

# The Google Settlement: a Brief Overview

**Abstract:** Google's plan to digitise huge numbers of books from over 40 libraries has been controversial from the start with court actions still taking place in the United States. Chris Holland traces the history of the project and discusses its potential impact on copyright issues.

**Keywords:** copyright; internet; libraries; books

## Introduction

When discussing the Google Settlement, the starting point is the Google Library project, an ambitious plan to digitise vast numbers of books from the shelves of some 40 major libraries in a number of countries, including the Bodleian Library in the UK. In the case of European libraries, only out of copyright works were included but, by contrast, in the USA works which are out of print but still in copyright were also in scope for digitisation. One of the remarkable aspects of the project is the sheer audacity of its scope. The numbers of works digitised already has been estimated at 30 million. Following digitisation the aim is to provide internet access according to some specific business models, of which more below. There are also a number of fascinating legal aspects of the Google Settlement, not least the apparent challenge which it poses to accepted copyright law.

The digitisation programme and Google's project of providing access to digital versions of vast quantities of books has been controversial from the start and particularly so with authors, publishers and other rights holders. In 2005 a class action was started in the USA, *The Authors Guild et al v. Google Inc*, Case no 05CV8136. Extensive negotiation led to a provisional settlement in October 2008, which in addition to complex provisions for Google's future activities in this area also included the sum of \$125 million to settle outstanding rights holder claims.

## Basic elements of the settlement:

- A Book Rights Registry to be established by Google in order to distribute income to rights holders and record ownership of US copyright in books.

- The income will be generated by book sales, advertising, institutional subscriptions etc. Google will retain a percentage share.
- An opt-out arrangement for rights owners of out of print books which Google has digitised. This means that Google would be free to digitise their works, but the rights holders can ask for them not to be made available.
- US-based users to be able to search the entire database of digitised books free of charge and preview up to 20% of the content of out of print books.
- Consumers can buy access to the full text of out of print books online.
- Subscription based institutional subscriptions for universities etc, giving access to all the books in the Institutional Subscription Database, including all in copyright but out of print works.
- Google to provide limited access for not-for-profit higher education institutions and public libraries (in the case of the latter, one terminal per library building).

## The US Department of Justice steps in

Although the Authors Guild and the Association of American Publishers were party to the proposed settlement of the class action, many interests remained vehemently opposed including many individual authors and the members of the Open Book Alliance, which include Amazon and Microsoft. The settlement required court approval to proceed and came before the US District Court for the Southern District of New York. On 18<sup>th</sup> September 2009 the US Department of Justice lodged a document with the court outlining its misgivings about

the proposed settlement (05-cv-08136DC, Document 702), <http://thepublicindex.org/docs/letters/usa.pdf>

The Document from the Department of Justice considers the positive aspects of the proposed settlement, that it would provide a means of public access to e-versions of vast numbers of out of print works for which the rights holders would receive compensation, bearing in mind that most of those works are currently very difficult for people to access and in many cases little known. There could be significant benefits for people with visual impairments wishing to access these works, since once digitised they could be made available in accessible formats. It then sets against this the numerous issues or potential issues listed below, remembering that these points refer specifically to the original proposal rather than the later amended version:

- Should a major change in copyright law be carried out via a class action settlement? Such changes would usually require legislation and this therefore seems inappropriate in principle. Google seem to be relying on the “Fair use” provision under US copyright law, yet the usual position would be that permission of the rights holders would be required before digitisation of a work, subject to copyright exceptions.
- How does the settlement sit with the US procedural rule governing class actions, “Rule 23”, particularly the question of whether the rights of absent class members are adequately protected? Absent class members refers to owners of copyright in out of print works, including “orphan works” where there is no available information to identify the owners.
- A class action would more usually deal with the rights of a number of individuals affected by events in the past, but the proposed settlement has some very sweeping forward looking provisions, giving open ended control to the Registry (and to Google therefore?) over the future exploitation of the rights of absent class members. They can of course opt-out but that presumes that they are aware of the copyright they own and aware of their rights under the settlement. To quote the document from the Department of Justice:

“And, because the owners of orphan works are an incredibly diverse group that includes not only living authors or active publishers, but heirs, assignees, creditors, and others who acquire the property interest by contract or operation of law, these rights holders are difficult or impossible to locate, and thus difficult to notify. Moreover, no amount of notice is likely to protect those orphan rights holders who are unaware of their right.”
- There are particular concerns expressed about the rights of “foreign rights holders” whose works

would be swept up by Google’s proposals and whether the interests of those rights holders could be adequately represented. This follows specific submissions from the governments of France and Germany.

