

## Briefing on aspects of the Google Settlement and responses to members' questions

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Please note that content in this document in *italics* denotes specific questions formally put to the Association of American Publishers' lawyers, Debevoise and Plimpton, by the PA and the FEP on behalf of its members, and their verbatim responses.

## Options available to rightsholders

### **Opt Out**

*If the publisher wants to preserve its right to sue Google and the libraries in the United States, under U.S. copyright law, for copying its Books from U.S. libraries and displaying snippets of the Books in the United States, then the right strategy would be to opt out of the Settlement entirely. In adopting this strategy, however, that publisher should understand that Google can use all of the publisher's Books, as Google sees fit (which could include scanning and displaying portions of the Book, in snippets or otherwise), unless and until the publisher brings a copyright infringement suit resulting in a victory or in a settlement with Google that provides otherwise.*

### **Removal**

*If the publisher wants one or more Books out of all of Google's United States (and U.S. library) databases forever, then the publisher should claim those Books under the Settlement and "Remove" them. By doing so, however, that publisher will not be able to participate in any of the U.S. Revenue Models under the Settlement, at least as to those Books, even if the publisher decides years later that the Institutional Subscriptions or Consumer Purchase models make sense for those (or some of those) Books.*

### **Manage Books**

*If the publisher does not want one or more of its Books displayed in any Settlement Revenue Model in the United States, but wants to preserve the right to participate in the future in those Revenue Models, then that publisher should claim those Books. If they are not "Commercially Available," the publisher should exclude them from all "Display Uses" or Revenue Models under the Settlement. (Books that are "Commercially Available" are "No Display" by default.) Books that are in the Settlement remain in Google's database and can be used for "Non-Display Uses," such as display of bibliographic information or for research, such as determining word frequency.*

*If the publisher wants to benefit from some or all of the U.S. Revenue Models for its Books, then the publisher should claim those titles, and choose which models to participate in, what level of preview of pages of the Book makes sense for Consumer Purchase, and in the case where Consumer Purchase is authorized, what price to charge for the Book.*

*We now turn to describing these options in more detail.*

### **Opting Out of Settlement**

*By providing notice to Class Counsel by 5 May 2009, a publisher can opt out entirely of the Settlement. (A Rightsholder cannot "opt out" on a Book-by-Book basis.) The only advantage of opting out is that a publisher would preserve its right to bring a lawsuit under United States copyright law against (a) Google, for directly infringing copyright by scanning and making display uses of the publisher's Books in the United States and (b) the participating libraries, for contributorily infringing by providing Books to Google and for receipt of Digital Copies of those Books, and for directly infringing, with respect to any uses by the libraries of*

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*the Digital Copies of Books. A Rightsholder who opts out is not entitled (1) to a Cash Payment for any Books scanned by Google on or before 5 May 2009, or (2) to manage Books (e.g., “Remove” or “exclude” them) or (3) to any of the other benefits of the Settlement Agreement.*

*How Google will handle the Books of a publisher who opts out is not certain. Publishers who opt out must, as a condition of opting out, provide all the names (of publisher and imprints) under which it owns a copyright interest in Books. Therefore, Google is likely to compare those names with the names of publishers and imprints of the Books that are in its database. We believe that Google will not display content from those Books in the United States. If Google were to display such content, it would be doing so on the basis of the copyright owner not having released any claims of past or future copyright infringement; therefore, Google would have liability for scanning Books and for displaying more content than “snippets.” (Google concedes that its display of more than “snippets” of in-copyright Books is not a fair use under U.S. copyright law.) Google might continue to scan and make “Non-Display Uses” (e.g., display of bibliographic information, internal research uses, etc.) of Book content of publishers that opt out of the Settlement. Whether the Books of publishers that opt out would remain in the Research Corpus is uncertain. Because the Settlement does not authorize or prohibit Google’s uses of Books outside the United States, opting out of the Settlement has no legal effect on such uses.*

