

Publishers and Authors Face Critical May 5 Deadline Under Google Books Settlement

Alert

By May 5, 2009, publishers and authors—which includes cultural institutions and not-for-profits—must make a decision with major consequences for their copyright interests: whether to allow their books to be governed by the proposed settlement of the Google Books class action. Unless copyright owners formally opt out by that date, Google will receive the right to make extensive electronic use of their works, including to sell full-text access to out-of-print books.

The proposed settlement arose out of two lawsuits by publishers and authors against Google concerning Google's unauthorized digitization of several large libraries' print collections. If approved by a federal court in New York, the settlement will affect *all* written works published in bound, hard-copy form on or before January 5, 2009; U.S. works must also be registered in the Copyright Office. Periodicals and journals and a few other categories of printed material, such as personal papers, sheet music, and photographs are unaffected (except where excerpted in a "book").

Google has been using its unauthorized digital copies to create an Internet book-search service supported by commercial advertising. By participating in the settlement, copyright owners release Google (and the libraries) from all liability for the scanning effort before January 5, 2009, and for the continuing provision of search results—including "previews" of up to 20% of a book's content—to Internet users. In exchange, Google will make one-time cash payments to the rightsholders for the past scanning.

By not opting out, rightsholders also authorize Google to broadly expand its commercial exploitation of their copyrighted books. Perhaps most significant is permission for Google to sell full-text access to digitized books, through both individual consumer sales and institutional subscriptions. (Free access will be made available at a large number of public and university libraries.) Google may also sell advertising space on book pages, similar to the advertising shown in its Internet search service.

Under the settlement, a distinction is made between books that are out-of-print and in-print. Without further authorization, Google has permission to sell access only to out-of-print books, but participating publishers and authors can choose to include their in-print works as well. In addition, Google and the not-for-profit "Book Rights Registry," newly created to represent publisher and author interests, can agree on additional commercial uses not currently described in the terms. (The settlement also permits Google and the cooperating libraries to make more minor research and archival uses of their digital copies.)

The settlement does provide measurable benefits in terms of both money and control: Participating rightsholders are entitled to claim 63% of Google's revenue from its advertising and sales. They may also choose to limit some or all of Google's public use of their books. Effecting these limitations requires a significant administrative investment by rightsholders in gathering and providing to Google detailed information about each book in a publisher's or author's catalogue. That information need not be submitted by May 5, 2009.

Given the broad scope of the deal, and the unique bargaining position that the resulting digital archive may afford Google in the future, rightsholders should carefully consider their decisions to participate. The settlement agreement (over 200 pages) is not an easy read. More manageable primers are the FAQs and the 32-page Notice to Class Members found at www.googlebooksettlement.com. If you would like help reviewing your options, please contact Gloria C. Phares at 212.336.2686 or gcphares@pbwt.com.

If you would like more information about this alert, please contact one of the following attorneys:

Gloria C. Phares	212.336.2686	gcphares@pbwt.com
Karen R. Berry	212.336.2545	krberry@pbwt.com
Eric P. Rasmussen	212.336.7896	erasmussen@pbwt.com
Irene Choi Treloar	212.336.2838	itreloar@pbwt.com

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