

April 2009

**Frequently Asked Questions about
Settlement Agreement between
The Association of American Publishers/the US Author's Guild and Google**

1. What is the purpose of the settlement?

The purpose of the agreement is to resolve a lawsuit brought by the AG and the AAP launched in 2005 against Google in the US. The original lawsuit was challenging the Google Books Library programme under which Google was digitising and making available in copyright works without permission of the rights holders.

2. What is the scope of the agreement?

This settlement is limited to the territories of the United States of America therefore IT DOES NOT APPLY TO THE TERRITORIES OF THE EUROPEAN UNION.

This settlement covers all books published anywhere on or before January 2009 contained now or in the future in the collections of the libraries partners in the Google Library Programme in the United States therefore IT INCLUDES EUROPEAN BOOKS. Google is also scanning books from other sources such as second hand bookstores. This is the case due to (i) application of a basic principle of copyright which is that all works enjoy the national treatment (Berne Convention) (ii) the Authors' Guild originally introduced a class action.

The effects of the class action are that all members of the class (rights holders of all books contained in the collections of the partner libraries in the US) are included in the settlement unless they implicitly opt out of the settlement. Please note a class action, which is a typical US legal form of claim which does not exist in Europe as such, allows that a large group of people collectively bring a claim to Court.

It is relevant to note that US works and works simultaneously published in the US (that is a book published for example in Belgium and sold within 30 days in the US) must have been registered by 5th January 2009 with the US Copyright Office in order to be included in the settlement. The requirement that United States works be registered with the Copyright Office was included in the Settlement Agreement for the sole purpose of complying with a previous US court decision concerning a class action¹.

3. What does the settlement provide for?

The agreement consists in setting up a system allowing the further creation of a database, including full text, of digitised books by Google in order to monetise it in different ways. This new system will involve rights holders of the works giving them the possibility to determine whether and to what extent Google may use their books and providing them for compensation of their works.

The settlement provides for:

i) Compensation of \$ 60 per principal work (\$ 15 per insert and \$ 5 for partial insert) to rights holders that file in claims for those works that have been digitised without permission as to the 5th May 2009. The total sum to be paid by Google will be of 45 million dollars. In order to receive the money, authors and publishers will have to determine whether their works have been digitised by checking the database and claiming their book.

¹ Decision of the Second Circuit, which held that registration was necessary for a District Court to have jurisdiction to certify a class of copyright owners of United States works and approve a class action settlement. In Re: Literary Works in Electronic Databases Copyright Litigation, 509 F.3d 116 (2d Cir. 2007).

ii) Google will provide \$ 34,5million to establish and maintain a registry of rights to books (“Book Rights Registry”) that will locate class rights holders, maintain database of their contact information, collect and pay revenues to the rights holders and represent their interests. The costs of notice to the class (including distribution of the notice) will be included in that sum of money. The Registry will be funded by an estimated percentage of 10-20% of the revenues from Google.

iii) Prospectively, rights holders will receive from Google 63% of the revenues earned from Google’s sale of subscription to an electronic database, sale of online access to books, advertising revenues, and other commercial uses. In case of advertising uses, Google may include advertisements on snippets, bibliographical information etc and the rights holders will receive revenues but Google may also place advertisements on other products such as search result pages and the rights holders of a book will not earn revenues from it.

Book pricing: A rights holder may select one of two pricing options for Consumer Purchases:

(1) Specified Price. In this option, the rights holder identifies the price for which it wants its Book authorized for Consumer Purchase to be sold.

(2) Settlement Controlled Price. In this option, the rights holder permits the price for which its Book authorized for Consumer Purchase is to be sold to be determined by an algorithm (the “Pricing Algorithm”) that Google will design. Google and the Registry will agree upon a set of predefined prices for Books (“Pricing Bins”), and each Book will be priced at one of those prices. The initial Pricing Bins for Books will be: \$1.99, \$2.99, \$3.99, \$4.99, \$5.99, \$6.99, \$7.99, \$8.99, \$9.99, \$14.99, \$19.99 and \$29.99.

4. What does the settlement cover?

The settlement covers books and inserts which are in copyright and have been digitised by/on the 5th May 2009 (this date is relevant in order to receive the compensation of \$ 60 for books, inserts etc). Also, the books included in the settlement must have been published before/on the 5th January 2009.

It excludes photographs, graphic designs, artworks, illustrations (other than children’s Books) and other images and works of visual arts included in the book unless the rights holder is the same as the one from the book. These will be blackened after digitisation. Also excluded are periodicals, personal papers, public domain works and Government works (but the database may contain this too). So far, Google has digitised 7 million books but the database contains over 80 million entries (around 40 million correspond to 3 of the major US libraries involved). The database contains not only books from the Library program but also other sources such as second hand bookshops.

5. How are books classified for the purposes of the agreement?

i) Commercially available books/In print. According to the settlement, these are books that are “*currently offered for sale through one or more than-customary channels of trade in the US*”. Google will decide whether a book is commercially available in the US and will automatically remove them from the Google database. IT IS NOT FORESEEN IN THE SETTLEMENT THAT EUROPEAN BOOKS WHICH ARE COMMERCIALY AVAILABLE IN EUROPE (AND THANKS TO INTERNET SALES, ALSO COMMERCIALY AVAILABLE IN THE US) WILL BE CONSIDERED AS COMMERCIALY AVAILABLE AND AUTOMATICALLY REMOVED.²

Display uses for commercially available books will only be permitted if the right holder previously gives permission to do so. Google will keep on making non-displays uses, unless the rights holder excludes this possibility.