*A publisher that opts out of the Settlement, however, may be able to negotiate with Google to accept certain Books through the Google Partner Program. (This same option is available, on a Book by Book basis, for Books that are “Removed,” as discussed below.) Google has said that it will make the Revenue Models in the Settlement available to Google Partner Program participants. Whether, for purposes of the Google Partner Program, Google will scan hard copies of Books provided by the publisher is uncertain; the publisher may be asked to provide digital files. Because it costs Google money to scan Books, Google might not scan hard copies of Books that a publisher would be willing to make available through the Google Partner Program.*

## **Removal**

*A publisher who remains in the Settlement (that is, does not “opt out”) can Remove Books, on a Book by Book basis, at any time until 5 April 2011. If a Book has not been scanned by Google by that date, then the Rightsholder can Remove Books (that is, instruct Google not to scan those Books) thereafter; Google will honour that request. “Removal” means that the Book will not be stored on – or be made available through – any Google or library server or other storage device (other than on back-up tapes). Therefore, if a Book is Removed, Google will not make that Book available for any Display Use or Non-Display Use, and a library that has received Digital Copies will not make such a Book available for its internal or any other library use authorized under the Settlement Agreement. Accordingly, if a Book is Removed, a publisher would not be able to participate in any of the Revenue Models for that Book; however, a publisher would be able to file a claim for a Cash Payment, for a Book scanned on or before 5 May 2009, even if the publisher had previously Removed, or thereafter Removes, that Book.*

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*Google has said that, through the Google Partner Program, it may accept Books that have been Removed from the Settlement and that it may then use the Book in ways authorized by the publisher, which may be similar or identical to uses that are available through the Settlement. If Google accepts a Removed Book through the Google Partner Program, one advantage of having used the Removal option is that that Book is not subject to the “coupling” requirement of Books included in the Settlement; “coupling” is the requirement that if a Rightsholder authorizes a not Commercially Available Book to be made available for Consumer Purchase (i.e., direct sales to an end user), then such Book must also be made available for access through Institutional Subscriptions and the Public Access Service.*

*If the publisher wants to Remove its Books and provide those Books to Google through the Google Partner Program, Google might, however, ask the publisher to provide digital files of the Books because it costs Google money to scan Books. That is, if Google scanned a Book through the Library Project, and if the publisher Removes that Book, then Google may not want to spend money to scan the Book a second time. As a practical matter, therefore, if a publisher Removes an out of print Book, but does not have a digital file of the Book, then Google might choose not to include that Book in the Google Partner Program unless the publisher pays Google to rescan the Book.*

*Note that a publisher can only Remove Books where it is “Highly Confident” that the rights in the Book have not reverted to the author. For purposes of the Settlement, a publisher would be “Highly Confident” that the rights have not reverted based on, for example, the individual Book or author-publisher contract (e.g., the publisher does not provide for reversion for Books of that type, the Book is an in print Book, the established practice within the imprint, etc.).*

## **Manage Books (Including Exclusion)**

*A publisher who remains in the Settlement can, at any time and through either the Registry or Google, give directions as to the management of its Books, on a Book by Book basis. The Settlement provides that Books that are not Commercially Available in the United States (in general, similar to “out of print”) are, by default, “Display Books,” meaning that Google can make Display Uses of those Books in the United States. Display Uses include Consumer Purchase, associated Preview Uses, Institutional Subscriptions, Public Access Service, and Advertising Uses; each and all of these Display Uses are compensated, as provided in the Settlement Agreement.*

*A publisher has complete flexibility to turn off any or all of these Display Uses for any or all Books at any time (assuming that the publisher is a “Rightsholder,” i.e., that the publisher has rights in the Book because those rights have not reverted to the author). Accordingly, even if the author of the Book wants to leave the Display Uses turned on, the publisher’s decision to exclude the Book from such Display Uses (that is, the publisher’s more restrictive decision) will, in general, be honoured. In addition, publishers can set the prices of Consumer Purchase for any of their Display Books and can adjust the percentage of a Display Book available through Preview Uses. Once a publisher turns off a Display Use, at any time thereafter, the Display Use can be turned back on. In such case, Google may exploit the Book in accordance with the Settlement. As noted, Google’s exploitation of the Book cannot be guaranteed if, instead, the Book is Removed by the publisher.*

