

## The Revised Google Books Settlement Agreement

In October 2008, a broad class of authors and publishers, the Authors Guild, the Association of American Publishers, and Google announced a settlement agreement that will unlock access to millions of out-of-print books in the U.S. and give authors and publishers new ways to distribute and control access to their works online. If approved by the Court, the settlement will:

- Generate greater exposure for millions of in-copyright, out-of-print books, by enabling students, scholars, and readers to search, preview, and purchase online access to these works;
- Open new opportunities for authors and publishers to sell their copyrighted works and to maintain ongoing control over the ways those books can be displayed;
- Create an independent, not-for-profit Book Rights Registry that will locate and represent rightsholders, making it easier for everyone, including Google's competitors, to license works;
- Offer a means for U.S. colleges, universities, and other organizations to obtain subscriptions for online access to collections from some of the world's most renowned libraries;
- Provide free, full-text, online viewing of millions of out-of-print books at designated computers in U.S. public and university libraries; and
- Enable unprecedented access to the written literary record for people who are visually impaired.

On November 13, 2009, the parties to the settlement filed an amended agreement with the U.S. District Court for the Southern District of New York. Over the last several months, we have been carefully reviewing the submissions filed with the Court, including that of the Department of Justice. The changes made to the settlement were developed to address many of these concerns, while preserving the core benefits of the agreement.

Areas of change are summarized below, and a broader list of changes can be found in the supplemental notice (<http://www.googlebooksettlement.com/Supplemental-Notice.pdf>).

### **International Scope**

As revised, the settlement will only include books that were either registered with the U.S. Copyright Office or published in the U.K., Australia, or Canada. After hearing feedback from foreign rightsholders, the plaintiffs decided to narrow the class to include only these countries, which share a common legal heritage and similar book industry practices. British, Australian, and Canadian rightsholders are joining the case as named plaintiffs and will also be represented on the Board of the Book Rights Registry.

In addition, as we have stated previously, we have clarified the wording in the agreement to make it clear that works that are for sale as new internationally are considered commercially available and thus Google will not display any of their content by default.

Google remains interested in working directly with international rightsholders and organizations that represent them, including those in countries excluded from the settlement, to reach similar agreements to make their works available worldwide. Authors and publishers from around the world can also enter into promotional and revenue-generating programs through Google's Partner Program.

### **Unclaimed Works**

The amended settlement agreement requires the Book Rights Registry to search for rightsholders who have not yet come forward and to hold revenue on their behalf. The settlement now also specifies that a portion of the revenue generated from unclaimed works may, after five years, be used to locate rightsholders, but will no longer be used for the Registry's general operations or redistributed to other rightsholders. The Registry may ask the court after 10 years to distribute these funds to nonprofits benefiting rightsholders and the reading public, and may provide abandoned funds to the appropriate government authority in compliance with state property laws. The Registry will now also include a Court-approved fiduciary who will represent rightsholders of unclaimed books, act to protect their interests, and license their works to third parties, to the extent permitted by law.

Just as with the original agreement, nothing in the amended settlement limits anyone's ability to use unclaimed works. In terms of the small subset of unclaimed works that some have referred to as "orphans," as we've said repeatedly (<http://googlepublicpolicy.blogspot.com/2009/06/google-book-search-settlement-and.html>), the settlement agreement takes one important step towards opening up access to unclaimed books. In the meantime, we continue to encourage legislation that provides meaningful avenues for any entity to use these works.

### **Syndication of All Works in the Settlement to Others, Including Google's Competitors**

As Google first announced in September 2009, any book retailer -- Amazon, Barnes & Noble, local bookstores, or other retailers -- will be able to sell consumers online access to the out-of-print books covered by the settlement, including unclaimed books. Rightsholders will still receive 63% of the revenue, while retailers will keep the majority of the remaining 37%. This provision has been explicitly written into the revised agreement as a Google obligation.

### **Access Models**

The amended settlement does not change the primary access models outlined in the original agreement, including enabling readers to preview and purchase books, selling institutional subscriptions to the whole database, and giving libraries free access at designated terminals. Under the revised agreement, possible additional access models to which Google and the Registry might agree in the future have been reduced and are now limited to: print-on-demand, file download, and consumer subscription.

The amended agreement also enables the Registry to increase the number of terminals at a public library building, and it clarifies that rightsholders can choose to make their books available for free or allow re-use under Creative Commons or other licenses. Rightsholders can also choose to modify or remove restrictions placed on Google's display of their books, such as limits on the number of pages that users can print.

**Pricing and the Non-Discrimination Clause**

The amended settlement clarifies how Google's algorithm will work to price books competitively. The algorithm used to establish consumer purchase prices will simulate the prices in a competitive market, and prices for books will be established independently of each other. The agreement also stipulates that the Registry cannot share pricing information with anyone but the book's rightsholder.

In addition, the amended settlement removes the non-discrimination clause (commonly called the "Most Favored Nation" clause) that pertained to the Registry licensing of unclaimed works. The Registry is free to license to other parties without ever extending the same terms to Google.