US Google Book Settlement: Impact and Practical Consequences

Jens Bammel
Bogota, 8 July 2009
Legal Notice

Nothing in this presentation is intended to be legal or business advice. You are urged to refer to the original Settlement documents available from the Settlement homepage: www.googlebooksettlement.com and to consult legal counsel.
IPA can only take a position where there is a consensus by its members. Where there is no consensus, like with the Google settlement, IPA provides factual information to help its members and their publishers make their own decisions.
Can’t I ignore the settlement?

- « USA is far away »
- « No real effect on Colombian publishers »
- « I am a small publisher »
- « It is all too complicated »
- « The more I read, the less I understand »
- « I don’t see the arguments and I don’t see the consequences »
- « I have other, bigger problems »
- …etc.etc.etc.
Your search did not match any books. Try making your search less specific to match more books.

**Search for a book**

For each book, please provide as much information as you can.

**Title:**

**Author or other contributor:**

**Identifier:**

10 or 13 digit ISBNs are accepted.

**Search by ISBN prefix**

**Publisher or Imprint:**

alfaomega

**Published between the years:**

and

**Search**  **Return to finding tools**

**Add a book if it is not listed above**
<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Year</th>
<th>Format</th>
<th>Imprint</th>
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**Results**

*Claiming a book:* please check the box next to the book you wish to claim.

*Claiming an Insert:* please check the box next to the book that contains the Insert you wish to claim. You will be asked to identify the Insert within the book in the next step. If the Insert is not listed below, modify your search or, at the bottom of the page, you may add a book to the list.

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**Finish claim form for selected books (0)**

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<thead>
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<th>Author</th>
<th>Year</th>
<th>Format</th>
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<td>Oriens antiquus</td>
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<td>김선영</td>
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**Books of 7 books**

**Finish claim form for selected books (0)**
### Books of 7 books

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<th>Imprint</th>
<th>ISBN</th>
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</table>
Results

**Claiming a book:** please check the box next to the book you wish to claim.

**Claiming an Insert:** please check the box next to the book that contains the Insert you wish to claim. You will be asked to identify the Insert within the book in the next step. If a book is not listed below, modify your search or, at the bottom of the page, you may add a book to the list.

Finish claim form for selected books (0)  »  Change your search

### Books of 2 books

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<td>Author</td>
<td>Year</td>
<td>Format</td>
<td>Imprint</td>
<td>Identifier</td>
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<td>(Meta) cultura del estado-nación y estado de la (meta) ...</td>
<td>Claudia Briones</td>
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<td>Editorial Universidad del Cauca</td>
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<td>Actividad física y adulto mayor</td>
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<td>Kinesis, Editorial Kinesis</td>
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<td>Actividad física y salud para la vida</td>
<td>Gladys Elena Campo S., Grupo de Estudio Kinesis Staff, G ...</td>
<td>2003</td>
<td>Paperback</td>
<td>Kinesis, Editorial Kinesis</td>
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<td>Adaptación y cuidado en el ser humano</td>
<td>María del Carmen Gutiérrez Agudelo</td>
<td>--</td>
<td>Book</td>
<td>Manual Moderno</td>
<td>ISBN: 958944619...</td>
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<td>1098</td>
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<td>Nova-Medical</td>
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<td>Jorge Humberto Blanco Restrepo, José María Maya Mejía</td>
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<td>Corporación para Investigaciones Biológicas CIB, Corpo ...</td>
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<td>William Cristancho Gómez</td>
<td>2000</td>
<td>Book</td>
<td>Universidad del Cauca</td>
<td>ISBN: 958947511...</td>
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Yes
you must make a decision
on the Google settlement itself

Because you are a party in the settlement
The Google settlement is a messenger for some uncomfortable truths:
• You must deal with digitsation of your works
• You must address the issues of orphan works
• You must clarify historic book rights
• You must prevent that your works become « orphans »
• You must learn to understand and manage complicated digital rights deals
In 2009

• Google has digitised ca 7 m books
• Settlement has been notified to you
• 4 Sept: Deadline to opt out
• 7 Oct: Fairness hearing
• End ‘09: Court decision
New Deadlines

Until 4th September 2009 (previously 5th May):
(i) Rights holders can opt out of the settlement
(ii) Rights holders can raise objections to the settlement.

