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Google Book Settlement – The Ongoing Saga

On November 19, 2009, the U.S. District Court for the Southern District of New York granted preliminary approval of an amended settlement agreement¹ (“Amended Settlement”) in the Google Book Search (“GBS”) litigation, which centred on Google’s plans to digitize millions of books from major research libraries. The Amended Settlement is an attempt to settle two lawsuits commenced in 2005, one by the Authors Guild and several individual authors² and the other by certain publisher members of the Association of American Publishers (“AAP”).³

By way of background, in 2004, Google began digitizing books from several library collections as part of its “Library Project” under its GBS initiative. Some of the books scanned during this process were in the public domain, while others were still in-copyright and were scanned without the copyright holders’ permission.

GBS allows full text searching of books that Google has scanned, indexed and stored in an electronic database. Users may read and download books in their entirety if they are in the public domain, or if the books are still in copyright, GBS makes available only basic bibliographical information and short “snippets” of text displaying the search term in context (unless the copyright owner is part of Google’s “Partner Program” and has granted permission for more extensive access to the book’s contents). In both cases, GBS provides links to online booksellers and libraries.

The lawsuits filed against Google allege that Google infringed the plaintiffs’ copyrights by digitizing and creating an electronic database of books, displaying “snippets” in response to search requests and providing each participating library with a digital copy of the books in its collection that were scanned by Google, all without the copyright owners’ permission. Google denied the claims and maintained that its activities were consistent with the doctrine of “fair use” under U.S. copyright law since, as Google argued, it was not displaying substantial parts of the books’ contents, it was facilitating greater public access to the books and, furthermore, copyright holders could opt out of and exclude their books from the Project.

In October 2008, before any ruling on the copyright infringement claims, Google reached a settlement with the plaintiffs which, because the litigation was a class action, was subject to approval by the Court. The breadth of the original settlement agreement precipitated intense debate and much criticism including objections from the U.S. Department of Justice (“DOJ”), foreign governments, consumer protection groups, authors, publishers and others, both foreign and domestic. As a result, the parties withdrew the original settlement agreement and negotiated the Amended Settlement.

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The Amended Settlement is subject to approval by the Court, which held a Fairness Hearing on February 18, 2010 to consider objections and whether the settlement is fair, adequate and reasonable. A ruling on the Amended Settlement is forthcoming. Despite the changes made, the Amended Settlement remains highly controversial and numerous new objections have been filed, including a statement of interest filed by the DOJ on February 4, 2010 indicating that substantial problems remain and its belief that the Court does not have the authority to approve the Amended Settlement in its current form.⁴

Overview of the Amended Settlement

The Amended Settlement is both lengthy and complex. The following is a very broad overview of certain basic elements of the Amended Settlement, as well as some of the benefits and concerns arising from it.

Settlement Class and Books

The proposed settlement would, if approved, be settled as a class action on behalf of all class members. The class consists of all persons and entities that, as of January 5, 2009, own a U.S. copyright interest in one or more Books to the extent that such interest is “implicated by a use” that is authorized by the Amended Settlement or for which compensation could be payable thereunder (i.e., the copyright interest is one that Google will be exploiting in using the Book).

The Amended Settlement narrowed the definition of “Books” from the original settlement agreement and, as a result, the settlement class. Books are included in the Amended Settlement if, as of January 5, 2009, they had been published in hard copy form, were subject to a U.S. copyright interest and either were registered with the U.S. Copyright Office or their place of publication was in Canada, the United Kingdom (“UK”) or Australia. Books published after January 5, 2009 are not included. Also excluded from the definition of Books are periodicals, personal papers, sheet music, public domain works and government works that are not subject to copyright. As a result of the narrower definition, many foreign authors and publishers will not be eligible to participate in the Amended Settlement or be bound by its terms, if approved, and many books published outside of the United States will be excluded from its scope.

Proposed Settlement Terms

The Amended Settlement, if approved, would allow Google, on a non-exclusive basis, in the United States, subject to the terms and conditions thereof, to: (a) continue to digitize Books and Inserts;⁵ (b) sell subscriptions to an electronic Books database to institutions (“Institutional Subscriptions”); (c) sell online access to individual Books to consumers (“Consumer Purchases”); (d) display portions of Books in a “preview” format to encourage sales of online access to Books (“Preview Use”); (e) sell advertising on Preview Use pages and other online pages dedicated to a single Book (“Advertising Uses”); (f) display “snippets” from Books (“Snippet Display”); and (g) display bibliographic information from Books. Rights granted to Google in the Amended Settlement are non-exclusive and rightsholders (those who



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did not opt out of the Amended Settlement) would have the right to authorize others to use their works in any way.

