

The Google Settlement and You

Dear Agency Clients,

This is important information about the “Google Settlement” that may affect your rights as an author or children's book illustrator.

This booklet is to bring you information about what the settlement is, what it means for you, what you may do, some agency recommendations, and the timetable.

The timetable is of paramount importance so we're putting it first. More information is in this booklet to assist you in making the choice of what to do.

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Important timetable for Google Settlement

May 5, 2009: Decide whether to participate in the settlement, object, or opt out. This date is important if you plan to object or to opt out because **May 5, 2009 is the last day to object or to opt out** of the settlement.

If you wish to object to the settlement, we recommend you obtain the assistance of your own attorney. This must be done by May 5, 2009, so please do not delay.

If you wish to opt out, your opt out must be submitted online or postmarked by May 5, 2009. The online list of books covered by the settlement will be final. If you decide to opt out, **please take action soon and do not wait until May 4 or May 5** - the settlement website may be overwhelmed near the deadline.

June 11, 2009: A court hearing is currently scheduled to determine whether the Settlement will be approved by the Court and then take effect.

If you wish to opt in (remain a member of the Settlement Class), and accept the terms of the settlement, you must complete your Claim Form by **January 5, 2010**.

We will further explain the choices on the following pages.

The Google Settlement - What it is

The Authors Guild and Association of American Publishers sued Google for alleged copyright violations arising from Google's scanning of books and making the books available in digital format online. Google and The Authors Guild have agreed to a tentative (awaiting court approval) settlement in that suit.

The rightsholders for all books and inserts (see definitions at the end of this booklet) published before January 5, 2009 and registered with the U.S. Copyright office - whether or not those books or inserts have been digitized by Google - are considered Class members for the Settlement.

Under the settlement, Google agreed to pay a minimum of \$45 million into a settlement fund to pay Settlement Class members whose books and inserts were digitized without their authorization prior to May 5, 2009. The Plaintiffs in the settlement will establish a new non-profit organization, the Book Rights Registry, which will maintain a rights information database and will receive and disburse payments from Google to the registered rightsholders in accordance with the terms of the settlement.

Google is authorized under the Settlement to make "Display Uses" of books that are **not** Commercially Available (generally, out-of-print) and, with the express authorization of rightsholders, of Commercially Available books.

If a book is designated as **not** Commercially Available, then Google will be able to make all Display Uses of the book unless a rightsholder of the book instructs Google to exclude the book from one or more Display Uses.

The terms of the settlement should you want to read them are available here: <http://www.googlebooksettlement.com>

The FAQ section (which was written by the same people who are advocating the settlement) has helpful answers to questions you may have.

Does it apply to you?

This settlement applies to the following materials if they were **published on or before January 5, 2009 and you hold the electronic display rights:**

- all books in which the author owns a copyright interest (excluding "work for hire") - see the Settlement's Definition of "books" at the end of this booklet
- children's books illustrations, if the illustrator has a copyright interest in either the book or the illustrations in the book
- "inserts" (Google's definition of "insert" at the end of this booklet). We believe that a short story published in an anthology qualifies as an insert - it is text and it is contained in a Book in which the holder of the copyright of the story is not the copyright holder of the Book.

What if you do not live in the U.S.?

If your book was published in the U.S., yes, it applies to you.

What if the Publisher holds the electronic rights to your book?

You should let the Publisher and your agent of record know whether you would like to opt in or out and include or remove, and/or exclude your books from the Settlement. You can also follow the instructions in this booklet to take action yourself, and let the settlement administrators work out any confusion later. In any case, please see the end section on Recordkeeping.

What if you have a book that is out of print and there is no eBook edition?

Our attorney recommends that you opt out of the settlement, and that we request reversion of your book for you. We will help you and we should do it before May 5, 2009.

Our attorney's opinion is that if you accept Google's proposed cash payment for the display rights for your out-of-print book, then you have *de facto* set the acceptable price for the display rights and possibly for the reprint rights for your work.

What it really means (agency opinion)

The settlement establishes the "Book Rights Registry," which is essentially ASCAP for authors. In consultation with our attorney, this makes the rights agency a *de facto* "agent" for authors. If another entity (say, Microsoft) should decide to scan books, then authors who choose to be covered by this Google Settlement would automatically accept the scanning of their books by Microsoft, and accept not receiving any more than Google paid for the right to display their work. And it is a practical barrier to negotiation with the Publisher of your book about the royalties for eBook rights.

