

California Digital Library

Highlights of the Google Books Amended Settlement Agreement

Nov. 16, 2009

This summary highlights key revisions to the Amended Settlement Agreement that was filed with the court on Friday, November 13th between Google, the Authors' Guild, and the Association of American Publishers. Additional information including the full text of the amendment may be found on the Settlement Administration website at <http://www.googlebooksettlement.com/r/home>.

Google's overview of the revised Settlement terms is available here: <https://sites.google.com/a/pressatgoogle.com/googlebookssettlement/revise-settlement/SettlementModificationsOverview.pdf>.

A more complete summary can be found in the proposed Supplemental Notice to Rightsholders (<http://www.googlebooksettlement.com/Supplemental-Notice.pdf>).

References in parentheses are to the corresponding clauses in the Amended Settlement Agreement (ASA).

International Works (ASA Section 1.19)

- The scope of the class has been amended to include only those Rights Holders who either registered their copyright with the U.S. Copyright Office or published their book in the UK, Australia, or Canada by January 5, 2009.
 - ☞ The effect of this change is to exclude most foreign works from non-English-speaking countries from the Settlement terms, including any of the revenue models established by the Settlement. Google will continue to scan these works from libraries and will continue to supply Fully Participating Libraries with an LDC of these works. It's estimated that this will reduce the size of the institutional subscription corpus by as much as 50-60% or more.

Definition of a Book (ASA Section 1.19)

- The definition of a Book under the Settlement has been modified in the following ways:
 - 1) To conform to the exclusion of international works above, by excluding works whose copyright was not registered with the U.S. Copyright Office or published in the UK, Australia, or Canada on or before January 5, 2009.
 - 2) To exclude works more than 20% of whose pages consist largely of musical notation.
 - 3) To add calendars as an exclusion from what is a "Book" and add "comic book" to what is included as a Periodical
 - ☞ The effect of these changes is to exclude most foreign works (as defined above) as well as works whose primary purpose is for the performance of music (in response to

objections by the Songwriters Guild). Google will continue to scan these works from libraries and to supply Fully Participating Libraries with an LDC.

Microforms (ASA Section 1.50)

- Digitization under the Settlement now explicitly excludes digitization from microform.

Commercial Availability (ASA Section 1.31)

- Google will notify the Registry when it classifies a Book as not Commercially Available and then wait 60 days before making Display Uses of that Book. Changes of status from not Commercially Available to Commercially Available will be made promptly upon notice from the Book Rights Registry.
- A Book will be considered Commercially Available if it is available for sale new from sellers anywhere in the world to purchasers in the U.S., the U.K., Canada or Australia.

☞ The effect of the latter change is to clarify that the definition of commercial availability is world-wide in scope, as long as the affected works are available to purchasers in the U.S. or the other named English speaking countries. Commercial availability affects the viewability status within the Institutional Subscription and other revenue models; by default, works that are commercially available will have their display status set to ‘no display’ and will therefore not be viewable in the required library services or other revenue models.

Removal of Books (ASA Section 1.126)

- The date by which Rightsholders must notify Google of a decision to remove their Books from the Settlement has been extended to March 9, 2012 (27 months from the new Supplemental Notice Commencement Date). The original date was April 5, 2011 (27 months from the original Notice Commencement Date). If a Rightsholder removes his or her Book after April 5, 2011, Google will retain the ability to maintain a copy of the scan, to make technological updates to improve the file, to provide Books to Fully Participating Libraries and Research Corpus Host Sites, and to use the Book if Google is serving as a Host Site.
- The Removal date for purposes of the LDC and the Research Corpus is unchanged from the original agreement: April 5, 2011.

