

National Writers Union

FAQ about the revised Google Book Search copyright infringement settlement proposal

If you've ever written anything that might be in the collection of a major library (including books or anything included in books – stories, poetry, etc. -- as well as offprints of articles, articles in irregular serials, monographs, chapbooks, ephemera, unpublished dissertations, etc.), you might be affected by the proposed settlement of the Google Book Search (“GBS”) copyright infringement lawsuit. The original settlement proposal was opposed by the National Writers Union, other writers' organizations, individual writers, and other organizations, and was withdrawn by its proponents.

Now there is a new settlement proposal, “GBS Version 2.” All authors and publishers have a second chance until January 28, 2010, to decide whether they want to be included in this revised settlement, if it is even approved by the court.

Even if you missed the original deadline, you can “opt out,” make a claim for a possible share of the settlement money from Google, or change your original choice.

This is especially important for people who missed the original deadline, aren't sure if they made the right choice, or aren't sure whether they should change their choice based on the changes from the original settlement proposal to the revised one. (Warning: The official “supplemental notice” and website (<http://www.googlebooksettlement.com>) are in part false, in part misleading.)

You have this second chance regardless of whether you got an official notice about the original or revised settlement proposals, and regardless of what (if anything) you did about the original settlement proposal. But some of your choices will become binding and irrevocable after January 28, 2010, so you should choose carefully.

You can choose to (1) do nothing, (2) make a claim, or (3) opt out of the settlement

Doing nothing may be the worst choice. If you do nothing, you will give up some rights and some control over how your work is used, and you will receive no money. But you will be considered to have agreed to be legally bound by the settlement. You will give Google an irrevocable license to use your work in certain ways.

If you make a claim, you might get some money, although it is impossible to predict whether you will get anything, or how much you might get. If your book is in print, it will be up to your publisher(s) to decide how much of any money they receive from Google they should pass on to you. If you don't agree with how your publisher divides the money from Google, you won't be able to sue either Google or your publisher unless they give you permission to sue; your only recourse would be binding, secret arbitration. Even if Google or an arbitrator decides that your book is out of print, and you hold all rights, your publisher could still claim that it holds the rights, and you might not receive any money unless you take your publisher to arbitration, and win. But if you make a claim, even if you never get any money, you will give up some rights and some control, and you will give Google an irrevocable license to use your work in certain ways, some of them without payment.

If you “opt out” completely, you will receive no money, but you will preserve all of your rights. To opt out, you need to send a postal (snail-mail, not e-mail) letter to the court by January 28, 2010. We’ve provided a sample letter that you can use to opt out, if you decide to do so.

This information is provided by the National Writers Union (we are not lawyers) to assist NWU members and all writers in making informed choices. The NWU as an organization opposed the original settlement proposal as unfair to writers, and continues to oppose the revised settlement proposal. The revisions to the settlement proposal fail to address our objections. But we encourage each writer to review the revised proposal in light of his or her individual situation, and to discuss it with fellow NWU members and other writers. The NWU’s Book and Grievance and Contract Divisions and chapters are available to assist NWU members. We invite you to join us!

1. What is the Google Book Search (GBS) lawsuit about?

Since 2004, Google has been scanning the entire collections of several major libraries, without asking for or obtaining permission from the authors or other copyright owners.

Google scans entire books and other works, converts the scans from images to text, indexes them, and republishes them for profit by including “snippets” from scanned books in results of Google searches and selling ads on these search result pages. None of the money from these ads goes to the author or copyright holder, even if someone searches for a quotation from your book, poem, etc., or all the search results on the page with the ads come from your book.

The Authors Guild (without consulting or involving the NWU or any other writers' organization) and the Association of American Publishers (which represents major New York commercial publishers) sued Google in federal court in New York for copyright infringement. Their lawsuit was provisionally certified as a class action on behalf of all authors and publishers anywhere in the world whose works were scanned by Google.