7th October 2009: Fairness hearing.
End 2009: Judge decides whether to approve the settlement or not.
5th January 2010: Deadline to file claim payments (compensation of 60 $) for each book digitised before the 5th May 2009.
5th April 2011: Deadline to remove a digital copy of the book from the database.
- 2004
  - Google entered into agreements with several libraries in the US and elsewhere to digitize books
  - Over seven million books digitized today
  - Google users can search Google's digital library and view "snippets" from books

- Authors' Guild v Google - September 20, 2005 (class-action)
- McGraw-Hill v Google - October 19, 2005 (5 publishers)

- October 28, 2008
  - Almost 3 yrs of negotiations
  - Google will make payments of $125 million.
  - $34.5M for notice and administrative costs and to establish the Book Rights Registry
  - $45M to resolve existing claims by authors and publishers
  - The rest to cover legal fees and other payments

- November 17, 2008
In Summary

Under the settlement, Google is authorized, on a non-exclusive basis, to:

- Digitize (almost) all books published on or before January 5, 2009
- Sell subscriptions to an electronic books database to institutions
- Sell online access to individual books
- Sell advertising on web-pages with content from books; and
- Make other specified uses
- In the territory of the United States

Google will pay rightsholders 63% of the revenues earned from these commercial uses.
Definitions and Other Useful Things to Know

Google Book Search
- Google book search allows a user to search within a scanned book. The books are scanned by Google under 2 programs: (1) the Google Library Project which is the subject of this settlement, and (2) the Partner Program whereby participating publishers and authors make their books discoverable on Google.

Books
- Book means a written or printed work on sheets of paper bound together in hard copy form that was published or distributed to the public by January 5, 2009
- Excludes: periodicals, personal papers, sheet music, public domain and government works

Inserts
- An insert is a work contained in a book where the copyright interest in the insert is owned or held by someone other than the rightsholder in the book
- Excludes: pictorial works and works that are in the public domain

Commercially available/in-print
- Commercially available means that the book is offered for sale new through one or more then-customary channels of trade in the United States (other than as derived from a library scan)
- Commercially available works are assumed to be in-print and vice-versa
<table>
<thead>
<tr>
<th><strong>More definitions and other useful things to know</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>US term of copyright</strong></td>
</tr>
<tr>
<td><strong>Work for hire</strong></td>
</tr>
<tr>
<td><strong>US copyright interest</strong></td>
</tr>
<tr>
<td><strong>Jurisdictional application of settlement</strong></td>
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</tbody>
</table>
What’s a class action settlement?

Class Action begins
- a class action is a form of lawsuit where a large group of people collectively bring a claim to court
- Class representatives sue on behalf of others with similar claims
- US court certifies groups with similar claims as a class

Parties agree to settle
- Parties agree to settle lawsuit
- Court preliminarily approves proposed settlement on meeting the criteria for a class action

Notice
- Due process requires that notice describing the class action/settlement be sent, published, or broadcast to class members.
- Provides opportunity for class members to exclude themselves (opt-out)

Fairness Hearing
- The Court will consider and hear any objections or comments to the settlement
- The Court will decide whether the settlement is “fair, adequate and reasonable”
Works covered by the Settlement

• “Books” and “Inserts”
• Not periodicals
• Published on or before 5 January 2009
Authorisations given by Rightsholders through the Settlement

- Digitisation – retroactively & in the future
- Not-for-cash uses ("Non-Display Uses")
- Library Uses
- Cash uses ("Display Uses")
- US only
What Next?

- January 5, 2009
- Over several weeks notice sent directly to authors and publishers
- Notices will be published worldwide in 213 countries, 72 languages and over 140 publications
- RROs will play an important role in providing notice to the class members outside the US

- February 27, 2009

- To opt-out you must send written notice to the settlement administrator by May 5, 2009
- If you wish to stay in the settlement but want to object or comment on the settlement you must file with the Court a statement of your objection or position by May 5, 2009
What Next?

- June 11, 2009
- The purpose of the Hearing shall be to determine: (a) whether Settlement is fair, reasonable, and adequate; (b) whether to certify the Class and the Sub-Classes for the purposes of the settlement; and (c) whether the proposed Settlement Agreement should be approved by the Court and judgment entered thereon.