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*Books that are Commercially Available in the United States (in general, similar to “in print”) are, by default “No Display Books,” meaning that Google cannot make any of the Display Uses of those Books in the United States without the express authorization of the Rightsholder. For such Books, the publisher has the right to authorize such uses; if it wishes to turn on any one or more Display Uses of an in print Book the author of the Book (except if it is an Educational Book) has the right to be asked, and the right to object to, such Display Uses. Again, if, in contrast, the publisher had Removed such Book, there is no guarantee that Google would accept the Book for exploitation through the Google Partner Program.*

*Google can make Non-Display Uses of all Books, whether Commercially Available or not Commercially Available (unless those Books are Removed).*

*Libraries are permitted to make certain uses of Digital Copies of Books (unless those Books are Removed). In general, libraries can only display content of Books that are not Commercially Available, though some permitted library uses of Digital Copies (e.g., to make replacement copies of destroyed or lost physical copies of books; provide access to persons with Print Disabilities, use in library finding tools and indices) apply to both Commercially Available and not Commercially Available Books.*

*In sum, except with respect to Non-Display Uses and the specified uses that libraries may make of Digital Copies of Books, from a publisher perspective, leaving Books in the Settlement and then managing those Books through exclusion and inclusion directions, has advantages over Removal, given the Settlement’s commitment to ensuring that the Rightsholder has complete flexibility with respect to managing Books that are not Removed.*

## **Roll out of Consumer Purchases and Institutional Subscriptions**

*For Google to roll out Consumer Purchases or Institutional Subscriptions under the Settlement, the Effective Date of the Settlement needs to occur. The Effective Date will occur once the Settlement has been approved by the District Court and the time for all appeals has expired. The earliest date on which the District Court could approve the Settlement is June 11, 2009, the date on which the Final Fairness Hearing is scheduled. Any appeals from the District Court to the Court of Appeals must be taken within 30 days of the date of approval, making the very earliest possible Effective Date July 11, 2009. If appeals from the order granting approval are filed, then the Effective Date will not occur until those appeals are finally resolved.*

*When, after the Effective Date, Google will launch its offerings under the Settlement is for Google to decide. Assuming the earliest possible Effective Date, Google has indicated that it would be prepared to begin rolling out the Consumer Purchase model in the fall of 2009. Google is required to launch Consumer Purchases and Institutional Subscriptions within five years of the Effective Date.*

## Scope of the Settlement

### **Does the agreement apply to EU publishers whose works are contained in the collections of the US libraries?**

*Yes, the Settlement applies to all Books (i.e., written works published in hard copy on or before 5 January 2009), whether they are presently in the collections of US libraries or might be in the United States at some future time. Note that Google is also scanning Books in the United States from sources other than libraries (e.g., acquisitions of Books from second hand bookstores). If an EU publisher simultaneously publishes a Book in the EU and in the United States (such that the Book is a “United States work” under the U.S. Copyright Act), then that Book must be registered with the United States Copyright Office by 5 January 2009 to be covered by the Settlement.*

### **Does the agreement apply to EU publishers whose books may be purchased by US libraries in the future (after January 2009)?**

*Yes, so long as the Books were published anywhere on or before 5 January 2009.*

### **Does the publisher need to prove that he has the digital rights to opt out of the agreement?**

*No.*

### **What would the implications be of a lack of notification to the concerned right holders in a particular language area? What would the implications be for the associations of publishers or Reproduction Rights Organisations that do not notify their members?**

