



Settlement between U.S. authors and publishers and Google, concerning the creation of 'digital libraries': information summary for ALCS members

Background

During the past four years Google has been digitising copies of books in the U.S. to make them accessible via their Book Search service. Google has entered into partnership agreements with certain publishers to use scans to promote sales of books. Separately Google has also been undertaking a large-scale programme of scanning books held in U.S. libraries. Although originally focussed on Public Domain works, the Library Project also included the scanning of works in copyright but favoured an opt-out model rather than a system of up-front rights clearance. Defending the principle that permission should be sought prior to the use of copyright works, the Authors Guild and the Association of American Publishers issued separate legal proceedings against Google. Pending final approval by the Court (and any subsequent appeals), these proceedings were effectively brought to an end by the Settlement Agreement announced at the end of October 2008. Following discussions and debate during 2009, certain amendments have been proposed to the original terms of the settlement. In February 2010 a Court in the U.S. will consider whether or not to pass the amended proposals as a fair settlement.

Impact on UK authors

The Settlement is not limited to U.S. authors/ publications - it also covers books and 'inserts' first published in the UK, Canada and Australia. 'Inserts' are distinct parts of text included within books - examples given include forewords, poems and quotations from other books, and a limited range of graphic works. Claims in respect of Inserts only apply in cases where the author/owner of the insert is a distinct person from the rightsholder of the book in which it appears.

Many UK writers (or their heirs and successors) are therefore potentially part of the 'class' to which this Settlement applies and have the opportunity to submit claims for financial recompense.

The Settlement website (<http://www.googlebooksettlement.com>) provides links to the database listing works that are potentially covered by the Settlement.

Class members that do not wish to participate in the Settlement were originally given until the 5th May 2009 to opt-out. This deadline was subsequently extended to 4th September 2009 and then extended again until 28th January 2010. (A list of key dates appears at the end of this paper).

Claims under the Settlement

To account for the books/inserts scanned prior to the opt-out date Google has agreed to make available a pot of no less than \$45m for claims. For each work claimed against, minimum rates of \$60 (books), \$15 (Inserts), \$5 (partial Inserts) will apply. The money attaches to the digitised *content*, so multiple claims for exactly the same text appearing in multiple volumes will not attract multiple payments.

If total claims are less than \$45m, further payments will be made: up to \$300 per book, up to \$75 per insert. Any surplus after this allocation will be dealt with under the rules applying to the Book Rights Registry, a new body to be established using further funds from the Settlement (see details below).

Use of digitised works

Status of works

Aside from the issue of making payments to rightsholders for works scanned by Google without express permission, the Settlement also deals with the future use of these digitised works. Through the process of digitising library stock, Google copies works that have fallen into the Public Domain, works that are 'out of print' and works that are 'in print'. It is compiling a huge, valuable database of works, many of which are hard to find or access. The Settlement recognises that Google will offer various services connected to this database, and that income generated from these services will be split: 37% for Google, the remaining 63% to the Book Rights Registry for distribution to authors and publishers.

The operation of the services vary depending on whether the book is in or out of print. Google will make the initial classification of works as "Commercially Available" or "not Commercially Available" using the following criteria to determine the former:

"...the Rightsholder of such Book, or such Rightsholder's designated agent, is, at the time in question, offering the Book (other than as derived from a Library Scan) for sale new, from sellers anywhere in the world, through one or more then-customary channels of trade into purchasers within the United States., Canada, the United Kingdom or Australia."

In determining these classifications Google will consult "multiple third-party databases" and analyse the "the Book's retail availability based on information that is publicly available to it on the Internet. Google will use third-party databases from a range of United States, Canadian, United Kingdom, and Australian sources."

These classifications appear on the database of works available via the settlement website. Rightsholders (individually or through the Book Rights Registry) may challenge Google's initial determination in respect of a given work.

The Settlement provides a mechanism for authors to change the status of a book at the Registry. This is an important point for authors as the division of revenues to authors (and level of control over the use of the book) depends on the position of the author's rights in the out of print books, and whether they can be said to have 'reverted' to the author. The challenge process is set out in full in the Schedule to this paper.

The services that Google will provide in relation to its database fall under two broad headings: 'display uses' and 'non-display uses'.

Display uses

1. Access uses. Viewing and annotating the entire book; printing and copying/ pasting 'portions'.

- a) Institutional subscriptions. Subscriptions to the database will be sold to the business, education and public administration sectors. Pricing will follow per student/ per employee models and will be based around 'market rates', arrived at by weighing factors such as the breadth of the repertoire and the rates offered by comparable services. Individual copy/paste commands will be limited to 4 pages; individual print commands will be limited to 20 pages. Printed pages will carry copyright notice watermarks.
- b) Consumer purchases. Individuals may also pay for the right to access books in the database, with pricing set either by individual rightsholders or by Google directly based on a pricing algorithm to be designed by Google to find the optimal price for each book.
- c) Public Access libraries. The database will be made available for free at dedicated terminals in public libraries and selected non-profit higher education institutions. The annotation and copy/ paste functions will be disabled for this type of use. Printing will be permitted with per-page revenue from print charges split between Google and the Registry in the above shares. The Registry may approve the extension of this kind of service to commercial 'copy shops'. The data tracking technology used to measure these public access uses will be provided by Google.

