

## A Guide for the Perplexed Part III: The Amended Settlement Agreement

Jonathan Band  
policybandwidth  
jband@policybandwidth.com

On Friday, November 13, 2009, Google, the Authors Guild, and the Association of American Publishers filed an Amended Settlement Agreement (ASA)<sup>1</sup> in the copyright infringement litigation concerning the Google Library Project.<sup>2</sup> The amendments proposed by the parties are designed to address objections made by the U.S. Department of Justice and copyright holders to the original proposed settlement agreement.<sup>3</sup> While many of the amendments will have little direct impact on libraries, the ASA significantly reduces the scope of the settlement because it excludes most books published outside of the United States. This paper describes the ASA's major changes, with emphasis on those changes relevant to libraries.

---

<sup>1</sup> Amended Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05-8136 (S.D.N.Y. Nov. 13, 2009), available at

[http://thepublicindex.org/docs/amended\\_settlement/amended\\_settlement.pdf](http://thepublicindex.org/docs/amended_settlement/amended_settlement.pdf).

<sup>2</sup> See Jonathan Band, *A Guide for the Perplexed: Libraries and the Google Library Project Settlement*, November 13, 2008, <http://www.arl.org/bm~doc/google-settlement-13nov08.pdf>, and Jonathan Band, *A Guide for the Perplexed Part II: The Expanded Google-Michigan Agreement*, June 12, 2009, <http://www.arl.org/bm~doc/google-michigan-12jun09.pdf>,

for detailed discussions of the original settlement agreement and the subsequent modification to the agreements between Google and its partner libraries. This paper will assume that the reader is familiar with the settlement's provisions.

<sup>3</sup> See Brandon Butler, *The Google Book Settlement: Who is Filing and What Are They Saying?*, September 28, 2009, <http://www.arl.org/bm~doc/googlefilingcharts.pdf>, for a summary of the objections made by various entities.

## **I. LIBRARY ISSUES**

### **Books Within the ASA**

The original settlement applied to: 1) books first published in the U.S. and registered with the U.S. Copyright Office before January 5, 2009; and 2) books published outside the United States before January 5, 2009, regardless of copyright registration. The overwhelming majority of class members who objected to the original settlement were foreign rightsholders of books published outside the U.S. Moreover, the Department of Justice and the Copyright Office argued that the inclusion of the foreign rightsholders within the plaintiff class did not meet the requirements of Rule 23 of the Federal Rules of Civil Procedure, which governs class actions.

In response to these concerns, the ASA does not apply to books published outside the U.S. unless: 1) the books were published in Canada, Australia, or the United Kingdom before January 5, 2009; or 2) the books were registered with the Copyright Office before January 5, 2009. (ASA 1.19) Perhaps as much as 50% of the titles in the research libraries partnering with Google are not in English; and most of these foreign language titles probably were published outside the U.S. and were not registered with the Copyright Office. The ASA, therefore, likely applies to half as many books as the original settlement. The foreign (non-Anglo) books will not be available for the full-text display services under the ASA such as the institutional subscription, consumer purchase, and the free public access.<sup>4</sup>

---

<sup>4</sup> The ASA also tightens the exclusion of books primarily used to play music. (ASA 1.19) Further, the ASA clarifies that comic books (as opposed to graphic novels) are considered periodicals and therefore are not books under the settlement. (ASA 1.104) Additionally, the ASA clarifies that a bound compilation of periodicals is not a book under the settlement.

Google does, however, intend to continue scanning the foreign books into its search base, and to display snippets in response to search queries. In other words, Google intends to continue the existing Library Project with respect to the foreign books. Because the ASA does not cover these books, their rightsholders could sue Google for copyright infringement for scanning and snippet display, and Google presumably would defend itself by claiming that its activities fall within the fair use privilege of 17 U.S.C. 107.<sup>5</sup> Google also will attempt to negotiate for permission for full text display from foreign collecting societies that have the authority to represent the copyright interests of authors and publishers in their countries.<sup>6</sup>

Eliminating the foreign books from the settlement means the elimination of many of the foreign rightsholders from the class of plaintiffs. The plaintiff class is defined as the holders of a U.S. copyright interest in a book under the settlement; if a foreign book no longer is covered by the settlement, its rightsholder no longer is a member of the plaintiff class.<sup>7</sup> (ASA 1.13) By removing foreign language books and their rightsholders from the settlement, the parties have removed the source of much of the controversy concerning the settlement. At the same time, the products available under the ASA will be far less comprehensive.