Under the Amended Settlement, Google would pay US\$34.5 million (of which US\$12 million has been paid) to establish and fund the initial operations of a not-for-profit Books Rights Registry (“Registry”) to be run by representatives of authors and publishers. The Registry would, among other things, represent the interests of rightsholders in connection with the Amended Settlement, maintain a rights information database for Books and Inserts and their authors and publishers, use commercially reasonable efforts to locate rightsholders of Books and Inserts and collect payments from Google and distribute them to rightsholders in accordance with an agreed Plan of Allocation and Author-Publisher Procedures.

The Registry would have equal representation of the author sub-class and publisher sub-class on its Board of Directors, and would include at least one author and publisher representative from each of the United States, Canada, the UK and Australia. The Registry would also delegate to an independent fiduciary (“Unclaimed Works Fiduciary”) responsibility for representing the interests of the rightsholders of unclaimed or “orphan” works (being works for which the appropriate rightsholders are unknown or cannot readily be found) under the Amended Settlement.

In addition, Google would pay a minimum of US\$45 million to compensate rightsholders whose works Google has scanned without permission on or before May 5, 2009. Such rightsholders are eligible for cash payments of at least US\$60 per “Principal Work” (the main work in a Book), US\$15 per “Entire Insert” and US\$5 per “Partial Insert”.⁶ Google would also pay US\$45.5 million toward the legal fees of the plaintiffs.

Pursuant to the Amended Settlement, Google would pay to the Registry, for the benefit of rightsholders, 63% of all revenues Google receives from the commercial uses it makes of Books in the United States that are authorized under the Amended Settlement (i.e., Institutional Subscriptions, Consumer Purchases, Advertising Uses, Public Access Service and any Additional Revenue Models (described below)).⁷ Revenue for unclaimed or orphan works would be held for 10 years and the Registry, in consultation with the Unclaimed Works Fiduciary, would be able to spend up to 25% of that revenue after 5 years to search for the rightsholders of those works. After 10 years, unclaimed funds would, subject to Court approval, be distributed to literary-based charities.

The Amended Settlement would permit three “Additional Revenue Models” to be developed in the future, subject to approval by the Registry: print-on demand (which would permit purchasers to obtain a print copy of Books that are not “Commercially Available”), file download (which would permit purchasers to download a copy in a file format such as PDF or EPUB for use on electronic devices) and consumer subscription (which would permit the purchase of individual access to Books available for Institutional Subscription or a designated subset thereof) all on the condition that rightsholders who have asserted a claim to their Books and the Unclaimed Works Fiduciary are given advance notice of, and the opportunity to exclude works from, these new services.



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The Amended Settlement would also require Google to allow third party resellers to sell consumers online access to the Books made available by Google through the Consumer Purchase model (in which case the reseller would retain the majority of Google's 37% share of the net revenue split).

In exchange for the payments and settlement benefits, Google and the libraries would be released from liability for copyright claims arising on or before the effective date (the date final approval has been obtained and the time for appeals has been exhausted) relating to the Library Project and, thereafter, claims relating to activities authorized by the Amended Settlement.⁸

Rightsholders' Options – Removal or Exclusion – Display Uses

Pursuant to the Amended Settlement, rightsholders would be able to request that Google "remove" one or more of their Books if they have already been digitized, or request that Google not digitize a Book. If the removal request is made by April 5, 2011 digital copies of the Book will not be accessible to Google or participating libraries (although they may store copies). After March 9, 2012, however, only requests for "exclusion" can be made. Requesting the removal of Books that have been digitized is no longer an option.⁹

As an alternative to removal, rightsholders of Books would be able to manage the uses they wish Google to make of their Books by requesting that their Books be "excluded" by Google from particular "Display Uses" (i.e., Access Uses, Preview Uses, Snippet Display and Front Matter Display) or Revenue Models, and may change these elections from time to time.¹⁰ Rightsholders of Inserts would also have the right to exclude Inserts from all, but not less than all, Display Uses.

Under the Amended Settlement, "Commercially Available" Books (generally, those in-print and available for sale new to purchasers within the United States, Canada, the U.K. or Australia) by default are not included in any Display Uses but are included in "Non-Display Uses".¹¹ Rightsholders of these Books, however, can decide to include one or more of their Books in any or all Display Uses and can change these elections from time to time. In contrast, Books that are not "Commercially Available" (generally, out-of-print Books) by default are included in all Display Uses and Non-Display Uses. Rightsholders of these Books can decide, however, to exclude one or more of their Books from any or all Display Uses and can change these elections from time to time.

