

What the Google Book Settlement Means for Authors and Publishers

An Annotated Summary

by Joy R. Butler*

(Please read the disclaimer on page 10.)

This document provides a summary of the proposed Google Book Settlement Agreement (the "Settlement"). You can find the full Settlement and all its attachments online at www.googlebooksettlement.com.

LISTEN TO TELSESEMINAR REPLAY: This annotated summary tracks a free teleseminar I offered on April 2, 2009. A recording of the teleseminar will be available for replay by phone until at least May 31, 2009. You can access the complimentary telephone replay by calling (641) 715-3900. When prompted for the extension, enter 47422 followed by the pound sign (#). The written outline for the teleseminar is available at www.joybutler.com/googleoutline.pdf

Numerical References Used in this Annotated Summary

Unless otherwise noted, the numerical references in parenthesis are references to the relevant provisions in the main body of the Settlement. I do also reference the following documents that are attachments to the Settlement:

- Attachment A - Author-Publisher Procedures (abbreviated herein as "**A/P Procedures**")
- Attachment C – **Plan of Allocation**
- Attachment F – **Preview Uses**
- Final Notice of Class Action Settlement (abbreviated herein as "**Final Notice**")

I. Overview. If the Google Book Settlement is approved, the following will happen:

- A.** Google will pay \$45 million to copyright owners whose books and inserts were digitized without permission on or before May 5, 2009. It's estimated that each book copyright owner will get at least \$60 and up to \$300. (Section 5.1 (a), pp. 61-62; Plan of Allocation, Section 3.2, p. 7; Final Notice, p. 11)

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- B. Google will pay \$34.5 million to establish a Book Rights Registry (the “Registry”). (Section 2.1(c), p. 20)
 - 1. The Registry will receive payments from Google and distribute those payments to authors and publishers. It will also represent copyright owners in negotiating terms for new or modified uses of books under the Settlement. (Section 6.1, p. 65)
 - 2. The Registry will be a not-for-profit managed by a board consisting of both authors and publishers. (Section 6.2, pp. 65-66)
- C. Google will pay up to \$30 Million to counsel for the author sub-class. (Section 5.5, p. 64)
- D. Google will be allowed to use your books for commercial purposes which include subscriptions to an electronic database, sales to consumers, and advertising uses (Section 2.1(a), p. 19). Authors and publishers will receive 63% of the revenues from those commercial uses. (Section 2.1(a), p. 19; Section 4.5(a), p. 56)

II. Background - Evolution of the Google Book Program and Lawsuit

- A. In 2004, Google announced the Google Library Project. Google entered into agreements with several libraries to digitize books in those libraries’ collections. The books digitized included books still protected by copyright. Google displayed snippets – or several lines of text - of the digitized books in response to search results on Google.
- B. There was a class action lawsuit filed in the Southern District of New York. The parties that initiated the lawsuit include the Authors Guild, the Association of American Publishers, McGraw-Hill Companies, Simon & Schuster, John Wiley & Sons, and five individual authors. The name of the lawsuit is *The Authors Guild v. Google*, Case No. 05 CV 8136-JES (S.D.N.Y.) That lawsuit has led to the proposed Settlement.

III. Who Falls Under the Terms of the Google Book Settlement?

- A. The Settlement applies to you if you have a copyright interest in a book that was published on or before January 5, 2009. The Settlement does not apply to books published after January 5, 2009. (Final Notice, p. 1)
- B. The Settlement applies to books owned by citizens of other countries if the book was published in the United States or the person’s country of citizenship has copyright relations with the United States (*e.g.*, through an international copyright treaty such as the Berne Convention). (Final Notice, p. 5)

- C. The Settlement applies to certain inserts that may appear in books. Most inserts are text-based like a foreword, an epilogue, a poem, or an essay. Inserts also include song lyrics, tables, and charts. (Section 1.72, p. 9)
- D. Photographs, illustrations, maps, paintings and other pictorial works in books are covered by the Settlement ONLY if one of two circumstances applies:
 - 1. The pictorial work is an illustration in a children's book.
 - 2. The same person holds the copyright in the pictorial work and in the book in which the pictorial work appears. (Section 1.72, p. 9)