---

<sup>5</sup> Infringement actions over these foreign works are unlikely. Google will continue to honor rightsholders' requests to opt-out of the Library Project. Moreover, these foreign works were unregistered at least until January 5, 2009. Their rightsholders, therefore, will be entitled only to actual damages for any infringement that occurred prior to registration. This significantly decreases any rightsholder's incentive sue.

<sup>6</sup> Additionally, Google will continue to negotiate license arrangements with individual foreign publishers.

<sup>7</sup> See also the discussion of "inserts" below.

### **Public Access Terminals**

The ASA provides the Book Rights Registry (BRR) with the authority to increase the number of free public access terminals in a public library branch. (ASA 4.8(a)(i)(3)) Increasing the number of terminals would be purely discretionary on the part of the BRR.

### **Library Digital Copies**

The original settlement permitted Google to provide a fully participating library<sup>8</sup> with digital copies of books in that library's collection that Google did not obtain from that library (*i.e.*, Google obtained the book from another fully participating library), provided that Google scanned more than 300,000 books from that library's collection.<sup>9</sup> Because the ASA employs a narrower definition of "book," the threshold requirement now refers to "volumes" rather than "books." (ASA 7.2(a)(ii) and (iii)) This ensures that fully participating libraries do not receive fewer digital copies from Google by virtue of the ASA's exclusion of the foreign books.

### **Institutional Consortia**

The ASA no longer excludes the Online Computer Library Center (OCLC) from the category of institutional consortia that can receive certain benefits under the settlement. (ASA 1.76) For institutional consortia, different minimum levels of participation apply from those indicated above before a library can receive digital copies made from another library's collection. (ASA 7.2(a)(iii))

### **Microform**

---

<sup>8</sup> A fully participating library is a library that allows Google to scan in-copyright books in its collection, that receives in return digital copies of the books made available to Google, and that enters into the required agreement with the BRR.

<sup>9</sup> If a library has fewer than 900,000 volumes in its collection, the threshold is 30% of the volumes in that library's holdings.

The ASA does not permit Google to digitize books from microform. (ASA 1.50)

### **Privacy**

The ASA clarifies that Google will not provide the BRR with personally identifiable user information “other than as required by law or valid legal process.” Other privacy issues are addressed in the privacy policy that Google developed for Book Search. (ASA 6.6(f))

### **Removal**

The ASA creates a new window for rightsholders to request “removal” of books from uses by Google. As under the original agreement, if Google receives a removal request before it scans a book, it cannot scan the book. And if the rightsholder requests removal by April 5, 2011, of a book already scanned by Google, Google and fully participating libraries must stop all uses of their digital copies of the book (although they can store the copies). The ASA adds a new removal period: if the rightsholder requests removal between April 5, 2011, and March 9, 2012, Google must stop using the digital copy, except for the limited purpose of providing digital copies and updated files to fully participating libraries. (ASA 1.126(b)) If a rightsholder makes a removal request after March 9, 2012, Google may not display any of the book’s text, but it can make “non-display uses” of the book (*e.g.*, retain the book in its search database and displaying bibliographic information in response to queries.) (ASA 3.5)

## **II. RIGHTSHOLDER ISSUES**

### **Registry Representation**

The ASA provides that the Board of Directors of the BRR will have at least one representative of the Author Sub-Class and one representative of the

Publisher Sub-Class from each of the following countries: the United States, the United Kingdom, Australia, and Canada. (ASA 6.2(b)(iii)) The ASA does not, however, provide for any Board representation for academic authors, contrary to the request of the Library Associations.<sup>10</sup>

### **Inserts**

The original settlement allowed the rightsholder of a work contained within another rightsholder's book (e.g., a book's foreword) to exercise her rights under the settlement independently, and to receive separate compensation from Google through the BRR. The ASA clarifies, and thereby arguably narrows, the definition of such "inserts." Under the original settlement, the insert had to "covered by a registration with the United States Copyright Office."<sup>11</sup> The ASA clarifies this phrase by adding that the insert had to be registered as a stand-alone work or as part of another registered work from which it was excerpted. (ASA 1.75) In other words, if A included in his book an essay by B, and A filed a copyright registration for his book, B's essay is not an insert under the settlement unless B had registered the essay on a stand-alone basis or as part of B's own book of essays. If B's essay is not an insert, B is not entitled to separate compensation and Google does not have to honor his request to exclude his essay from displays of the book.<sup>12</sup>