2. What was the first proposed settlement?

In 2008, Google, the print publishers, and the Authors Guild proposed a settlement to the lawsuit, which would pay some money to “rightsholders” (although it's unclear how much of that money would go to writers and how much to print publishers) but which would grant Google the right to carry on even more extensive scanning as well as new uses of the scans such as sale of complete e-books or print-on-demand copies of scanned books.

Some authors were sent notices about the proposed settlement in early 2009.

After extensive discussion at our 2009 Delegates Assembly, including consideration of background materials prepared by the Grievance and Contract Division and other NWU members, the NWU decided to oppose the proposed settlement, as did many other individuals and organizations. As a “friend of the court”, the NWU joined a brief filed with the court by other individual authors and the American Society of Journalists and Authors (ASJA), urging the court to reject the proposed settlement as legally unjustified and unfair to writers.

Separate objections were filed by the Science Fiction and Fantasy Writers of America (SFWA), and by other individual writers and writers' organizations from Canada, Europe, Japan, Australia, New Zealand, and elsewhere. Many print publishers (both in the USA and abroad) also objected to the proposed settlement, as did many librarians, academics, and privacy and civil liberties organizations such as the Electronic Frontier Foundation. The U.S. Department of

Justice objected that the proposed settlement would violate antitrust law by giving Google a monopoly on electronic distribution of works for which nobody came forward to claim the rights (so-called “orphan works”). The governments of France and Germany objected that the proposed settlement would violate the Berne Convention (the principal international copyright treaty). Several U.S. state governments objected that the provisions of the proposed settlement for revenues from Google’s use of “orphan works” would violate their state “unclaimed property” laws.

3. What happened to the proposed settlement? Why am I hearing about this again?

Faced with hundreds of objections -- some of them from governments of foreign countries, the U.S. Department of Justice, and state governments, as well as from writers and print publishers who had been excluded from the negotiations – and the likelihood that the federal judge hearing the case would reject the proposed settlement, the parties (Google, the AAP, and the Authors Guild) withdrew their proposal on the eve of what was to be the final hearing, and asked the judge for more time to negotiate a revised proposal.

After a month of renewed secret negotiations, from which the NWU and the other writers and writers' organizations who had objected to the original proposal continued to be excluded, the parties submitted a revised proposal for a settlement just before the court-ordered midnight witching hour on Friday the 13th of November.

Without yet considering any of the objections, the court gave preliminary (tentative) approval to the *revised* proposal for a settlement, and has authorized a second round of notices to some authors and a second chance for writers (and publishers, including self-publishers) to object or opt out of the settlement. New notices began to be sent to some authors by e-mail and/or by snail mail, on December 14. The “second chance” notice, opt-out, and objection period for the revised proposal (“Google Books settlement version 2.0”) runs until January 28, 2010.

4. What’s happening now?

Notices began to be sent to some authors beginning December 14.

Authors and publishers (again, including self-publishers) have until January 28, 2010 to opt out (even if they previously filed a claim), opt back in (if they previously opted out), object (regardless of what, if anything, they originally did) to the revised proposal, or request to speak at the “final” court hearing on whether to approve the revised proposal.

Judge Denny Chin of the U.S. District Court will hold a hearing in New York City on February 14 on whether the revised proposal for a settlement is fair, is legal, and should be approved. Any authors or publishers who opt in to the settlement have the right to speak at the hearing, as long as they send a letter to the court by January 28, 2010 stating their intent to appear and speak (although the judge may limit how long each person is allowed to speak).

5. Does this affect me?

If you’ve ever written anything that might be part of a library collection, yes, even if Google hasn’t yet scanned anything containing any of your works.

6. If I don't get a new notice, does this mean I don't need to worry?

No. Only those authors who already filed a claim or opted out through the settlement administration Web site (<http://www.googlebooksettlement.com>), or who wrote to the court about the original settlement proposal, will be sent notice of the revised settlement proposal, in English only. But the proposed settlement would affect all authors of works in any language published in the USA, Canada, UK, or Australia (notably including, among others, authors of works published in French in Canada, home of the second-largest city and second-largest publishing industry in the Francophonie) that might have been included in the major research libraries scanned by Google.