IV. Important Dates

- A. May 5, 2009 is the deadline to opt out of the Settlement (Final Notice, p. 25). You can opt out online at www.googlebooksettlement.com. If you opt out
 - 1. You will not receive the \$60 - \$300 cash settlement payment.
 - 2. You will not waive any claims against Google (meaning that you could still file a copyright infringement lawsuit against Google if it digitized your book without your permission).
 - 3. Google will not be able to use your copyrighted book under the Settlement.
- B. January 5, 2010 is the deadline to file a claim to receive the cash settlement of \$60 to \$300 if Google digitized your book prior to May 5, 2009 without your permission (Final Notice, p. 11). This deadline is relevant only if you do not opt out of the Settlement by May 5, 2009.
- C. April 5, 2011 is the deadline to request removal of your book altogether from Google's book database (Final Notice, p. 10). This deadline is relevant only if you do not opt out of the Settlement by May 5, 2009.

V. What Can Google Do with Your Book If You Remain in the Settlement

- A. Overview
 - 1. If you remain in the Settlement, Google can make various uses of your book. (Section 2.1(a), p. 19)
- B. Display Uses
 - 1. "Display Uses" include Snippet Display, Front Matter Display, Preview Use, and Access Use. (Section 1.48, p. 7)
 - 2. If Google determines that your book **is** commercially available, Google will classify your book as a No Display book and will not display your book unless you give Google permission to do so. If Google determines that your book **is not** commercially available, it will automatically categorize your book as a Display Book meaning that Google may display it. (Section 3.2(b), p. 23)

3. What does Display Use entail?
 - a) Snippet. Google can offer “snippets” of your book in response to searches. Snippets are three to four lines of text from your book offered in response to a search request. (Section 1.147, p. 18)
 - b) Preview. Google can offer a free preview or sample of your book - similar to amazon.com’s “Look Inside” feature. (Section 4.3(a), p. 51)
 - (1) The default Preview setting for most books is Standard Preview which allows someone to view up to 20% of the book but no more than five adjacent pages. (Section 4.3(b)(i), pp. 51-52)
 - (a) For fiction books, the final 5% or the last fifteen pages will be blocked. (Section 4.3(b)(i)(1), p. 53)
 - (b) By default, there is no preview for poetry or fictional short stories. (Section 4.3(b)(ii), p. 52; Attachment F-Preview Uses)
 - (2) You can change the default Standard Preview setting to Fixed Preview or Continuous Preview. (Section 4.3(c), p. 53)
 - (a) Continuous Preview removes the five-adjacent-page restriction and limits the preview to 10% of the book. (Section 4.3(c)(iii), p. 53)
 - (b) Fixed Preview fixes the specific pages that can be previewed for every search and for every user. Fixed Preview is the default for reference books like dictionaries. (Section 4.3(b)(iii), p. 53)
 - (3) Unless you (or the Registry) approves, Preview Use will not let the user “copy and paste”, print or do book annotations. (Section 4.3(b)(i)(3), p. 52.)

C. Access Use

1. Categorized under the Settlement as a Display Use. (Section 1.48, p. 7)
2. Access Use currently includes Institutional Subscriptions, Consumer Purchase, and the Public Access Service. (Section 1.1, p. 2)
3. Google has five years to implement Institutional Subscriptions and Consumer Purchases. If it fails to do so, it can lose the rights to display books. (Section 3.7(a) & (b), pp. 34-35)
4. Institutional Subscriptions
 - a) Google will offer a database of all digitized books and sell subscriptions to the database to various institutions. Users of the institutional database will have online access to the full contents of your book. (Sections 1.74 & 1.75, p. 10; Section 4.1(a)(5), pp. 42-43)
 - b) Users will be able to view, “copy and paste”, and print pages of the book, and might also be able to do book annotations. There are limitations on the “copy and paste” and print functions. For “copy and paste”, someone could only copy and paste up to four pages with a single copy/paste command. The user will not be able to print more than twenty pages with one print command. (Section 4.1(d), p. 47)

- c) Printed pages will have a watermark with encrypted data that identifies the authorized user. (Section 4.1(d), p. 47)
- d) There is currently no specific rates set for Institutional Subscriptions. Google and the Registry will have to agree on pricing before Google can offer Institutional Subscriptions. Pricing decision goes to arbitration if they cannot agree. (Section 4.1(a)(vi)(4)(a). p. 44.)