- If your work was digitized on or before May 5, 2009, you have until January 5, 2010 to make a claim for payment.
- Works digitized after May 5, 2009 are not subject to a payment.
- Only one cash payment will be made per book or insert, even if Google digitized it more than once.

- If you have not opted-out of the settlement but still wish to request that Google remove one or all of your already digitized works from its digital database, you must do so by April 5, 2011.
Books Covered by Settlement *

Books published before January 5, 2009 (gazillion)

Out-of-Print, Copyright Protected (3.5M)

In-Print, Copyright protected (1.5M)

Publisher Partner (1M)

Public Domain and US Government publications (1M)

Books not Covered by Settlement

Books Covered by Settlement

* The size of the circle is not representative of the number of works
Not Covered by Settlement

- Books published before January 5, 2009 (approx. 10 billion)
- Out-of-Print, Copyright Protected (1.5M)
- In-Print, Copyright protected (1.5M)
- Publisher Partner (1M)
- Public Domain and US Government publications (1M)
- Periodicals
- Sheet music
- Personal papers
- Pictorial works in books, unless same copyright owner as book or illustrations in children books

* The size of the circle is not representative of the number of works
# Uses Covered by Settlement

## Display Uses

- **Access Uses**: viewing and annotating the entire book, and printing and copying/pasting portions of the book, subject to certain page number limitations.
- **Institutional Subscriptions**: Educational, government and corporate institutions will be able to purchase time-limited subscriptions to access the full contents of the institutional subscription database.
- **Consumer Purchases**: Individual users will be able to purchase the right to access books online.

- **Preview Uses**: user to view up to 20% of a book (but no more than 5 adjacent pages) before making a purchase decision. For books of fiction, Google will block the last 5% of the book. Rightsholders may change the preview availability.

- **Snippet Displays**: display three/four lines of text in response to a user’s search.

- **Display of Bibliographic Pages**: display book’s title page, copyright page, TOC and index.

## Non-Display Uses

- Uses that do not involve displaying any content from a book to the public.

  - For Example, the display of:
    - bibliographic information,
    - full-text indexing,
    - geographic indexing,
    - algorithmic listings of key terms, and
    - internal research and development at Google.
More Uses Covered by Settlement

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<tr>
<th>Free Public Access Uses</th>
<th>Free Non-Consumptive Research</th>
<th>Other Uses</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Colleges get 1 terminal per 4,000 or 10,000 students</td>
<td>• Research that does not intrude on the rightsholders’ interest in making money from having the books read by people</td>
<td>• The Registry and Google may agree to new revenue models, including:</td>
</tr>
<tr>
<td>• Public libraries get 1 terminal per building</td>
<td>• While at the same time advancing knowledge about algorithms, natural language, the history of publishing, and other topics</td>
<td>• Print on Demand</td>
</tr>
<tr>
<td>• Public access terminals will allow printing for a per-page fee</td>
<td>• Can only exclude your book from this use if commercially available during the first 2 years and while it remains commercially available</td>
<td>• Coursepacks for educational and professional markets</td>
</tr>
<tr>
<td>• Libraries that allow their books to be scanned are eligible to get back a digital copy that they can use for accessibility and to replace damaged or lost copies, if they sign an agreement with the Registry.</td>
<td></td>
<td>• PDF downloads</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Consumer subscription models</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Summaries, abstracts and/or compilations of books</td>
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</tbody>
</table>
## Where is the Money Coming From?