- The submission from the Department of Justice also considers possible antitrust issues. The position which would be enjoyed by Google under the terms of the settlement gives rise to questions about the implications for healthy competition and consumer choice.

### Google’s response

Following the submission from the Department of Justice, Google agreed to a delay in the “fairness hearing” before the District Court, scheduled originally for October 2009 and agreed also to amend the terms of the settlement to try to meet the concerns expressed by the Department of Justice. This amended version was provisionally accepted by the court but was still required to undergo a hearing to establish that it is “fair, adequate, and reasonable”.

Some of the amendments are clearly meant to address worries about the position of rights holders in unclaimed, out of print works and the danger of potential conflict of interest between known rights holders, and the rights holders of “orphan works”. The controversial “opt-out” provision for out of print works, as opposed to opt-in, seems to be a particular sticking point:

- Provision of an independent fiduciary to represent the interests of rights holders of unclaimed books with respect to the exploitation of those works under the scheme.
- The use of up to 25% of unclaimed funds to be used by the Registry in locating rights holders after they have been held for five years.
- Unclaimed funds to be held for a minimum of ten years after which they may be distributed to literacy charities.

The Fairness hearing began before Judge Denny Chin in February 2010 with submissions for and against the settlement by some 25 prominent organisations, but Judge Chin was not ready to make his decision. In April Judge Chin’s promotion to the Second Circuit Court of Appeal was announced, a factor which could cause further delay.

Meanwhile Google’s ambitions to build the world’s largest online library and to launch further commercial services based upon that library are on hold, although deals between Google and publishers of current material have proceeded. It has succeeded in throwing a spotlight on digitisation projects and their significance as a means of preserving cultural heritage and making previously relatively obscure works widely accessible to the public

on a massive scale. Google is of course not the only organisation working in that field. There is also for example the European Union's Europeana project and many smaller scale digitisation projects. One of the accidental results of the plans for Google Library would be

that a vast number of European publications digitised by Google would (for legal reasons) be available exclusively to US based consumers. The fact of the rival Google Library project has undoubtedly given an added impetus to Europeana.

### Reference

The Google site with background information and links to documents can be found at: <http://www.googlebooksettlement.com/>

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# Managing Copyright Information

**Abstract:** A new Law Licence was agreed between the legal profession and the CLA in late 2008 and Paul Rollins of the The Copyright Licensing Agency Ltd, describes its main features and the role of the CLA in enforcing copyright law in the UK.

**Keywords:** copyright; copyright licensing; legal profession

## Introduction

The framework of intellectual property legislation and copyright in particular, forms a bridge between the creators and owners of copyright works, such as content published in books, magazines and journals, and the consumer who wants to use the work.

Copyright does an important job in protecting the interests of creators and those who invest in creativity. If there were no legal copyright protection, it would be difficult for creative people to make a living from their work and less likely that anyone would be willing to invest in it without the opportunity to earn a return and obtain protection from exploitation by others. As technology makes it easier to access creative works, the more vital it is that we respect copyright law.

The CLA Law Licence has been developed specifically to meet the needs of the legal sector, helping to ensure that law firms and barristers' chambers are able to respect the rights of copyright owners and protect themselves against the risks associated with using copyright materials.

This article provides a brief overview of UK copyright legislation as it applies to everyday users of copyright materials and explains all you need to know about when you need a licence and what benefits they may offer.

## About the Copyright Licensing Agency (CLA)

CLA is the UK organisation set up by authors and publishers to perform collective licensing of copyright content on their behalf.

CLA was established in 1983 by the Authors Licensing and Collecting Society Ltd (ALCS) and the Publishers Licensing Society Ltd (PLS) to license copying from books, journals and magazines. Visual creators are also represented through an agency agreement with the Design and Artists Copyright Society (DACS).

CLA licenses organisation from across the business, education and government sectors, permitting limited copying under blanket licences, in most cases in return for one single annual fee. Through reciprocal agreements with sister organisations in other countries, CLA licences also include rights to copy from titles published in 30 overseas territories.

## About copyright

The main legislation dealing with copyright in the United Kingdom is the Copyright, Designs and Patents Act, 1988.