5. Consumer Purchases

- a) A consumer will be able to buy (perpetual) online access to the full contents of your book. (Section 1.32, p. 5; Section 4.2(a), p. 48)
- b) Purchasers will be able to view, copy/paste and print pages of a book, and might also be able to do book annotations. Consumer purchases will have the same “copy and paste” and print features and restrictions as the Institutional Subscriptions. (Section 4.2(a), p. 48.)
- c) With respect to pricing for Consumer Purchase, the rights owner of the book could specify the price (Specified Price) or could allow Google to set the price. (Settlement Controlled Price). (Section 4.2(b), pp. 48-49.) Settlement Controlled Price is the default. (Section 4.2(b)(iii), p. 49).

6. Public Access at Libraries and elsewhere.

- a) Google will make the Institutional Database available at public libraries and at not-for-profit higher education institutions. (Section 1.115, p. 14; Section 4.8, pp. 60-61)
- b) There will be no subscription charge to these institutions and no payments to authors and publishers. (Section 4.8(a)(i), p. 60)
- c) Google may allow patrons to print from Display Books for a fee and that fee would be shared with authors and publishers. (Section 4.8(a)(ii), p. 60)
- d) A related potential future use is to provide similar public access at commercial businesses such as copy shops. There would be a subscription or annual fee for such service. The Registry and Google would have to agree to the terms for this revenue model. (Section 4.8(b), p. 61)

D. Advertising Uses

- 1. For advertising uses, Google can display advertisements on Preview Use pages and on web pages dedicated to a single book (*e.g.*, pages displaying snippets, search results from a user’s search performed within a single book). (Section 3.14, p. 41)
- 2. Google cannot place the advertisements on, behind or over the contents of a book. (Section 3.10(c)(3), p. 40)

E. Research Corpus

- 1. The research corpus is a set of all digital copies of books made in connection with the Google book project. (Section 1.130, p. 17)

2. The research corpus may be hosted at up to two institutions at any given time. Google may become a third host. The hosts may provide on-site and remote access for non-consumptive research. (Section 7.2(d)(ii) & (iii), pp. 79-80)
3. Non-consumptive research is research where the researcher is not reading or displaying your book for the sake of understanding its content. For example, it might be linguistic analysis or research related to automated translation techniques (Section 1.90, p. 11)

F. Book Annotation

1. “Book Annotation” allows an online reader to add text to your book. The annotated text will be displayed on or over any webpage on which a page of the book appears. (Section 1.17, p. 4)
2. Only the user who added the book annotations and a limited number of his associates will see the annotations. (Section 3.10(c)(5), pp. 39-40)
3. Book annotation may be a feature of Institutional Subscriptions and Consumer Purchases. (Section 4.1(d), p. 47; Section 4.2(a), p. 48)

G. Non-Display Uses

1. Non-Display Uses are uses that do not involve displaying any content from the book to the public. Examples include display of bibliographic information. (Section 1.91, p. 12)
2. The only way to prevent your book from being used in Non-Display Use is to opt out of the Settlement or request removal. (Section 3.3(a), p. 27; Section 3.4(a), p. 28)

H. Additional Future Commercial Uses

1. Additional future commercial uses of books that might be offered through the Settlement include:
 - a) Consumer subscriptions (similar in concept to the institutional subscriptions)
 - b) Print on Demand (POD) Books
 - c) Custom publishing. Custom publishing is using portions of books in educational book packs and for course materials. Includes other forms of custom publishing for the educational and professional markets.
 - d) PDF downloads
 - e) summaries, abstracts or compilations of Books
2. Google cannot initiate any of these new uses without authorization from the Registry or the copyright owner of the book. (Section 4.7, p. 59)

VI. Right to Remove or Exclude Your Books

A. Removal

1. You can request that your book be removed. With removal, no digital copies of your book will be available through the Settlement (with the possible

exception of a back-up tape). (Section 1.124, p. 16; Section 3.5(a), pp. 28-29.)