The ASA also excludes illustrations in children's books from the definition of inserts. (ASA 1.75)

---

<sup>10</sup> The American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries filed comments with the Court on May 4, 2009 and September 2, 2009. See <http://www.arl.org/bm~doc/googlebrieffinal.pdf> and <http://www.arl.org/bm~doc/library-associations-supp-filing-sept-2-09.pdf>.

<sup>11</sup> This requirement applies only to inserts first published in the U.S.

<sup>12</sup> Nonetheless, Google probably would honor such a request because the essay is not covered by the settlement and B could sue Google for infringement if it displayed the full text of the essay.

## **Unclaimed Works**

The original settlement was criticized for not adequately protecting the interests of rightsholders who did not file ownership claims with the BRR. The BRR was to hold revenue from the unclaimed books and inserts in escrow for five years. If the funds remained unclaimed after the five years elapsed, the BRR could use them for its operating expenses, and distribute the rest to rightsholders who filed claims or to charities.

The ASA establishes an independent fiduciary responsible for representing the interests of the rightsholders of the unclaimed works. The Unclaimed Works Fiduciary will not be a published book author or a book publisher, and will be chosen by a supermajority of the BRR Board of Directors and must be approved by the Court. (ASA 6.2(b)(iii))

Under the ASA, the unclaimed funds will not be used for the BRR's operating expenses and will not be distributed to rightsholders who filed claims. Rather, the BRR, in collaboration with rightsholder organizations in Canada, Australia, and the U.K., and in consultation with the Unclaimed Works Fiduciary, can spend up to 25% of the unclaimed funds held for five years on searching for absent rightsholders. After holding the remaining 75% for another five years, the BRR, with the approval of the Unclaimed Works Fiduciary, may petition the Court for approval to distribute the unclaimed funds to literacy-based charities. The BRR must notify the attorneys-general of the state governments,<sup>13</sup> all rightsholders located by the BRR, and Google's partner libraries of its motion to distribute the unclaimed funds. (ASA 6.3)

---

<sup>13</sup> State laws contain provisions regarding the disbursement of abandoned funds.

### **Creative Commons Licenses**

The ASA provides that the BRR will facilitate rightsholders' requests that their works be made available through alternative licenses for consumer purchase, such as through a Creative Commons license. The ASA clarifies that the rightsholders can set the consumer purchase price for their book at zero. (ASA 1.44, 4.2(a)(i) and 4.2(b)(i)(1))

### **Modification of Restrictions on Users**

The ASA allows rightsholders to authorize Google to modify or remove the default restrictions such as the number of pages that can be cut and paste or printed out with one command. (ASA 3.3(g))

### **Arbitration**

The original settlement agreement required rightsholders to resolve disputes among themselves (*e.g.*, a dispute between a book's author and publisher) through an arbitration procedure. The ASA allows rightsholders to agree to resolve disputes in other fora, such as courts. (ASA 9.1(a))

### **Commercially Available Books**

The ASA defines a book as "commercially available" for purposes of the default rules for displays if it is available for sale new from sellers anywhere in the world to purchasers in the U.S., the U.K., Canada, or Australia. (ASA 1.31) For commercially available books, either Google or the rightsholders will have the ability to request renegotiation of the 63% / 37% standard revenue split. (ASA 4.5(a)(iii))

### **Revised Deadlines**

The ASA extends until March 31, 2011 the deadline for rightsholders to file claims for payment for works scanned by Google prior to May 5, 2009. (ASA



5.1(a)) The new deadline for removing books is described above. The Court established January 28, 2010, as the new deadline for opting out of the ASA.

### **III. COMPETITION ISSUES**

The Department of Justice criticized the original settlement for granting Google a privileged position with respect to the unclaimed books. Under the original settlement, Google was the only entity that received a release from infringement liability for the full text display of the unclaimed books. The ASA does not change this situation. Significantly, the Unclaimed Works Fiduciary will not have the power to authorize third parties to scan and display unclaimed books.<sup>14</sup> The ASA does, however, address other issues relating to competition.