<table>
<thead>
<tr>
<th>Source</th>
<th>Details</th>
</tr>
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</table>
| **Digitization Payment**       | - Minimum of $45M and at least $60 per principal work, $15 per entire insert and $5 partial insert, if scanned on or before May 5, 2009  
- Must make claim by January 5, 2010  
- No entitlement to payment if opt-out of class-action or remove book |
| **Ad Revenue**                 | - Google will pay 63% of ad revenue and retain 37%, if web page is dedicated only to a single book  
- Google may place advertisement on other Google products/services, but rightsholders will not earn revenues from those advertisement |
| **Subscription**               | - Google will pay 63% of subscription revenue and retain 37%  
- Pricing on an FTE basis with different pricing buckets for different categories of institutions (higher ed., K-12, corporate, government)  
- Rightsholders will receive this revenue based in a Usage Fee and a set Inclusion Fee |
| **Consumer Purchases**         | - Google will pay 63% of the purchase price and retain 37%  
- 2 pricing options: rightsholder set or a price set by a Google algorithm  
- The algorithm will find the optimal price for each book and maximize revenue for each rightsholder |
<table>
<thead>
<tr>
<th></th>
<th>Out-of-Print</th>
<th>In-Print</th>
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<tbody>
<tr>
<td><strong>Display Uses</strong></td>
<td>Opt-out of some or all (insert must opt-out of all) display uses, changes possible at anytime</td>
<td>Opt-in of some or all (inserts must opt-out to all or none, if book included), changes possible at anytime</td>
</tr>
<tr>
<td><strong>Non-Display Uses</strong></td>
<td>No possibility of exclusion, unless remove book</td>
<td>No possibility of exclusion, unless remove book</td>
</tr>
<tr>
<td><strong>Direction</strong></td>
<td>If reverted to author or “author-controlled”: author</td>
<td>Both publisher and author (unless work for hire) must direct, process initiated by publisher</td>
</tr>
<tr>
<td></td>
<td>If work for hire: publisher</td>
<td>Most restrictive direction rules</td>
</tr>
<tr>
<td></td>
<td>For all other books: either author, or the publisher for good cause articulated</td>
<td></td>
</tr>
<tr>
<td><strong>Pricing</strong></td>
<td>If reverted to author or “author-controlled: author</td>
<td>Set by publisher (possible to set different economic terms through Partner Program)</td>
</tr>
<tr>
<td></td>
<td>If work for hire: publisher</td>
<td>If author disagrees with price set by publisher, author may exclude book from consumer use</td>
</tr>
<tr>
<td></td>
<td>For all other books: either author or publisher (the higher price governs)</td>
<td></td>
</tr>
<tr>
<td><strong>Payment</strong></td>
<td>100% to author, if rights reverted or author controlled</td>
<td>Payment to publisher with flow through to author according to author-publisher contract</td>
</tr>
<tr>
<td></td>
<td>100% to publisher if no reversion</td>
<td></td>
</tr>
<tr>
<td></td>
<td>If shared rights: 65/35 in favor of author for publication prior to 1987</td>
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</tr>
<tr>
<td></td>
<td>50/50 for publications during or after 1987</td>
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The Engine that will Make it Happen: The Registry

**Objective**
- Clearing house for the administration of the rights of rightsholders under the settlement agreement
- Must act in the interest of both sub-classes
- An RRO?

**Corporate structure**
- Not-for-profit entity
- All funds received by the Registry under the settlement agreement will be for the exclusive direct or indirect benefit of the rightsholders

**Funding**
- Initial $34.5 million from Google settlement to establish and maintain the Registry
- An administrative fee as a percentage of revenues received from Google (estimated to be 10-20%)

**Organizational Structure**
- Equal representation of the Author sub-class and the Publisher sub-class on its Board of Directors
- Each act of the Board will require a majority of the directors, with such majority including at least one director who is a representative of each sub-class
## The Book Registry

<table>
<thead>
<tr>
<th>What the Registry will do</th>
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<tbody>
<tr>
<td>Basic administration tasks</td>
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<tr>
<td>Maintain a database of who owns what copyright and inclusion/exclusion list</td>
</tr>
<tr>
<td>Exchange data with Google regarding rightsholders’ directions</td>
</tr>
<tr>
<td>Mediate ownership and payment disputes</td>
</tr>
<tr>
<td>Receive payments from Google and distribute those payments to rightsholders</td>
</tr>
<tr>
<td>Track down AWOL authors</td>
</tr>
<tr>
<td>Negotiate the terms of new revenue models with Google</td>
</tr>
<tr>
<td>Approve security plans that Google and libraries use</td>
</tr>
<tr>
<td>Audit Google’s records and security procedures</td>
</tr>
<tr>
<td>Broad discretion to work out an equitable formula for dividing revenues among authors</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What the Registry will not do</th>
</tr>
</thead>
<tbody>
<tr>
<td>Keep a digital copy of the books scanned</td>
</tr>
<tr>
<td>Mediate disputes regarding ownership and payments related to authors and publishers of educational books</td>
</tr>
<tr>
<td>Negotiate on behalf of authors and publishers with an entity other than Google, unless it has received the express approval of the rightsholders of the books involved in such other commercial arrangement</td>
</tr>
</tbody>
</table>
Are you in or out?