Rights holders would be required to register or file a claim in order to claim and manage their Books and Inserts (for e.g., to remove or exclude Books and Inserts), to receive a cash payment for any Books and Inserts digitized on or before May 5, 2009 and to participate in future revenues. There are deadlines to claim cash payments (March 31, 2011) and to remove Books, but there is no deadline to assert a claim for Books and Inserts or to exclude Books and Inserts.

Opt-Out and Objection Rights

January 28, 2010 was the last day on which owners of U.S. copyrights in Books published in the United States, Canada, the UK and Australia could opt out, opt-back



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in or file an objection to the Amended Settlement. Those who have “opted out” will not be bound by the terms of the Amended Settlement, if approved, and the Amended Settlement will neither authorize nor prohibit the use of their works. Those who opted out will not be precluded from pursuing legal action against Google and participating libraries or from subsequently negotiating a deal with Google to commercialize their Books through Google’s Partner Program. Those who “objected” were able to put their objections to the Court for consideration at the Fairness Hearing. If the objections are rejected and the Amended Settlement is approved, the objectors will be bound by the settlement (although they could still participate separately in Google’s Partner Program if they desired).

Benefits and Concerns

Google and other supporters of the Amended Settlement point to the numerous public benefits that the settlement, if approved, would provide. For instance, the settlement would: (i) make millions of in-copyright, out-of-print books more widely accessible online to users in the United States; (ii) enable authors and publishers to attract new readers and larger markets for their works and establish new ways for them to distribute and profit from digital versions of their works, while allowing them to retain control over how their works are used and displayed; and (iii) allow libraries, universities and other organizations to purchase institutional subscriptions, giving students, researchers and other users unprecedented access to the collections of major research libraries while compensating authors and publishers for the service. In addition, public and university libraries in the United States will also be able to offer designated terminals where readers can access the full text of out-of-print books for free on line viewing (“Public Access Service”) with revenues from per page printing fees being shared with rightsholders to the extent that such printing service is available.

Under the Amended Settlement, Google would also commit to using commercially reasonable efforts to accommodate users with print disabilities (such as blindness and visual disability) and to extend the services available under the agreement to such users through screen enlargement, voice output and Braille display technologies at no extra charge. The Amended Settlement would also allow for the creation of two research centres or Host Sites to whom the Research Corpus (a set of all digital copies of Books made in connection with the Library Project, other than those that have been removed or withdrawn by rightsholders) would be made available. The Research Corpus would be available to “Qualified Users” solely for engaging in specific types of “Non-Consumptive Research”.¹²

Notwithstanding the potential public benefits, a wide array of concerns and criticisms remain with respect to the Amended Settlement, including, among other things, that:

- the Authors Guild (representing the author sub-class) and the AAP (representing the publisher sub-class) who negotiated the proposed settlement to the class action do not adequately and fairly represent the diverse interests of their respective classes as a whole;¹³



- the settlement is an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond resolution of the dispute that was before the Court in litigation;
- the proposed settlement is anti-competitive in nature and, if approved, would: (i) provide Google with an unfair competitive advantage (verging on a monopoly) in the competitive search market;¹⁴ (ii) bestow upon Google a de facto exclusive license to millions of books; (iii) and undermine competition in digital book distribution by bolstering Google's market power and dominance through a judicial grant of access to books that no other competitor can secure;¹⁵
- the pricing mechanisms continue to raise antitrust concerns in terms of restrictions on price competition among authors and publishers;
- the “opt out” nature of the settlement is inconsistent with the basic copyright principle that copyright owners generally must affirmatively grant permission for the kinds of use of their works contemplated by the settlement;
- the treatment of unclaimed or orphan works should more properly be addressed by legislative action rather than by private settlement agreement;
- the settlement lacks meaningful constraints on future increases in institutional subscription license fees; and
- the settlement lacks sufficient user privacy protections; in particular, regarding the ability of Google to track users' reading habits and search history.

If the Amended Settlement is approved, the issue of whether Google's actions under the Library Program constitutes copyright infringement or “fair use” will remain unanswered by the Court, at least for now. Given the number of objections before the Court, including the latest filing by the DOJ, approval is far from certain; there may be further amendments and, regardless of the outcome of the Fairness Hearing, there may be appeals of the Court's decision. It seems safe to say that there will likely be a few more chapters left in the ongoing saga of the Google Book Settlement.

Stay tuned for the ruling from the February 18th Fairness Hearing for the next chapter.

¹ Amended Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05-8136-DC (S.D.N.Y. Nov. 13, 2009) (proposed), available at http://www.googlebooksettlement.com/r/view_settlement_agreement.

² *Authors Guild, Inc., et al. v. Google, Inc.*, Case No. 05 CV 8136 (S.D.N.Y. Sept. 20, 2005).