#### **Consumer Purchase Pricing**

The Department of Justice expressed concern that the pricing of individual books for consumer purchase could discourage competition among publishers. Under the original agreement, Google could offer only temporary discounts from the list price. In contrast, the ASA removes any time limits on Google's right to discount the list price of books for consumer purchase. (ASA 4.5(b)) The ASA clarifies that Google's pricing algorithm to establish the consumer purchase pricing will be developed to simulate the prices in a competitive market. (ASA 4.2(c)(ii)(2)) The price for a book will be set without regard to changes in the price of any other book. The ASA clarifies that the BRR has no involvement in the development of the pricing algorithm. The pricing bins are under Google's control, although rightsholders will be able to set minimum and maximum

---

<sup>14</sup> Although the Department of Justice advised the parties to provide some mechanism by which Google's competitors' could gain comparable access to the unclaimed works, the Department also recognized the tension between providing such access and protecting the rights of absent class members as required by Rule 23. ASA 6.2(b)(i) empowers the Unclaimed Works Fiduciary to make unclaimed works available to competitors "to the extent permitted by law," but copyright law currently permits no such licensing.

pricing bins. (ASA 4.2(c)(i)) The Unclaimed Works Fiduciary has the right to approve Google's establishment of additional pricing bins for unclaimed works. (ASA 4.2(b)(i)(2), 4.2(c)(ii) and (iii))

### **Resale of Consumer Purchase**

The ASA requires Google to allow third parties to sell consumer access to books offered through the consumer purchase service. The reseller will receive a majority of Google's 37% share of the revenue split. (ASA 4.5(b)(v)(2)) Google had previously announced that it would voluntarily allow third party resale.

### **"Most Favored Nation" Clause**

The original settlement included a "Most Favored Nation" (MFN) clause that required the BRR to extend to Google the same terms it negotiated with any other entity that provided services of the same scope as those permitted under the settlement. The Department of Justice objected to the MFN clause as discouraging the creation of competitive services. The ASA deletes the MFN clause.

### **Additional Revenue Models**

The original settlement allowed the BRR to authorize Google to provide unspecified additional revenue-generating services. The Department of Justice objected to the settlement favoring Google in this manner. The ASA permits only the following three additional revenue models to be developed in the future: print on demand, file (*e.g.*, PDF) download, and consumer subscription. (ASA 4.7) Rightsholders of claimed books and the Unclaimed Works Fiduciary must be given advanced notice of these new services, with the opportunity to exclude works from those services. (ASA 4.7)

### ***Noerr Waiver***

Under the *Noerr-Pennington* doctrine, if an activity receives government approval, it cannot form the basis of antitrust liability. Some have suggested that if the Court approved the settlement, Google, the rightsholders, and the BRR would receive antitrust immunity with respect to their conduct under the settlement. The new proposed Final Judgment and Order of Dismissal (attached to the ASA) provides that the order does not provide antitrust immunity to the parties or any other person. Professor Randal Picker of the University of Chicago Law School observes that this waiver

changes substantially the opportunities and choices that the Department of Justice faces with regard to the settlement agreement. With the possibility of immunity attaching, DOJ faced a possible all-or-nothing judgment about whether to challenge the agreement now. Failing to mount a challenge now might forfeit that challenge seemingly forever. [...] DOJ can now wait to assess how the pricing issues actually play out under the agreement. DOJ can use the normal tools of antitrust investigations – civil investigative demands and the like – as it would for any other joint venture.<sup>15</sup>

### **IV. PROCESS GOING FORWARD**

The ASA can go into effect only if the Court determines that it is fair, reasonable, and adequate. The Court has accepted the parties' recommended schedule and set January 28, 2010, as the deadline for class members to opt out of the ASA or to file objections, and February 4, 2010, as the deadline for the Department of Justice to file its comments. The Court will hold the fairness hearing on February 18, 2010.

November 23, 2009

---

<sup>15</sup> Randal C. Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement*, November 16, 2009, U of Chicago Law & Economics, Olin Working Paper No. 499, available at SSRN: <http://ssrn.com/abstract=1507172>