Even if you missed the original deadline, or chose not to make a claim, opt out, or write to the court before the original deadline in September 2009, you will be affected by the revised settlement if it is approved. Every writer or publisher has a second chance to opt out or object, but you won't receive any new notice of the revised proposal or the "second chance" options and deadline unless you already submitted a claim or opted out by the earlier deadline.

7. Do I have to do anything?

No, but ... if you do nothing, you will be bound by the settlement, if it is approved. If you do nothing, you will be considered to have "opted in" by default. Once you have opted into the settlement – whether by choice or by default through inaction – some of your choices will be irrevocable, such as your "agreement" to allow Google to make some uses of your work without paying anyone, and to binding arbitration of any disputes with your publisher, or with Google, about the rights or revenue share. If you do nothing, you will give up some rights, and some control over how Google and others use your work. You will be considered to have granted Google a license to use your work, and to sub-license it to others, for their profit. But if you do nothing, you will receive no money from the settlement. Doing nothing may be the worst choice.

8. What if I already filed a claim or opted out?

You can change your mind, and revoke any of your earlier choices. Whatever you do last will be your final choice. Note that if you make a claim, you will automatically be opted in to the settlement, even if you previously opted out. You can only (a) make a claim for a possible share of some of the money from Google, (b) make written arguments to the court objecting to the proposed settlement, or (c) speak at the court hearing, if you opt in. If you opt out, you are not bound by the settlement, and that's the end of your role in the court case.

9. How can I opt out?

Write to the court and/or the settlement administrator. (See the sample opt-out letter on the NWU website and at the end of this FAQ.) It's supposed to be possible to opt out through the settlement administrator's website at <http://www.googlebooksettlement.com>, but as of the time the supplemental notice was sent out, that wasn't working, and the opt-out page on the website gave a false and misleading message that the deadline had passed. The settlement website was later updated to allow you to opt out online, but especially in light of past problems, it's probably better to opt out by letter to the court, so that you can prove that your opt-out request was received. If you opt out online, you have to specify whether you are opting out of the "Author Sub-Class" or the "Publisher Sub-Class." If you are or might be determined to be a self-publisher, and want to opt out entirely, you need to go through the whole process on the website twice, once as author and once as publisher (or send a snail-mail letter). If you opt out online or by letter just to the settlement administrator, not the court, you won't get any confirmation. If

you opt out by letter to the court, your letter will become public as soon as it is received, so other writers and the public can see what you said, and know that you opted out, even if the judge can ignore your objections. (If you opt out through the settlement website, or by letter to the settlement administrator, your name and address will eventually be made public, but not until after the settlement is approved.)

10. Is there anything I need to say in my letter, other than, "I opt out"?

You should mention the specific case name and number (The Authors Guild, Inc., et al. v. Google Inc., No. 05 CV 8136). If you just want to opt out, it's probably sufficient to send your letter to the court clerk, but if you want the chance that anything you say might be considered by the court in its decision, you should also send copies to the lawyers for Google, the publishers, and the Authors Guild. You should probably send your letter by certified mail (or Express Mail if it's close to the deadline), so that you can prove that it was received.

11. Do I have to list my books to opt out?

No. You can list specific books and/or other works, but you aren't required to do so. If you list specific books and/or other works (stories, articles, poems, etc.), it may be best to preface the list with, "All of my works, including but not limited to..." in case Google scans something you hadn't remembered or didn't think they would count as a "book." (Google has counted a 20-page article, photocopied on 8 ½ by 11 inch paper, with a staple in the corner, as a "book.")

12. What if I self-published some of my books, or distribute my own books or e-books, or publish excerpts from my books or other printed works on my own website?