2. You must request removal by April 5, 2011. After that, Google will honor your request only if the book has not already been digitized. If the book has already been digitized after April 5, 2011, you can request exclusion but not removal. (Section 3.5(a)(iii), p. 29; Final Notice, p. 10)
3. If you do not want Google to make any commercial uses of your book but you miss the May 5, 2009 opt-out deadline, requesting removal is your next best option.
4. If you stay in the Settlement and remove your book rather than opt out of the Settlement, you will be eligible for the cash settlement payment.

B. Exclusion

1. Any rightsholder of a book at any time may direct exclusion of the book from Display Use, from Book Annotation, from Institutional Subscriptions, from Consumer Purchases, from Advertising Uses, and from Public Access Service. (Section 1.131, p. 17; Section 3.5(b)(i), p. 29)
2. Any rightsholder of an insert at any time may direct exclusion of the insert from all (but not less than all) Display Uses. (Section 3.5(b)(i), pp. 29-30)

VII. Payments by Google to Authors and Publishers

A. Cash Settlement Claims

1. Google is providing \$45 Million for a cash settlement payment. The minimum cash settlement is \$60 for books, \$15 for an entire insert, and \$5 for a partial insert. (Section 5.1(a), pp. 61-62)
2. Depending on the number of claims, the cash settlement may go up to \$300 for books, \$75 per entire insert, and \$25 per partial insert. (Plan of Allocation, Section 3.2, p. 7; Final Notice, p. 11)
3. You must register and file a claim by January 5, 2010 in order to receive the cash settlement payment. (Final Notice, p. 11)

B. Share of Revenues

1. Google is going to share with authors/publishers 63% of revenues from purchases and from advertising. (Section 2.1(a), p. 19; Section 4.5(a), p. 56)
2. While Google will pay \$34.5 million to launch the Registry, the ongoing administration, operations, and tax costs for the Registry will be deducted from the authors and publishers' 63% of revenue. (Section 2.1(c), p. 20; Plan of Allocation, Sections 2.1 and 4.2, pp. 6 & 7)
3. The revenue can be impacted by the price ultimately charged for the use of books. For example, with the Registry's authorization, Google has the opportunity to discount books for consumer purchase by up to 40% off of list price. (Section 4.5(b)(ii), p. 56)

4. For most of the revenue models (advertising, consumer purchases, print-on-demand, custom publishing, and pdf downloads), you will be compensated based on the actual use of the book. (Plan of Allocation, Section 2.1, p. 6)
5. For Institutional Subscriptions, you will receive payment based on an inclusion fee and a usage fee.
 - a) Inclusion Fee. A payment just because your work is included in the database. The target inclusion fee is \$200 for books, \$50 for an entire insert, and \$25 for a partial insert. (Plan of Allocation, Section 1.2(a), p. 2)
 - b) Usage Fee. A payment based on the actual use of your book through the database. (Plan of Allocation, Section 1.1, pp. 1-2)
 - c) Rightsholders of inserts will receive inclusion fees but not usage fees. (Plan of Allocation, Section 1.1(f), p. 2)
6. You must register in order to receive any of these payments. (Plan of Allocation, Section 1.1(c) & 2.2, pp. 1 & 6)

VIII. Significance of Google Classifying Your Book as Commercially Available Versus Not Commercially Available

- A. Google will classify your book as “Commercially Available” if the book is available for sale new through one or more customary channels of trade in the United States. (Section 1.28, p. 4)
 - a) Being available as a print-on-demand book alone may not be sufficient to make Google classify a book as commercially available. (Section 4.7(a), p. 59)
- B. If your book is not commercially available,
 1. you cannot withdraw it from the research corpus. (Section 7.2(d)(iv), pp. 80-81.)
 2. the coupling requirement applies which means if you want to make your book available for consumer purchase (or any of the other new revenue models), you cannot exclude it from the institutional subscription database. (Section 3.5(b)(iii), p. 30)
 3. certain colleges and universities may allow faculty members to read, print, or download up to five pages of your book for personal scholarly use or for classroom use. (Section 7.2(b)(vii), p. 76)
 4. in the event class members request removal of more than 200,000 books classified as not commercially available, Google can begin challenging whether class members are the rightful owners of the books they claim. However, Google can only make such challenges of a rightsholder that requests removal for more than a certain number of books (Google is keeping the number confidential). (Section 13.2(c), pp. 120-121)