*The Court before which the Settlement is pending has approved an ambitious, worldwide program of providing Notice. Notice is provided individually and directly; this will happen by sending the long form Notice directly to publishers and authors for which addresses or other contact information is available. For this purpose, it is hoped that both RROs and other associations may assist in passing along the Notice. Notice is also provided by publication of a Summary Notice in newspapers and magazines in virtually every country in the world. If a particular Rightsholder does not get actual notice of the Settlement (and, therefore, is unaware of its opt out option), that Rightsholder would still be bound to the Settlement. United States law does not require that every single member of a class receive actual notice to be bound to the terms of a class action settlement. United States law does not obligate associations of publishers or RROs to notify their members and they would have no liability to the Court, the plaintiffs or Google if they fail to do so.*

### **What possibilities exist to introduce changes into the settlement at any stage? Can the US Court change any part of the settlement or does the Court only have the possibility to accept or reject the settlement?**

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*Rightsholders that do not opt out of the Settlement have the right to file a written objection to one or more provisions of the Settlement. The deadline for filing such objections is 5 May 2009. The Court will read the written objections. If a party wishes to make an objection in person, the party can attend and participate in the Fairness Hearing before the Court (11 June 2009). After reviewing all of the objections, both written and oral, the plaintiffs' and Google's responses to those objections and the parties' memorandum in support of the Settlement, the Court, in light of the standards set out in applicable federal law, will decide whether to approve the Settlement. The Court cannot change the Settlement, but only accept or reject it. If a court rejects a class action settlement it usually will state the basis for the objection. At that point, the parties to the settlement have two options: 1) renegotiate and modify the settlement to address the court's basis for rejection (and then re-present the settlement to the court for its approval) or 2) if the basis for rejection is so fundamental, potentially conclude that settlement is not possible and then return to litigating the case. Please note that only a member of the Settlement Class (e.g., a publisher or author) has standing to object to the Settlement. Any publisher or author who objects will be bound to the Settlement, once it is approved by the Court.*

## Treatment of books not registered as "US works"

The records of the US copyrights office have been digitized since the mid 1970s. Using these records, Google can search for any titles that have been registered in the US since that time and compare them against a list of all US titles published. Only titles that have been registered with the copyright office qualify for compensation under the settlement.

There are two notable exceptions to this rule:

- Titles that have been published outside of the US at least 30 days before their US publication date do not count as United States works and as such do not need to be registered with the copyrights office to qualify for compensation under the settlement.
- Titles that were published in Canada since 1998 (the year in which UK and US copyright terms changed from 50 to 70 years) are also exempt from US copyright registration since the country has different copyright laws

The AAP's lawyers have advised foreign publishers to claim all of their titles (not just the digitised ones) on the basis that it is in Google's interest not to challenge these claims: Google will be keen to have as many titles as possible in the agreement, and it will be difficult and time consuming for Google to find whether any titles published in the US have been published less than 30 days earlier anywhere outside of the US.

The AAP is currently working on a deal with Google on the treatment of titles that should have been registered with the US copyright office but were not, to establish how these titles could participate in the agreement. Google has already stated that they won't offer cash payments for these titles.

***The Agreement requires that works which were published simultaneously in the United States and another treaty party must be registered as "US works" with the US Copyright Office by 5 January 2009 in order for them to be eligible for inclusion in the***

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## **Settlement. Why is this requirement not contrary to provisions in the Berne Convention and the TRIPS Agreement?**

*The only reason “United States works” need to be registered in order to participate in the Settlement is that in 2007, a federal court of appeals issued a decision that requires United States works to be registered with the Copyright Office in order to be included in a copyright class action settlement of a federal lawsuit. In that decision, the Court rejected the settlement of a copyright class action involving claims that the unauthorized inclusion of freelance authors’ contributions to periodicals in electronic databases was infringing. The basis for the rejection was that the majority of the purported class members owned copyrights only in United States works that were not registered. The Court held, pursuant to Section 411(a) of the Copyright Act, that U.S. federal courts had no jurisdiction over any copyright claim involving a United States work—even with respect to settling a claim involving such work—unless that work was registered. Because the Court determined that, for these reasons, the district court did not have jurisdiction to approve a copyright settlement that included unregistered United States works, the court of appeals vacated the order and judgment approving the settlement and remanded the case to the district court.*