Agency opinion and recommendation

In the opinion of our agency, in consultation with our attorney, we recommend that:

- 1) Authors write to your Congress critters, The White House, and the Register of Copyrights (that's a person) and object to this settlement and to its terms.
- 2) Some of you may want to opt in to the settlement and **object** to the terms of the settlement, as well as include or exclude your books and inserts from the Google database. **This requires assistance from your own attorney—another reason to avoid delay.**
- 3) Some of you may want to **opt out** of this settlement. To do so, visit <http://www.googlebooksettlement.com>, and click on Opt Out, and follow the instructions to opt out. This will *not* require assistance from an attorney.

If you wish to discuss whether to opt in and object, or opt out, please call us.

Getting started and your options

- 1) You should check your copyrights in all your works to make sure the copyright is registered. You can use the free online catalogue system at: <http://www.copyright.gov>
- 2) Register the copyrights in the works that you cannot find on copyright.gov. Another link from the copyright.gov homepage will take you directly to the new, less-expensive Electronic Copyright Office (eCO) registration forms.
- 3) Go to <http://www.googlebooksettlement.com>, click on the button that says Claim books and inserts, establish your author account (you may choose not to enter your SSN at this point), then search for your books. You may choose to download the resulting list to a spreadsheet without yet claiming any titles; the spreadsheet will list the titles, whether or not Google has digitized your books, and whether they believe the books are in-print or not commercially available (out of print).
- 4) If you own a copyright interest in a book or illustration published on or before January 5, 2009, **and you hold the electronic display rights**, then your choices are, relative to participating or not in this Settlement:
 - Option A) Do nothing and thereby opt in
 - Option B) Opt in, claim, and include or exclude your books
 - Option C) Object (have to opt in)
 - Option D) Opt out of the settlement

The options are explained further, below, with instructions. Those who opt out are not covered by any portion of the Settlement, nor may those who opt out object to the terms of the Settlement.

What if you write under more than one name?

You may choose to opt in for one name, and opt out for another if you write under more than one and wish to do so. Similarly, you may make a different decision for each book written under the same name, although this may result in confusion and errors.

Option A) What if you do nothing now?

If you do nothing you will be bound by the terms of (stay in) the settlement.

If you do nothing now, you may make a claim by **January 5, 2010** for payment for your books, inserts or illustrations that have been scanned. More information is below.

If you do not claim your Books, you will not receive any Cash Payment or be able to participate in future revenue from Google's use of your Books. By staying in the Settlement, you will, however, release all copyright infringement claims you might have against Google for digitizing your Books that are on the list without your permission.

Option B) If you opt IN, what are your options under the Settlement?

The Google Settlement Agreement identifies the following as the options for those who wish to actively opt in:

1. Claim (identify yourself as rightsholder) your books and inserts at <http://www.googlebooksettlement.com>. When you claim your books the website will tell you if a book has been scanned or not.
2. Rightsholders may claim a payment for copyright infringement for any book or insert that Google digitized without authorization on or before May 5, 2009. This payment is estimated by Google to be at least \$60 per book, \$15 for each insert, and \$5 for each partial insert. Only one cash payment will be made, even if Google digitized the hardcover and the softcover. If a cash payment is made for a book, then no additional cash payment is made for any portions of the book that are used as inserts. If your book is out of print, please see our advice page 4 above before claiming a cash payment. Claims for cash payments must be made by **January 5, 2010**. Payments will be made to the Registry; for in-print

books, the Registry will pay the Publisher who will distribute it to you according to the split in your contract.

3. You may request that one or more of your books be removed from the Google databases, that one or more of your books not be scanned/digitized, or exclude your books from the Google display uses and/or revenue models.
4. You may include or exclude your inserts from various Display Uses as defined by the settlement.

Rightsholders who accept the cash payment release Google and Participating Libraries from all claims for infringement, cannot remove their book from the Library project, place those works under the control of the Rights Registry, and until and unless a work is requested to be excluded, authorize Google to continue to make Display Uses and Non-Display Uses of Books and Inserts.

For in-print books and inserts either the Author or the Publisher may request that they be removed, not scanned, or excluded. These requests must be made by April 5, 2011. If a book that an Author requests be removed from the Google Library Project has not yet been digitized, Google will remove it from the database; if it has been digitized, Google will only exclude it from Display uses.

Option C) Opt in and Object

If you want to object to the settlement, you submit a statement that you disagree with some aspect of the settlement. Only Settlement Class members may object, so you cannot both opt out and object at the same time. Also, you cannot accept payment and object. The information on how to object to the Settlement is available online at: <http://www.googlebooksettlement.com> Click on FAQ, and then see the answer to Question 23.

This must be done by May 5, 2009. This is not a step you should take without consulting your own attorney. **Another reason to avoid delay.**

Opting in and Objecting vs. Opting out

In order to object to the terms of the settlement, you must remain a member of the Class (opt in). When you opt in and object, you have an opportunity to influence the terms of the settlement. However, once you object, you will have to pay attention to further developments.