Google and the Registry may in future agree to expand these commercial services e.g. into print-on-demand schemes.

2. Preview uses. (Viewing excerpts of books on-line as a sales tool subject to certain limitations). The Standard Preview service will limit the viewing to 20% of a book (with no more than 5 consecutive pages displayed) prior to a 'purchase decision'; fiction works will preview no more than 5% of text adjacent to the viewed page and will block the last 15 pages. A 'Fixed View' service may be developed to enable a pre-determined 10% of content to be available for viewing. Advertising will run alongside preview pages and, as with all revenues, this will be shared between Google and the Registry according to the 37/63 split.

3. Snippet displays. Each user will be allowed to view three 'snippets' (3/4 lines) from each book.

4. Bibliographic data. A book's title page, copyright notices, table of contents and index may be displayed to users.

Non-display uses

These are uses that do not involve displaying the actual content of the book, just items such as bibliographic details.

Library use

Google will provide participating libraries with a digital copy of each scanned book to use for purposes such as preservation, making accessible copies for disabled people and permitting library staff to access up to 5% of an out of print book for 'scholarly purposes'.

Research Corpus

The whole body of digitised books will be maintained at two host sites (and possibly a third hosted by Google) for the following purposes:

- (a) computational analysis of the digitized images to either improve the image or extracting textual or structural information from the image;
- (b) extracting information to understand or develop relationships among or within Books;
- (c) linguistic analysis, to better understand language, linguistic use, semantics and syntax as they evolve over time and across genres of Books;
- (d) automated translation (without actually producing translations of Books for display purposes); and
- (e) developing new indexing and search techniques.

These sites will only be available to 'qualified users' i.e. a person linked formally to a library participating in the Google digitisation scheme.

Opting out of the various usage schemes

For out of print books Google has the right to make all Display Uses. The rightsholder, can at any time, direct Google to prohibit certain uses of a particular work. The exclusion may be activated at the request of either the author or the publisher.

For in-print books Google can only include them for Display Uses with the express authorisation of all of the relevant rightsholders. These instructions can change at any time.

Rightsholders can remove a book completely from the project by lodging a notice with Google prior to 9th March 2012. This is separate from opting out of the Settlement and any rights to cash payments under the Settlement.

The Book Rights Registry

Governance

The payments due to authors and publishers from the above uses will be administered by a new body, the Book Rights Registry. The Registry will be established using a further sum of \$34.5m, payable by Google for this purpose under the terms of the Settlement. The Registry will be managed by a Board comprising an equal number of author and publisher representatives and will include separate representation from each of the non-U.S. territories (UK, Canada and Australia). A further seat on the board will be reserved for a 'fiduciary' to represent the interests of rightsholders due unclaimed fees.

Overall fee distribution

Once the start-up money from Google has been used up, the Registry will fund itself by taking a commission of (10-20%) from the fees paid by Google.

The net revenues received by the Registry will be split between two funds: a Usage Fee Fund (75%) and an Inclusion Fee Fund (25%). The former will provide income to those

whose books are actually used in the various services (based on a fixed price x hits/views model), while the latter will provide a fixed payment (likely to be c.\$200) for each book that is registered.

Authors-publisher fee splits

The distribution of fees by the Registry depends on whether a book is classified as being in or out of print. Authors can influence this determination by following the process set out in the Author-Publisher protocols under the Settlement (the relevant extract is set out in the Schedule to this paper).

In Print books. Unless the book is a work 'made for hire' (a feature of U.S. copyright that confers automatic authorship of works on employers/ commissioners over the creator) both the author and publisher must authorise the Display Uses. In the first place the Publisher will state the uses it wishes to authorise for a given book, and the author will have 30 days to object to some/ all uses. Both authors and publishers have a say in price setting for Display Uses, but the publisher retains sole control of pricing for Consumer Purchase schemes.

Payments for in-print books will be made by the Registry direct to the publisher and be transferred to the author as royalty payments under the terms of the publishing contract.

Out of print books. Unless the book is a work 'made for hire', books that have had the rights reverted (or are otherwise 'author controlled') are solely controlled by the author in terms of pricing, consent to uses etc. In other cases of non work 'made for hire' books the author and publisher retain joint control.