Display Use:
- Out-of-print: Opt-out
- In-print: Opt-in
- May exclude works at anytime

Non-Display Use:
- All works are subject to non-display uses, may not exclude from such uses unless opt-out of Settlement or Book is removed

Removal:
- May request the removal of the digital copy but must do so before April 5, 2011 (unless not yet digitized)

Out of Settlement:
- Must opt-out of settlement by September 4th, 2009
In Summary

Under the settlement, Google is authorized, on a non-exclusive basis, to:

- Digitize (almost) all books published on or before January 5, 2009
- Sell subscriptions to an electronic books database to institutions
- Sell online access to individual books
- Sell advertising on web-pages with content from books; and
- Make other specified uses
- In the territory of the United States

Google will pay rightsholders 63% of the revenues earned from these commercial uses.
Your options

- **i) Opt out of the settlement.** Their books will continue to be digitised and Google may continue to make unauthorised uses of them. Rights holders will be able to sue Google in the US.

- **ii) Do nothing and ignore the deadlines.** Books will continue to be digitised but the rightholder will not receive compensation for works digitised. Display uses will be made of out of print works.

- **iii) Stay in the settlement and claim your works.** If the books have been digitised before the 5th May 2009, rights holders are entitled to 60 $. When claiming, you can:
  - remove the books.
  - Prevent or allow all or some display uses.
The Global Debate

- Will it create a new monopoly or are we strengthening a competitor to Amazon?
- Will it give libraries too many rights or will it control their uses sensibly?
- Operational issues
  - Commercial availability
  - Data management for publishers
- Book Rights Registry representativeness
The Global Debate

• Positions of all publishers rightholders are closer than they appear
• AAP and the publishers are defenders of strong copyright
• Compromise is harder to sell than radical opposition
• Greater risks if the settlement fails?
  – Court battle with uncertain outcome
  – Legislation with an uncertain outcome
Special Notice

IPA provides factual information to help its members and their publishers make their own decisions.

It can only take a position where there is a consensus by its members. IPA therefore does not take any particular position to the Google settlement.
Looking Beyond the Settlement

• Will the BRR play a global role in determining orphan works?
  – All Colombian publishers should check for their works from time-to-time
The First Sign of a New Era

Book digitisation will happen in Colombia and Latin America

• Will you allow Google to do this?
• Is the settlement a good precedent in Colombia?
• What are the alternative models?
Managing Digital Rights

• Not just for Google but for your future business
• You need to know what rights you own
• Proof of ownership, or reasonable claim
• Recording your rights accurately and accessibly
• Make descisions on works that you do not own
• Start think of your rights policy
« This is too complicated »

- Ask an agent to manage your rights
- Consultation in your publishers association
- A role for collecting societies?
  - Collecting money rather than selling
  - What splits would apply?
  - How can you legally empower your RRO?
Relevant websites

www.googlebooksettlement.com
www.publishers.org
www.authorsguild.org
www.internationalpublishers.org
Not-for-cash Uses ("Non-Display Uses")

- Any use not involving content display to the public
- Deemed authorised for all works — **no** possibility to exclude
- No revenues for rightsholders
Library Uses

• Make preservation and replacement copies
• Grant access to print disabled users
• Display snippets
• Print 5 pages (out of print only)
• Deemed authorised for all works — no possibility to exclude
• No revenue for rightsholders
For Cash Uses ("Display Uses")

- Use for different revenue-generating business models
- E.g. institutional subscriptions, consumer purchases, public access point licenses
- Deemed authorised for out of print works only – unless expressly excluded
- In print works can be used upon express rightsholder authorisation only
Practical Consequences of Participation in Settlement

• Many – including:
  • Eligibility for cash compensation – possibly to be shared with authors
  • Revenue stream – possibly to be shared with authors
  • Need to manage lists
Management of Works

- *Display Uses* only
- Manage extent of uses permitted for individual works
- Not possible for *Non-Display* and Library Uses
- Only alternative: complete removal of individual or all works
What to do now

- Before 5 May 2009, decide whether to “opt out”
- If you stay in, decide whether to raise formal objections
- Decide if, and how, to manage your list
- Closely monitor the in print/out of print status of works in your lists
- Manage author communication
Thank You.

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