If you opt out entirely, you no longer have to pay attention to the Google settlement unless you choose to sue them.

Option D) What if you wish to opt out?

If you wish to opt out, you must do so in writing by May 5, 2009.

If you opt out of the Settlement, you opt out entirely.

From Google's Settlement agreement information: "If you opt out, you will not be included in the Settlement, you will not receive the benefits conferred by the Settlement and you will retain the right to sue Google and the Participating Libraries. If you opt out of the Settlement, you will not be eligible for a Cash Payment or to participate in any of the revenue models under the Settlement, nor will the Settlement's restrictions or obligations on Google or the Participating Libraries apply to your books or Inserts. [underlining added ours]"

Visit <http://www.googlebooksettlement.com> to opt out of the settlement and to identify your books, illustrations, or inserts.

If you check the box on the Opt Out form requesting that Google not digitize books that you identified, the Settlement Administrator will pass along your request to Google. Although Google has no obligation under the Settlement to comply with such request, Google has advised the Settlement Administrator that its current policy is to voluntarily honor such requests and refrain from digitizing your books or, if they have already been digitized, refrain from displaying them.

By opting out, you are not participating in the Settlement, and are retaining all rights against Google and the Participating Libraries."

Our attorney also informs us that if you opt out, you will also retain all rights — including the right to sue — against a publisher that improperly approves Google's use of the work if it doesn't have the right to do so, and against the Book Rights Registry.

You need not state your reason for opting out. However, your opt-out request must be signed or, if submitted online, completed by an authorized person; it must state which Sub-Class you wish to opt out of (either the Author Sub-Class or Publisher Sub-Class); and it must provide your name and address and any pseudonym used to author the Books, if applicable.

Although it is not a requirement should you opt out, Google asks you to include in your opt out notice the title, author, publisher and ISBN (if the Book has an ISBN) of all of your Books and Inserts so that Google can identify your Books and Inserts.

What if you can't go online and you want to opt out?

You may opt out of the settlement by sending written notice by First-Class Mail, postage prepaid, **postmarked on or before May 5, 2009** to the Settlement Administrator, at:

Google Book Search Settlement Administrator
c/o Rust Consulting
PO Box 9364
Minneapolis, MN 55440-9364

Alternatively, you may request that a paper claim form be sent to you by calling 1.888.356.0248.

**Google refers to “revenue models” and continuing payment?
How much money is this, potentially?**

Under the Settlement, Google is authorized to 1) continue to digitize Books and Inserts, 2) sell to institutions subscriptions to an electronic Books database, 3) sell online access to individual Books, 4) sell advertising on pages from Books, and 5) make other uses.

Google will pay 63% of the revenues they earn from sale of institutional subscriptions to the electronic books database, sale of online access to books, advertising revenues, and other commercial uses to the Book Rights Registry, who, after retaining an administrative fee (thought to be between 10-20%, although our attorney informs us it will probably be somewhat higher for the first few years, based on ASCAP’s track record), will disburse the money to the appropriate rightsholders.

Institutional subscriptions: Google’s and the Book Rights Registry will work out the institutional subscription fees, but initial plans are to provide unlimited access to the database of works for colleges and universities for a flat fee based on the number of students and faculty. Also, it is proposed to pay rightsholders “usage fees” and “inclusion fees,” with a target of paying \$200 per book, \$50 per entire insert, or \$25 per partial insert for inclusion in the database.

Sale of online access to books: Rightsholders who elect to offer their book for individual consumer purchase online may either set the price, or let Google set the price between \$1.99 and \$29.99. The rightsholder or publisher may change the price later. This money will be distributed as follows depending on whether or not the book is in print.

- If your book is in print and the electronic rights are controlled by the publisher, this revenue will flow from the Registry to the publisher to you, according to the royalty split in your contract.

- If the book is out of print and the rights have reverted to you, 100% of the income, minus the Registry’s fee, will flow to you.
- If the book is out of print but the rights have NOT reverted to you, and it was published in 1987 or after, the income is split 50-50 between the author and the publisher.
- If the book is out of print and was published prior to 1987, the income is split 65-35 between the author and publisher (author’s favor).

It should be noted that the Google Settlement notice states that they don't expect to pay any money to anybody until about 5 years after the settlement is approved.

If you opt in and take the money, you will receive taxable income and will receive a 1099 from the Rights Registry in the year the taxable income is received and a 1099 from the Settlement Administrator in the year of the first payment under the settlement.

Advertising revenues: Google expects to be able to sell advertising on pages displaying the books, inserts, etc. Rightsholders of Books will earn 63% of the revenues from such advertisements.

What are "Books" as used in the Settlement and Notice?