*Until this decision Google, the authors and the publishers had been negotiating the settlement of our litigation on the assumption that neither U.S. works nor foreign works needed to be registered in order for their copyright owners to be members of the class. This decision was surprising and disappointing. Although we think the decision is incorrect, failure to follow it in the Settlement would mean the Settlement would be deemed outside our court’s jurisdiction as well.*

*Nevertheless, treating works simultaneously first published in the United States and another treaty party as “United States works,” and thus requiring them to be registered, is consistent with Berne and TRIPS. Under Berne, a treaty nation can subject works originating in that nation to formalities, such as registration, so long as it does not subject works originating in other treaty nations to such formalities. However, Berne explicitly states that the “country of origin . . . in the case of works published simultaneously in several countries of the Union which grant different terms of protection, [is] the country whose legislation grants the shortest term of protection.” Berne Art. 5(4). The U.S. Copyright Act’s definition of “United States work” incorporates this provision of Berne and subjects all works simultaneously first published in the United States and another treaty nation to the registration requirement unless that other treaty nation grants a shorter term of protection than the United States.*

*Furthermore, there is no agreement on whether the requirement that United States works be registered before the copyright owners can sue for infringement is a formality of “protection” prohibited by the Berne Convention. At the time that the United States ratified the Berne Convention and passed implementing legislation (the Berne Convention Implementation Act), there was no consensus in the United States Congress that the registration requirement, if applicable to non-United States works, would be prohibited by the Berne Convention.*

*Finally, under United States law, international treaties to which the United States is a party are not self-executing. In other words, individuals cannot rely on or invoke treaty language*

*to exercise rights and obligations under United States law in the absence of United States legislation implementing that language. Accordingly, if Section 411(a) and the associated definition of “United States work” in the Copyright Act might violate treaty obligations of the United States, then the appropriate remedy would be for another nation party to those treaties to pursue applicable treaty remedies against the United States for having violated such obligations. So far as we are aware, Section 411(a) and the definition of “United States work” have not been the subject of any such proceedings.*

## Procedures for claiming titles

### **Claims process on Google settlement website**

Google has decided against providing publishers with a list of all the titles it has digitised since this might lead to fraud (people could search the list for obscure titles and claim them to get the compensation money).

Publishers should instead claim for all of their titles whether they have been digitized or not (and whether they qualify for compensation or not) since it allows the publisher to control display uses for these titles. This is particularly important as Google’s consumer offering could be in place as early as September 2009.

Once rightsholders have registered on the Settlement website they will find details on the procedures for claiming titles. For in-print and out-of-print titles these procedures can be summarised as follows:

### **In-print titles**

#### a) Gathering title information:

- Publisher uploads an Onix feed which populates a spreadsheet with all relevant information (ISBN, title, author etc.)
- At the same time two columns will be populated based on information provided by Google: whether or not the work has been digitised, and Google’s assessment of each work’s commercial availability
- A further check column has been introduced to show where the publisher’s and Google’s commercial availability status do not match

#### b) In order to claim a title under the agreement a publisher must:

- Fill in information on whether the work is for hire or not (if column is left blank the book will be treated as ‘not for hire’)
- Fill in information on the reversion status (highly confident/confident that rights have not reverted)

#### c) Managing claimed titles:

Once the completed spreadsheet is uploaded the publisher can start to manage all claimed titles, e.g.:

- Adjust and edit all previously entered information
- Challenge Google’s designation of a book as commercially available or not

- Exclude titles from all display uses
- Determine consumer usage prices (it is currently only possible to set absolute prices – Google is currently designing a feature for insert a formula, e.g. Google price + 10%)

## **Out of print titles with valid ISBNs**

a) Gathering title information:

- Publisher uploads an Onix feed with a list of out of print ISBNs. The spreadsheet will then be automatically populated with relevant information

Claiming (b) and managing titles (c) is done in the same way as for in print titles.