You might be considered to be a "publisher" as well as an "author" for purposes of the settlement. Publishers (including self-publishers) have the same options as authors: do nothing (which means to opt in by default), file a claim, or opt out. If you are or might be considered a self-publisher, and want to opt out of the settlement entirely, you should specify in your letter to the court that you are opting out of both the "Author Class" and the "Publisher Class."

13. Can an author or publisher "opt out" for some works and "opt in" for others?

Yes and no. If you opt in to the settlement, and if you are then found to be a "rightholder," you can then opt individual works in or out of certain uses by Google. And you could opt in to the "Publisher Sub-Class" and opt out of the "Author Sub-Class," or vice versa. But in order to make any book-by-book choices, you have to opt in to the settlement as a whole and agree to be bound by all of its rules and procedures including binding arbitration.

14. Can I have my opinion considered by the court?

Yes, but the court only has to consider what you say if you opt in. If you opt out, you are free to write to the court and include whatever you want to say in your letter. But if you opt out, it's at the discretion of the court whether to officially consider what you say.

15. Can I speak at the court hearing in New York on February 18th?

Yes, but only if you opt in, not if you opt out. Any writer who opts in is entitled to speak at the hearing. The judge will probably limit your time, but the notice expressly promised each writer or their lawyer a chance to speak directly at the hearing. If you want to speak, you must send a letter to the court, with copies to the parties, by January 28, 2010, specifically stating that you intend to appear and speak at the hearing.

16. Do I need to have a lawyer to opt out, file written objections with the court, or speak at the hearing.

No. You can have a lawyer represent you, but that is not required. You can simply write a letter to the court yourself, with copies to the lawyers for Google, the publishers, and the Authors Guild. Many of the authors who objected to the original settlement proposal did so in their own words – perhaps more eloquently than lawyers would have done.

17. If I opt out, can I file objections with the court or speak at the hearing?

Unfortunately, no. It's a Catch 22. You are only entitled to speak at the hearing or have your written objections or comments considered by the court if you opt in and agree to be bound by the settlement if it is approved. Since the people who object most strongly to the proposed settlement probably aren't willing to risk being bound by the settlement, and will probably opt out, the court won't hear from the strongest critics of the proposal. You can send your objections to the court with your opt-out letter, or separately, and you can ask for permission to speak at the hearing even if you opt out. But the court isn't required to consider your requests, comments, or objections if you opt out, and probably won't.

18. If I do nothing, will I get any money?

No. You won't get any money through the settlement unless you make a claim. (If you make a claim, you will automatically be opted in, and will be bound irrevocably by the settlement.)

19. If I make a claim, will I get any money? If so, how much?

It's impossible to predict whether you will get any money, or if so, how much. Nothing will be decided about who gets paid, or how much, until after the settlement is approved (and it is too late to opt out). Most of the decisions will be made by a "Book Rights Registry" that hasn't been created yet. If there are disputes about who holds which rights, or who is owed money, or how much, or how it should be divided, those disputes will be resolved by secret, binding, individual arbitration, according to criteria and procedures that have not yet been determined.

20. How much will Google pay if it scanned my book without my permission?

Google will pay \$60 per book to some "rightsholder", but not necessarily to the author.

21. Will I get paid directly?

Not if your book is eventually determined to be "in print." If your book is eventually determined to be "in print," any money will be paid to your publisher. It will be up to your publisher to decide how much, if any, of any money it receives from the settlement it should pass on to you. Based on the claims that publishers have been making recently for Kindle and other e-book rights, they might claim that they hold the electronic rights outright, and owe you nothing. Or they might claim that they owe you only your book royalty percentage (typically 10-15%) rather than the subsidiary rights percentage (typically 50%). If the publisher receives \$60, the publisher may pay the author(s) only 10-15% as your royalty share, or \$6-9 per book.

22. What if I want to have my book distributed electronically by Google?

If you hold the electronic rights (be sure to check your contract to confirm that, and check with an NWU contract advisor if you aren't sure), you can have Google include your book in its "Partner Program," which will pay you a larger share of the revenues, with more control, than if you allow the same book to be distributed by Google in the same ways through the settlement.