Text from the Google Settlement FAQ.

"For purposes of this Settlement, a "Book" is a written or printed work that meets the following three conditions as of January 5, 2009:

- It was published or distributed to the public or made available for public access under the authorization of the work's U.S. copyright owner or owners on sheets of paper bound together in hard copy form; and
- It was registered with the U.S. Copyright Office, UNLESS the work is not a "United States work" under the U.S. Copyright Act, in which case such registration is not required; and
- It is subject to a U.S. copyright interest (either through ownership, joint ownership, or an exclusive license) implicated by a use authorized by the Settlement.

Whether a work is a "United States work" is determined by the U.S. Copyright Act. If you are unsure whether your work is a "United States work" and, therefore, whether you must have registered the work with the U.S. Copyright Office to be covered by the settlement, you may wish to consult Class Counsel.

The requirement that United States works must be registered with the U.S. Copyright Office in order to be covered by the Settlement was included in the Settlement in order to comply with a decision of a U.S. court." [Our comment: However, the U.S. Supreme Court has agreed to consider overturning *that* decision; the Supreme Court's decision is expected between February and June 2010. No matter what the Supreme Court decides, that decision will create confusion about the Settlement.]

What are "Inserts" as used in the Settlement and Notice?

Our reading of the Google definition of "insert" (below) is that a short story published in an anthology would qualify as an insert - it is text, it is contained in a Book, wherein the holder of the copyright of the story is not the copyright holder of the Book.

Actual text from the Google Settlement FAQ follows:

"For purposes of the Settlement, to be an "Insert," content must:

- Be text; an illustration in a children's Book; or tables, charts, graphs or musical notation (i.e., notes on a staff or tablature); and
- Be contained in a Book, government work or public domain book published on or before January 5, 2009; and
- Be protected by a U.S. copyright where the U.S. copyright interest in the Insert is held by someone other than a Rightsholder of the Book's "Principal Work." (For example, if you own rights in a poem that is contained in a Book for which you also hold a U.S. copyright interest, then your poem, as it appears in your Book, is not an Insert; however, it would be an Insert if the poem is contained in a Book for which someone else holds the U.S. copyright interest); and
- Be registered either alone or as part of another work with the U.S. Copyright Office on or before January 5, 2009, UNLESS the Insert or that other work is not a "United States work," in which case such registration is not required.

Whether a work is a "United States work" is determined by the U.S. Copyright Act. If you are unsure whether your work is a "United States work" and, therefore, whether you must have registered the work with the U.S. Copyright Office to be covered by the settlement, you can contact Class Counsel. The requirement that United States works must be registered with the U.S. Copyright Office in order to be covered by the Settlement

was included in the Settlement in order to comply with a decision of a U.S. court. [Our comment: However, the U.S. Supreme Court has agreed to consider overturning *that* decision; the Supreme Court's decision is expected between February and June 2010. No matter what the Supreme Court decides, that decision will create confusion about the Settlement.]

What kinds of writings are considered "Inserts?"

Examples of Inserts include forewords, afterwords, prologues, epilogues, poems, quotations, letters; textual excerpts from other Books, periodicals or other works; song lyrics; musical notation; children's Book illustrations; or tables, charts and graphs that are not pictorial works.

Are there any works that are excluded from the definition of "Insert?"

Yes. Excluded from the definition of "Insert" are: Pictorial works, such as photographs, illustrations (other than children's Book illustrations), maps and paintings; and Works that are in the public domain under U.S. copyright law. Our attorney informs us that this second group includes works that either were in the public domain at the time the book was published or have since fallen into the public domain, either by expiration of copyright or through failure to renew copyright when required.

Recordkeeping

You will need to keep good records on paper of whatever action you take.

- If you decide to opt in and take no other action, you should still print out a copy of the list of books covered and sign and date that copy, along with a short sentence telling you what that list is. Although you're not required to do so, you should also send a copy of that signed page to the agent of record for that book and to the publisher; otherwise, if the agent or publisher recommends/takes a different action, someone inquiring on a book's status will get different answers!
- If you decide to opt out, you should sign and date a printout of the opt-out page (whether from the website or a paper form) for each work. You should also send a copy to the agent of record and to the publisher, for the same reasons as noted in the preceding bullet point.
- If you decide to object, ensure that your attorney notifies your agent of record and the publisher. Many attorneys who are well qualified to assist with objecting to this settlement nonetheless are not familiar with the publishing industry's rather involuted communications and rights systems.
- Regardless of your decision, you should keep a separate folder or file for all of your records relating to the Settlement. That will also include copies of 1099s when they are finally issued.
- Regardless of your decision, you should ensure that your will gets updated to tell your executor where to find your records relating to the Settlement.