## **Out of print titles without valid ISBNs**

ISBNs were only introduced in 1970 and would not have been assigned to titles that were out of print at the time.

a) Gathering title information:

- Publishers uploads a list of imprints to capture any out of print (or other) titles

Claiming (b) and managing titles (c) is done in the same way as for in print titles.

## ***Has an assessment been made of the administrative burden on publishers which the Settlement imposes, and the effect this is likely to have on SME publishers?***

*The parties to the Settlement considered the burdens that it might place on publishers and authors. For publishers, the claiming process was designed, with their consultation, to enable them to claim and manage large quantities of Books efficiently through uploading an ONIX file of all claimed Books, or spreadsheets with ISBNs or, simply, spreadsheets with imprint names. The spreadsheets will be returned with information about specific books already populated. Publishers can claim some or all of the Books on those spreadsheets with a single certification, although individual determinations (whether by imprint, class of Books or individual Books) need to be made with respect to whether the Book is a work-for-hire and whether a publisher is “Highly Confident” or “Confident” that the rights in the Book have not reverted to the author. A publisher, however, can make an across-the-board determination to remove its Books, or to exclude its Books from one or all Display Uses.*

*Once Books are claimed and these initial settings have been communicated, publishers will, as noted above, receive notices from the Registry regarding reclassifications of Books from Commercially Available to not Commercially Available. A publisher may choose to respond to those notices, or not. Further, any active management of Books— such as setting prices, Removing Books, excluding Books from one or more Display Uses, or including Commercially Available Books in one or more of the Display Uses—is always at the publisher’s discretion. If a publisher determines that the time, effort and costs of these administrative activities outweigh the benefits of the Settlement and its various revenue models, the publisher may choose to Remove its Books at any time until April 5, 2011.*

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**Clause 13.6 of the Settlement Agreement suggests that the agreement does not create an enforceable claim for cash. Can that be right?**

*If a Rightsholder feels aggrieved because it has not received the payment to which it believes it is entitled, it does not have the ability to sue the individual plaintiffs, Class Counsel, the Registry, the Settlement Administrator or Google. There is no individual right of action here, but it does have the right to pursue arbitration under Article IX of the Settlement Agreement.*

*Rightsholders do have the right to receive Cash Payments in accordance with the Settlement, of course. However, if the Settlement Administrator denies a person's claim and the arbitrator agrees with that denial (e.g., because the person is determined to be not the Rightsholder of the book), the person would have no right to sue the plaintiffs, Class Counsel, etc. Similarly, if a person does not agree with decisions taken by the Registry (e.g., with respect to its adoption of a usage formula for allocation of subscription revenues), that does not give rise to a legal claim against the Registry. Decisions of the arbitrator are final and nonappealable (Section 9.7).*

*An aggrieved Rightsholder, arguing that a party has acted in breach of the Settlement Agreement, would have recourse to the Court that will continue to oversee the settlement. See Sections 9.12 and 17.23.*

## Definition of Commercial Availability

**How will “customary channels of trade in the United States” be defined? Will it include the sale of e-books?**

*The definition of Commercially Available in the Settlement Agreement refers to “customary channels of trade” in the United States. There is no other definition and no further definition is proposed. Google will make an initial determination of whether books are Commercially Available based on the criteria set forth in the Settlement Agreement. Books that were initially published in hard copy (on or before January 5, 2009) and are now available solely as an e-book may be Commercially Available in the United States if sale as an e-book is sufficiently routine to be considered a then-customary channel of trade. (A book published solely as an e-book—and that was never published in hard copy—is not covered by the Settlement.)*

*The determination of whether a Book is Commercially Available is made on an individualized basis. For purposes of initially classifying a book as Commercially Available, Google will use information from metadata providers from the United States and elsewhere, along with information from websites within or outside the United States. Google will classify a Book as Commercially Available under the Settlement if it learns, through this procedure, that people within the United States can purchase the book new through a website, regardless of whether the website or the person making the book available is located within or outside the United States. Books published recently and sold through physical bookstores are likely to*

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be available through an online bookstore, such as Amazon, or other websites, and would be classified as Commercially Available under the Settlement.