23. Why did the National Writers Union oppose the original settlement proposal?

The NWU opposed the settlement proposal because it is unfair to writers: It would give Google monopolistic control over access to many works, would pay authors only a fraction of the statutory damages they are owed, would turn copyright law on its head by requiring writers to “opt out” and giving Google a license by default to use the work of writers who do nothing, would interfere with the relationship writers have with publishers, including overriding existing author-publisher contracts and subjecting author-publisher disputes to arbitration, depriving writers of recourse to the courts or collective negotiation with publishers, and would invade authors’ and readers’ privacy by allowing Google to track who reads which books online.

24. Who else opposed the settlement proposal?

Hundreds of objections were filed by the U.S. Department of Justice (on antitrust/monopoly grounds), by the governments of several foreign countries, by several U.S. state governments, by publishers and publishers’ associations (especially those outside the USA), by individual authors and authors’ organizations (including the NWU, American Society of Journalists and Authors, Science Fiction and Fantasy Writers of America, and many writers and writers’ groups from other countries), by scholars and academic writers, by privacy advocates, by public interest and civil liberties organizations, by Google’s competitors or potential competitors including Amazon and Microsoft, and by many others.

25. How has the settlement proposal been revised?

There are many small changes, but the only one with any major impact on writers’ rights is that the revised settlement would be limited to books published (in any language) in the USA, Canada, UK, or Australia. Books published in the rest of the world would no longer be included.

26. Do those revisions address the NWU's or other writers' objections?

No. As U.C. Berkeley law professor Pamela Samuelson – one of the leaders of opposition to the settlement proposal by academic authors – wrote after the revisions were announced: “What stands out after my initial review of GBS 2.0 is that changes were overwhelmingly made to placate the governments of France and Germany, as well as the U.S. Department of Justice (DOJ). Google is apparently hoping that if it can get these governments off its back, GBS 2.0 will be approved. Hundreds of authors, publishers and other interested parties raised dozens of objections to GBS 1.0, but their concerns were almost completely ignored.” [emphasis added]

27. The supplemental notice says arbitration would now be “optional”. Is that true?

Not really. Under the revised proposal, you could sue your publisher – but only if the publisher give you permission to sue! Otherwise, you’d still be stuck with binding arbitration.

28. Is anyone satisfied with the revisions to the settlement proposal?

So far as we know, no. We don't know of any public objector to the original settlement proposal who has said that the revised proposal satisfactorily addresses their concerns, and that they no longer object to the revised settlement proposal.

29. What will happen next?

Authors and publishers (including self-publishers) have until January 28, 2010, to opt out. Anyone who doesn't opt out by then will be bound by the settlement, if it is eventually approved. The U.S. Department of Justice will file its brief by February 4, 2010, saying whether the

revisions to the settlement satisfy its antitrust concerns. There will be a court hearing in New York on February 18, 2010. The judge will issue an opinion some time later (not at the hearing).

If the proposed settlement is approved, authors who didn't opt out will then have another deadline by which to decide, on a book by book basis, whether to allow their books to be distributed and used by Google, or whether to opt individual books out of some or all of Google's proposed uses. That decision to opt out of some or all of Google's proposed uses is separate and different from the initial decision of whether to opt out of the entire proposed settlement.

If the proposed settlement is rejected by the judge, the case will proceed toward trial while the parties (or their lawyers) try to negotiate another revised settlement. If no settlement is ever approved, the case will eventually be decided either by the judge or by a jury trial. Whatever the District Court decides, one of the parties or objectors is likely to appeal. No money is likely to be paid out until years from now, after any appeals are complete.

30. Where can I get more information about the proposed settlement?

The NWU Book Division discussion list and officers, and the Grievance and Contract Division, are available to assist NWU members to understand the proposal and your choices. (This FAQ was prepared for the NWU by Book Division Co-Chair Edward Hasbrouck, and has been approved by the Book and GCD division chairs and the NWU national officers.) If you're not an NWU member, we encourage you to join and to work with us to defend writers' rights!

