. The treatment of 'inserts' is one aspect that has been almost entirely glossed over.

The settlement agreement is a complex and difficult document. This brief summary of the treatment of anthologized pieces, excerpts and other 'inserts' is provided with no guarantees. It is not a substitute for studying the agreement itself. Authors and literary executors with valuable literary properties to safeguard would be advised to consult a lawyer.

A fuller account of the contents of the agreement will be found in my paper 'The Google Book Settlement: a survival aid for UK authors' (see below for link). It contains information on how to opt out, and also much information that authors are likely to find useful if they elect to stay in the settlement and claim their works.

Gillian Spraggs

Loughborough

28 December, 2009

This document may be found online at <http://www.gillianspraggs.com/gbs/inserts.html>

Further information

Gillian Spraggs, 'The Google Book Settlement: a survival aid for UK authors':

http://www.gillianspraggs.com/gbs/GBS_survival_aid.html

National Writers Union (NWU), 'FAQ about the revised Google Book Search copyright infringement settlement proposal': <http://www.nwubook.org/NWU-GBS2-FAQ.html>

Kenneth Crews, 'Google Books: "Dude, Where're My Inserts?":

<http://copyright.columbia.edu/copyright/2009/12/17/google-books-dude-where-re-my-inserts/>

The 'Public Index' has all the documents in the case: <http://thepublicindex.org/>

The Google Book Settlement agreement is here:

a) downloadable PDF: http://thepublicindex.org/docs/amended_settlement/amended_settlement.pdf

b) hyperlinked html: <http://thepublicindex.org/settlement>

Note: it is not safe to rely on the official summaries of the settlement agreement found in attachments J and N.

The official Google Book Settlement website is here: <http://www.googlebooksettlement.com/>

Note the warnings in the NWU FAQ against relying on the information provided by the settlement website.

For breaking news the best site is James Grimmelman's 'Laboratorium': <http://laboratorium.net/>