³ *McGraw-Hill Cos., Inc. v. Google, Inc.*, Case No. 05 CV 881 (S.D.N.Y. Oct. 19, 2005).

⁴ Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement, Case No. 05 CV 8136 (S.D.N.Y. Feb. 4, 2010) at p.2 and p.11 (“Statement of Interest”).

⁵ “Inserts” are works contained in a Book where the rightsholder of the insert is not the same as the rightsholder of the Book (for e.g., forewords, afterwords, prologues, epilogues, essays, poems, quotations, letters, song lyrics, textual excerpts from other Books, periodicals or other works,



tables, charts and graphs but not pictorial works such as photographs, illustrations or maps. In the case of U.S. works, Inserts will only fall within the scope of the Amended Settlement if they have been separately registered with the U.S. Copyright Office, either as a stand alone work or as part of another registered work from which it was excerpted. *Supra* Note 1, Amended Settlement, s.1.75.

⁶ *Ibid*, Amended Settlement, ss.1.113 and 5.1(a). Section 5.1(a) specifies that only one cash payment would be made per Principal Work, Entire Insert or Partial Insert, regardless of the number of times that Google has digitized such work and regardless of the number of Books in which such Principal Insert or Work appears.

⁷ *Ibid*, Amended Settlement, ss.2.1(a) and 4.5. Section 4.5(a)(iii) specifies that either Google or the rightsholders has the ability to request renegotiation of the 63%/37% revenue split for any Commercially Available Book.

⁸ *Ibid*, Amended Settlement, ss. 10.1 and 10.2. Section 17 of the Proposed Draft Final Judgment and Order For Dismissal attached to the Amended Settlement as Attachment L indicates that it is not intended to provide any anti-trust immunity to any Person or parties.

⁹ *Ibid*, Amended Settlement, s. 3.5(a)(iii). In the event of a request to remove received during the interim period (between April 5, 2011 and March 9, 2012), Google must cease use of the digital copies except for certain limiting purposes permitted by s.1.126(b).

¹⁰ *Ibid*, Amended Settlement, ss. 1.52, 1.133 and 3.5(b). “Front Matter Display” is the display of one or more of the title page, copyright page, table of contents, other pages appearing before the table of contents and indexes of a Book. “Revenue Models” are Institutional Subscriptions, Consumer Purchase, Advertising Uses, Public Access Service and any Additional Revenue Models.

¹¹ *Ibid*, Amended Settlement, ss. 1.31; 1.94, 3.2(d), 3.4. “Non-Display Uses” are uses that do not display expression from digital copies of Books or Inserts to the public; for e.g., display of bibliographical information, indexing, algorithmic listings and internal research and development.

¹² *Ibid*, Amended Settlement, ss. 1.123, 1.93 and 7.2(d). Non-Consumptive Research is described in Section 1.123 as research in which computational analysis is performed on a Book, but not research in which substantial portions of the Book are read or displayed to understand the intellectual content within the Book. Google could also act as a third Host Site.

¹³ A Supplemental Memorandum of Amicus Curiae in Opposition to the Proposed Settlement (“Supp. Memorandum”) filed with the Court on January 28, 2010 by the Open Book Alliance (members of which include Google’s competitors, Amazon, Microsoft, Yahoo! and other groups) states at p.2: “...Google has signed “Partner” agreements with thousands of publishers. Doubtless, each of the plaintiff publishers in this action has its own Partner agreement with Google that will govern the payments it receives from Google, in lieu of the provisions in the Settlement Agreement the plaintiffs negotiated to bind other class members. The terms of the Partner agreements remain secret”. The brief further states at p.3, “...the express language of [s.] 17.9 [of the Amended Settlement] permits the parties to negotiate secret side deals to govern the economic terms of books licensed to Google under the Settlement at any time, even after a court review of the Amended Agreement, effectively evading judicial and public scrutiny...”.

¹⁴ *Ibid.*, Supp. Memorandum, at p. 18, “Digital rights to virtually all out-of-print books provide Google with a decisive advantage in responding to tail queries.... If Google can deny its search rivals the ability to integrate the same corpus of books, Google’s lead in search will become insurmountable.”

¹⁵ Amended Google Books Settlement Is A “Paltry Proposal” That Defies Antitrust Laws, Open Book Alliance, posted Jan.28, 2010 by admin., available at <http://www.openbookalliance.org/2010/01/amended-google-books-settlement>. The DOJ also said in its Statement of Interest (*Supra*, Note 8, at p.2) that the legal rights granted in the Amended Settlement “confer significant and possibly anticompetitive advantages on a single entity – Google. Under the [Amended Settlement], as proposed, Google would remain the only competitor in the digital marketplace with the rights to distribute and otherwise exploit a vast array of works in multiple formats”.