☞ The effect of this change is to give Rightsholders the same amount of time as in the original Settlement to review the terms of Amended Settlement Agreement and decide whether to remove their works from the Settlement or keep them in. Thus, more time will be available for the removal of Books from the Settlement terms. The extension applies only to Google’s copy for use within the Google services, but not to the copies held by Fully Participating Libraries or to inclusion in the Research Corpus. Since under the original Settlement Rightsholders can choose to exclude their works from display

uses at any time (including the Institutional Subscription and other revenue models), the extended time for removal is not expected to greatly affect availability of these works in the Google services. Removal from a Fully Participating Library's LDC continues to be subject to the original 27-month removal date.

Ability for Fully Participating Libraries to obtain Digital Copies of Books not Digitized from that Library (ASA Sections 7.2(a)(ii) and 7.2(a)(iii))

- The thresholds for obtaining digital copies of books digitized at another library are unaltered from the original Settlement Agreement, but the thresholds will now apply to all volumes scanned by Google from a library, regardless of the Settlement status of those works.

☞ The effect of this change is to maintain the original Settlement thresholds governing a Fully Participating Library's ability to obtain an LDC of works scanned at another library, despite the exclusion of international works in the Amended Settlement Agreement (i.e. a library's eligibility to obtain an LDC of those works will not be adversely impacted by the ASA's more limited definition of a Book).

Book Rights Registry (ASA Section 6.2)

- The Board of Directors of the Book Rights Registry (BRR) will have at least one representative of the Author Sub-Class and one representative of the Publisher Sub-class from each of the following countries: the United States, the United Kingdom, Australia and Canada.
- The governance structure of the BRR will have an independent fiduciary (the "Unclaimed Works Fiduciary") who will have the sole responsibility for representing the interests of Rightsholders of unclaimed Books and Inserts with respect to the exploitation of their works under the Amended Settlement Agreement. The Unclaimed Works Fiduciary will not be a published book author or book publisher (or an officer, director or employee of a book publisher), will be chosen by a supermajority vote of the Board of Directors of the BRR, and will be subject to Court approval.
- From its inception, the Registry will be required to use settlement funds to attempt to locate Rightsholders, including Rightsholders of unclaimed Books.

☞ The intent of these changes is to ensure balanced representation of various Rightsholder groups on the BRR and avoid potential conflicts of interest between the BRR and Rightsholders of unclaimed works (i.e. orphan works).

Unclaimed Funds (ASA Section 6.3)

- Unclaimed funds will not be used by the Registry for general operations or reserves and will not be distributed to claiming Rightsholders.

- After five years, the Registry, in collaboration with organizations in Canada, the UK and Australia, and in consultation with the Unclaimed Works Fiduciary, may use up to 25% of unclaimed funds for the sole purpose of locating Rightsholders.
- After 10 years the Registry subject to the approval of the Unclaimed Works Fiduciary 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, upon notice to Rightsholders, the attorneys general of all states in the United States, and Fully Participating and Cooperating Libraries. Revenues will be distributed on a proportional basis according to the number of unclaimed Books from each country.

☞ The intent of these changes is to avoid potential conflicts of interest between the BRR and Rightsholders of claimed works on the one hand and Rightsholders of unclaimed works (i.e. orphan works) on the other, by ensuring that Rightsholders of claimed works do not benefit financially from revenues derived from unclaimed works.

Specified Price Can Be Zero (ASA Sections 4.2(b)(i)(1), 4.2(b)(i)(2), 4.2(c)(ii)(2) and 4.2(c)(iii))

- Language has been added clarifying that Rightsholders are free to set the Consumer Purchase price of their Books to zero.

Registry Support for Alternative License Forms (ASA Section 4.2(a)(i))

- Rightsholders can direct the Registry to make their works available for free through a Creative Commons or similar type of license.

Modification of Restrictions on Use (ASA Section 3.3(g))

- Rightsholders may authorize Google to modify or remove the default restrictions on features of the Institutional Subscription, Consumer Purchase, and other revenue models (such as restrictions on copy/paste and print). This allows a Rightsholder to lift any of these restrictions.

☞ The three changes listed above are intended to address the interest expressed by some academic Rightsholders in making books available without cost and under less restrictive terms than the default terms established by the Settlement.