IX. Impact of Google Settlement on Relationships between Authors and Publishers

- A.** Many of the provisions for relationships between authors and publishers are in the Author-Publisher Procedures which is Attachment A to the Settlement.
- B.** Many aspects of whether the publisher or author controls the book depend on whether or not the book is commercially available. In addition to using the terms commercially available and not commercially available, the Author-Publisher Procedures use the categorizations of in-print and out-of-print.
- C.** For the most part, classification of the book as commercially available will lead to a classification as in-print and classification of the book as not commercially available will lead to a classification as out-of-print. (A/P Procedures, Section 3.1, p.1-2)
- D.** A book is in-print if it meets either of the following tests
 - 1.** Test 1: The author-publisher contract for the book does not provide for reversion to the author of rights in the book under any circumstances, - or - the book is “in-print” according to the terms of the author-publisher contract. (A/P Procedures, Section 3.2(a)(i), p. 2)
 - 2.** Test 2: The publisher announces its intent to publish an existing or new edition of the book, and does so within twelve months of the announcement. (A/P Procedures, Section 3.2(a)(ii), p.2)
- E.** If the book is in-print:
 - 1.** Either the publisher or the author may request removal or exclusion of the book. (A/P Procedures, Section 5.1, p.5)
 - 2.** Both the author and the publisher must agree on which Display Uses Google may make of the book. (A/P Procedures, Section 5.1, pp. 5-6)
 - 3.** If the author and publisher issue conflicting instructions for removal, exclusion, or Display Uses, Google will implement the more restrictive instructions. (A/P Procedures, Section 5.3, p. 6)
 - 4.** All payments from the Registry (for cash settlement and commercial use) will be made by the Registry to the publisher and flow to the author through the royalty statements of the publisher. (A/P Procedures, Section 5.5, p.6)
- F.** If the book is out-of-print:
 - 1.** If the rights have reverted to the author, the author makes all decisions and receives payment from the Registry (A/P Procedures, Section 6.1(b) and 6.2(a), pp. 7 & 8)
 - 2.** If the rights have not reverted to the author, then both the author and the publisher are considered rightsholders. The Registry will separately remit payment to both the author and the publisher. (A/P Procedures, Section 6.2(c), p. 8).
 - a)** If the out-of-print book was published prior to 1987, 65% goes to the author and 35% goes to the publisher.

- b) If the out-of-print book was published in or after 1987, it's a 50/50 split between author and publisher.
- 3. If author and publisher make conflicting claims as to which owns rights in an out-of-print book, the dispute goes to arbitration. (A/P Procedures, Section 6.4, pp. 8-9)

X. Other Factors to Consider When Deciding How to Respond

- A. The interests of all authors and publishers regarding the Settlement may not be aligned. Large publishers that control hundreds of books may view the Settlement as a better deal than small publishers who control small catalogs of books.
- B. For those who simply want their book to continue to be available, the Settlement may be useful.
- C. Authors and publishers may anticipate that the exposure will increase sales for their book or anticipate receiving satisfactory income from the Settlement.
- D. The Settlement places many disputes out of the court system and into mandatory arbitration (Section 9.1(a), p. 105). The results of those arbitration proceedings will be confidential and not publicly available. However, publishers/authors who remain in the Settlement will have access to redacted versions of the decisions. (Section 9.8, p. 108)

DISCLAIMER: The material in this annotated summary is offered for informational purposes only, and should not be relied on as legal advice. Nothing herein constitutes the establishment of an attorney-client relationship between you and the Law Office of Joy R. Butler. While I have attempted to present accurate information, the Google Book Settlement is a complicated document of 300+ pages and this summary may omit a nuance, exception, or interpretation that is applicable to your specific situation.

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