Payments for out of print books will be made by the Registry direct to the author and/or publisher in the following shares:

- a) Rights reverted/ author controlled = 100% to author
- b) Works for hire = 100% to publisher
- c) Cases where the above conditions are not manifest:
 - (i) published before 1987 = 65% to author, 35% to publisher
 - (ii) published during/after 1987 = 50% each

Disputes over which category a book falls into are first dealt with by the parties, then the Registry and finally by an Arbitrator. Disputes over the status of books designed for education purposes can only be dealt with by reference to the publishing contract.

Unclaimed funds

The Amended Settlement clarifies that, from its inception, the Registry will use settlement funds to attempt to locate Rightsholders. The Amended Settlement also now provides that Unclaimed Funds will not be used by the Registry for general operations or reserves and will not be distributed to claiming Rightsholders. The Amended Settlement envisages the following processes:

- (i) Unclaimed Funds are held for five years, the Registry, in collaboration with organizations in Canada, the UK and Australia, and in consultation with the fiduciary, may use up to 25% of the funds for the sole purpose of locating Rightsholders;

(ii) Remaining Unclaimed Funds will be held for the Rightsholders for at least 10 years, after which the Registry, subject to fiduciary approval as to timing, may apply to the Court for permission to distribute Unclaimed Funds to literacy-based charities in the United States, Canada, the UK and Australia.

Schedule

Author-Controlled Determination (Article IV, Author-publisher procedures)

4.1 Procedures. The following procedure shall apply in determining whether any Book for which the rights have not reverted to the Author (other than a Book that is a work-for-hire or for which the author-publisher contract does not provide for reversion of rights to the Author in any circumstances) shall be classified as Author-Controlled solely for purposes of the Revenue Models and other Registry-brokered licenses:

(a) An Author shall send or shall have previously sent to the Publisher (either before or after the Effective Date) a request for reversion to the Author of rights in such Book, in accordance with the author-publisher contract.

(b) If the Publisher does not respond or did not previously respond in writing to such request within (i) ninety (90) days or (ii) the applicable written response period specified in the author-publisher contract, if any (whichever period is longer) (the "Response Period"), then the Author may send a "Change Status Notice" to the Registry (with a copy to the Publisher). The Change Status Notice must:

(i) affirm that the Author believes that the Book is no longer "in-print," as defined in Test 1 and that the Response Period has expired, and request that the Book be deemed to be Author-Controlled;

(ii) include a copy of the request for reversion previously sent to the Publisher; and

(iii) include a copy of the applicable author-publisher contract if the Author has it.

(c) Upon receipt of a Change Status Notice for a Book, the Registry shall escrow all revenues from Revenue Models thereafter owed to an Author and Publisher of the Book.

(d) If, within one hundred twenty (120) days of the date of the Change Status Notice, the Publisher does not respond in writing to the Registry and the Author to dispute the Change Status Notice, the Registry shall deem the Book to be Author-Controlled. Such Author-Controlled Book shall be subject to Section 6.1(b) and escrowed revenues shall be distributed according to Section 6.2(a).

(e) If, within one hundred twenty (120) days of the date of the Change Status Notice, the Publisher disputes the Change Status Notice, the parties shall submit the issues in dispute to the Registry for decision.

(i) At either party's request, the Registry shall review both parties' documentary submissions, as well as any other relevant evidence, to determine whether the Book should be classified as In-Print or as Out-of-Print pursuant to the procedures and tests in Article III.

(ii) The Registry shall review both parties' documentary submissions, as well as any other relevant evidence, to determine whether rights in the Book are subject to reversion to the Author according to the terms of the author-publisher contract.

(iii) If the Registry determines that the conditions in the author-publisher contract for reversion to the Author of rights in the Book have been met, the Registry shall deem the Book to be Out-of-Print and Author-Controlled, the Book shall be subject to Section 6.1(b), and all escrowed revenues shall be distributed according to Section 6.2(a).

(iv) If the Registry determines that the conditions in the author-publisher

contract for reversion to the Author of rights in the Book have not been met and that the Book is Out-of-Print, then the Out-of-Print Book shall be subject to Section 6.1(a) or 6.1(c), as applicable, and all escrowed revenues shall be distributed pursuant to Section 6.2(b) or 6.2(c), as applicable.

(v) If the Registry determines an Out-of-Print Book should be reclassified as an In-Print Book, then the In-Print Book shall be subject to Article V.

Landmark dates for authors

Date	Event	Action
January 5 th 2009	On-line publication of list of works digitised by Google	Check the list for your works
January 28 th 2010	Opt-out for Settlement claims	Send notice prior to this deadline if you want to opt-out of the Settlement (and retain the right to bring separate legal proceedings).
February 18 th 2010	Fairness Hearing	Register any objections to the Settlement before this date.
March 31 st 2011	Deadline for submission of claims under the Settlement	Send notice prior to this deadline to register work(s) against the \$45m claims pot
March 9 th 2012	Closing date for complete removal of a book from the scheme(s)	Final call for notices to Google/ the Rights Registry to remove a work from the scheme