Privacy (ASA Section 6.6(f))

- Google will not provide the Registry with personally identifiable information about any end user unless required by law or valid legal process.

Public Access Terminals (ASA Section 4.8(a)(i)(3))

- Authorizes the Registry to agree to increase the number of public access terminals at a public library building.

Pricing (ASA Sections 4.2 and 4.5)

- The ‘temporary’ limitation on Google’s right to offer discounts has been eliminated. Google may now offer discounts for all revenue models on an indefinite basis so long as the Registry continues to receive its designated share of the non-discounted price.
- The Registry may authorize Google to make special offers of Books available through Consumer Purchases at reduced prices from the list price, subject to notification to the Rightsholders, who can choose not to approve the reduced price for any of their books. The revenue split for special offers will be based on the agreed-upon reduced price.
- For Commercially Available Books, either Google or the Rightsholder will have the ability to request renegotiation of the standard revenue split for any or all revenue models.
- Settlement Controlled Pricing has been modified in the following ways:
 - Clarifies that the Pricing Algorithm used to establish the Settlement Controlled Prices for Consumer Purchase will be developed to simulate the prices in a competitive market. The price for a Book will be established without regard to changes to the price of any other Book.
 - The Registry may not disclose the Settlement Controlled Price for a Book to anyone other than the Book’s Rightsholders.
 - Wording has been added to remove the Registry’s involvement in approving the Pricing Algorithm or the addition of new Pricing Bins. Pricing Bins are under Google’s control, although Rightsholders will be able to add a minimum and a maximum Pricing Bin. For unclaimed Books, the Unclaimed Works Fiduciary must negotiate the use of additional Pricing Bins.

☞ These changes are intended to prevent the possibility of collusive pricing and address concerns about pricing policies that might interfere with the natural workings of a normal competitive market.

Consortia Eligibility for Institutional Subscriptions (ASA Section 1.76)

- OCLC-affiliated networks are no longer excluded from the definition of Institutional Consortium.

☞ The effect of this change is to enable OCLC-affiliated networks that are members of the International Coalition of Library Consortia to obtain an Institutional Subscription and to benefit from an Institutional Subscription discount, should Google offer such a discount to library consortia.

Additional Revenue Models (ASA Section 4.7)

- The potential new revenue models are now limited to the following three additional Revenue Models, which must be approved by the Registry:
 - 1) Print-on demand (for Books that are not Commercially Available only)
 - 2) File download (formerly “PDF Download”) and
 - 3) Consumer subscription.
- Rightsholders of claimed works and the Unclaimed Works Fiduciary for unclaimed works will be given advance notice before an additional Revenue Model is launched, with an opportunity to exclude works from that model.

☞ The effect of this change is to eliminate the open-ended nature of potential new revenue models that existed in the original Settlement Agreement.

Distribution by and Licensing to Third Parties (ASA Section 4.5(b)(v)(2) and ASA Section 6.2(b)(i))

- Google is obligated to allow the resale through third parties of Books offered through Consumer Purchase (including orphan works) with the reseller receiving a majority of Google’s 37% share of the revenue split.
- The BRR can license the U.S. Copyrights of Rightsholders of Books, and the Unclaimed Works Fiduciary can license the U.S. Copyrights of Rightsholders of unclaimed Books, to third parties to the extent allowed by law.

☞ The effect of these changes is

- (a) to allow third party resellers (including Google’s competitors) to sell access to Books (including orphan works) under the Consumer Purchase Model, and
- (b) to authorize the Unclaimed Works Fiduciary to license additional revenue models for unclaimed works to third parties independently of Google if legally allowed to do so. This would require passage of orphan works or similar legislation.

Non-discrimination Clause (“Most Favored Nation” clause) (Original Settlement Section 3.8(a))

- This clause has been deleted in its entirety from the Amended Settlement Agreement.

☞ The effect of this change is to enable the Book Rights Registry to negotiate arrangements with other entities without offering comparable terms to Google, lessening concerns about Google’s privileged position in any future business arrangements.