We've listed some online resources for further information below:

National Writers Union FAQ about the revised Google Book Search settlement proposal (this article – check the online version for any corrections or updates):

<http://www.nwubook.org/NWU-GBS2-FAQ.html>

This FAQ in printable PDF format:

<http://www.nwubook.org/NWU-GBS2-FAQ.pdf>

Sample opt-out letter (MS-Word format):

<http://www.nwubook.org/GBS-optout-letter.doc>

National Writers Union statements opposing the original and revised settlement proposals:

<http://www.nwubook.org/>

Brief filed with the court by the NWU and other authors, objecting to the original proposal:

<http://www.nwubook.org/NWU-Amicus-Brief.pdf>

Official information from the settlement administrator (warning: misleading in places):

<http://www.googlebooksettlement.com/>

Text of revised settlement proposal (redlined to show changes from the original proposal):

<http://thepublicindex.org/settlement>

“Objections to the Google Books Settlement and Responses in the Amended Settlement” (by Prof. James Grimmelmann and students at N.Y. Law School; outlines the objections to the original proposal and what, if any, changes were made to address them in the revised proposal):

<http://thepublicindex.org/docs/commentary/objections-responses.pdf>

“New Google Book Settlement Aims Only to Placate Governments” (analysis of the revisions to the settlement proposal by U.C. Berkeley law professor Pamela Samuelson):

http://www.huffingtonpost.com/pamela-samuelson/new-google-book-settlemen_b_358544.html

Objections to the original settlement proposal by Pamela Samuelson and other academic authors:

<http://thepublicindex.org/docs/letters/samuelson.pdf>

Privacy objections to the original settlement by authors and publishers:

http://www.eff.org/files/filenode/authorsguild_v_google/File%20Stamped%20Brf.pdf

Google Books: “Dude, Where’re My Inserts?” (by copyright law professor and academic author Kenneth Crews; discusses the ambiguous status of articles, chapters, poems, and other “inserts” in anthologies, collections, or other books under the revised settlement proposal):

<http://copyright.columbia.edu/copyright/2009/12/17/google-books-dude-where-re-my-inserts/>

“The Google Book Settlement: a survival aid for UK authors” (by author Gillian Spraggs; directed particularly to U.K. authors, but also provides a good overview for U.S. authors):

http://www.gillianspraggs.com/gbs/GBS_survival_aid.html

“Ask the Editor: Where to get a better deal than the Google Settlement? From Google.” (by writer and editor Anita Bartholemew):

<http://editorialconsultant.wordpress.com/2009/04/13/where-to-get-a-better-deal-than-the-google-settlement-from-google>

Law prof. James Grimmelmann blogs about the proposed settlement (excellent site for discussion, up-to-date news, and links to significant developments related to the settlement):

<http://laboratorium.net/>

“Google Books and Writers Rights” (by NWU member Edward Hasbrouck):

<http://hasbrouck.org/articles/GoogleBooks-WritersRights.pdf>

Additional resources about the original settlement proposal (compiled by Edward Hasbrouck)

<http://hasbrouck.org/blog/archives/001703.html>

Sample Opt-Out Letter

Office of the Clerk of Court
U.S. District Court for the Southern District of N.Y.
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: The Authors Guild, Inc., et al. v. Google Inc., No. 05 CV 8136

By this letter, I opt out of the proposed settlement in this case. I am opting out of both the “Author Sub-Class” and the “Publisher Sub-Class,” and out of the settlement in its entirety.

[Optional:] I have written and/or published works under names including, but not limited to, the following variant spellings, forms, pen names, and/or pseudonyms:

[Optional:] My works include, but are not limited to, the following:

[Optional:] I am opting out because ...

Sincerely,

cc: Google Book Search Settlement Administrator
c/o Rust Consulting
PO Box 9364
Minneapolis, MN 55440-9364

[Optional copies to lawyers for Google, print publishers, and the Authors Guild:]

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