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One should take into account that under the agreement a book classified as commercially available is presumably classified as “in-print” and a book classified as not commercially available is presumably classified as “out of print”.

ii) Not commercially available/ Out of print (included orphan works). Google will have the right to make all display uses (and non display uses) covered in the agreement for out of print books unless the rights holder excludes any of this uses or removes the book.

The classification made by Google of books as commercially available or not is very important for two reasons:

- a) A commercially available book will be automatically removed from display uses while a non-commercially available book will require action from the rights holder.
- b) According to the author-publisher procedure in the settlement, if it is a commercially available book the publisher will receive 100% of the revenues and share it with the author according to the contract. If it is a non-commercially available book, and the rights have not reverted to the author, the publisher will receive 50% and the author 50% (for works published before 1987- for works pre 1987 the split is publisher 35%/author 65%)

6. What are the uses that Google will make of the works foreseen in the settlement?

The agreement will allow Google to monetise the digitised books (paying 63% of the revenues to rights holders through the Registry) in the following manner:

a) Display uses:

a.i) Access uses:

1. Institutional subscription: Selling a subscription to an electronic database to educational, government and corporate institutions. It will be possible to view, annotate the entire book and print-copy/paste portions of the books.
2. Consumer purchase: Selling online access to individual Books. Rights holders will have the option to set the price themselves or to allow Google to price it based on an algorithm. It will be possible to view, annotate the entire book and print-copy/paste portions of the books.
3. Public access: at libraries and elsewhere. If a public library or a non-profit higher educational institution located in the US requests it, Google will provide a license (at no cost) to provide access to the database through a dedicated terminal in each library building or an agreed number of dedicated terminals in case of higher educational institutions. Upon previous approval of the Registry, it can be possible to print at a per-page fee in the public libraries (or other institutions) and commercial businesses such as copy centres could also allow viewing and printing at a fee.
4. New revenue models: The possibility is left open other future commercial uses such as print on demand. The Registry is in charge of communicating new uses to Rights holders who will then have the option to exclude their Books.

a.2) Preview use: In response to a user's search in the internet, the user will be able to see 20% of the book either adjacent to where a user lands or only those pages chosen by the Rights holders (at request of the Rights holders).

This is a marketing tool to sell the book and Rights holders will received revenues from advertisements. Similarly, Google will display after a user's search snippets and bibliographic pages (with advertising).

a.3) Snippet and front matter display: in response to a users search, Google may display up to 3 snippets (4 lines from a book) by user of a book. Google may also display the title page, copyright page, table contents and index.

Rights holders are expected to receive revenues from the advertisements in these pages. However, rights holders will not have the right to object to advertising on pages from a user's search over multiple books or over the internet.

b) **Non-display uses:** Uses that do not involve displaying content of the book to the public. This includes bibliographic information, full text indexing or internal research and development at Google. Rights holders can not exclude their books from this uses. The only possibility to prevent this uses are to ask Google to remove the book (which must be by the 5th April 2011). Even if the rights holders requests removal of the book, Google and the participating libraries will still keep backup tapes or other back up storage media of the book.

7. What will be the uses allowed by participating libraries?

Google can provide each participating library with a "Library Digital Copy" (LDC) under certain conditions (minimum number of books to be digitised by Google in that library).

Libraries will be able to:

- i) Do a preservation copy.
- ii) Provide access to users with disabilities.
- iii) Do a print copy of stolen or damaged book.
- iv) Display snippets in connection with finding tools.
- v) Staff and faculty can use up to five pages for scholarly and classroom use (it must be a not commercially available book)
- vi) Orphan works- if the US copyright law is amended, the digital copies could be used in accordance with the law.
- vii) Non-consumptive research.
- viii) Other uses allowed by the rights holders or the Registry.

8. What are the options for EU rights holders?

- i) Opt out of the settlement. Their books will continue to be digitised by Google and included in the Google database but they will be only displayed as snippets. Rights holders will be able to sue Google in the US.
- ii) Stay in the settlement and remove the books. The books will be completely removed from the Google database and from all uses (display and other uses). If the books have been digitised before the 5th May 2009, rights holders are entitled to 60 \$.
- iii) Stay in the settlement and prevent display uses. The books will be removed from the display uses. If the books have been digitised before 5 May 2009, rights holders are entitled to 60 \$.
- iv) Stay in the settlement and allow display uses. If the books have been digitised before the 5th May 2009, rights holders are entitled to 60 \$.

* It is important very that, when claiming, the publisher indicates that he is "highly confident" that the rights have not reverted back to the author.

9. What are the deadlines?

Until 4th September 2009

- i) Rights holders can opt out of the settlement (this means that their books will not be included in the settlement and that they will then retain the right to sue Google in the US), ii) Rights holders might raise objections to the settlement



7th October 2009

Fairness hearing

After October 2009

Judge decides whether to approve the settlement or not (if not approved, then the parties might decide to renegotiate it or to abandon it).

5th January 2010

Deadline for claim the 60 \$ for each book digitised before the 5th May 2009.

5th April 2011

Deadline to remove books from the database (unless the book has not been digitised by this date).

10. What will be the experience of a European user in Europe?

The settlement only addresses uses in the US territory so the settlement neither authorises nor prohibits uses by Google outside the US.