If Google classifies a Book as not Commercially Available and a publisher believes that the Book is Commercially Available (because it is available as an e-book, or otherwise), the publisher will be able to challenge Google's classification. In many cases, Google is likely to agree with the publisher's own assessment of the status of a Book as Commercially Available. If the publisher and Google disagree, however, the procedures for resolving the disagreement are set out in the Settlement Agreement.

It should be noted that the principal consequence of Google classifying a publisher's Books as not Commercially Available is that the Books, by default, will be authorized for Display Uses. A publisher who claims those Books, however, has the right under the Settlement to direct Google, through the Registry, to turn off one or all Display Uses for one or all of those Books; if those Books are "out of print," under the Author-Publisher Procedures (Attachment A to the Settlement Agreement) the publisher need only articulate a good reason for directing Google to do so.

***Is there a burden of responsibility on publishers to prove that a work is "commercially available" if Google cannot identify it as such? If so, does this mean that until publishers can offer such proof, even though it might arise from the fact that Google has imperfect information on the status of the work, Google is entitled to copy and make display uses of the work, despite that this might jeopardize publishers' sales channels?***

Google will assess whether a book is "Commercially Available" or "not Commercially Available" by using two methods: (1) By receiving information from the data providers who can provide Google with information as to whether a book is commercially available in the U.S.; (2) By finding and examining several websites to ascertain whether the book is commercially available in the U.S. If Google lacks information from these sources about a particular Book, that Book will be deemed not Commercially Available.

Importantly, when a Rightsholder submits its Claim Form, it may provide information directly to Google indicating that a Book is being offered for sale through one or more then-customary channels of trade. See Section 3.2(d)(i). By uploading an ONIX file or a spreadsheet in the claiming process, a publisher will receive back a pre-populated spreadsheet with Google's determination of whether a Book is Commercially Available. The publisher can review this spreadsheet and indicate that it challenges Google's classification of a book; the spreadsheet also allows for a publisher to provide the basis on which it might assert that a Book has been mistakenly classified as not Commercially Available (or vice versa). The amount of information that a publisher would need to supply is minimal (e.g., "available on a website"; "sold in bookstores"; "in print"). Having filled out the spreadsheet, the publisher would then upload it (with this information about Commercial Availability) as part of the claiming process. Google would then need to respond to the information provided by the publisher. Google has advised that if a publisher provides information indicating that a Book is Commercially Available it is improbable that Google would have reason to challenge that assertion.

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*Aside from providing Commercial Availability information as part of the claiming process, a Rightsholder may otherwise contact Google to correct a mistaken determination by Google that a Book is not Commercially Available, and Google will correct its determination within thirty days. See Section 3.2(d)(iii).*

*Of concern to European publishers has been the question of whether and when the commercial availability of a Book in Europe would mean that a Book would be classified as Commercially Available in the United States. Google and counsel to the Author Sub-Class agree that if a Book is available for sale through a website based outside the United States, such that purchases can be made from within the United States, then that Book should be regarded as Commercially Available. In addition, Google has proposed that it also use international databases to assist it in determining whether a Book is Commercially Available. In other words, if a Book is indicated as being “in print” in a European database, then Google would classify the Book as Commercially Available. (In such case, the Book would be default No Display.) Counsel for the Author Sub-Class are considering this proposal.*

*If a Book is claimed, a Rightsholder can exclude it from one, more or all Display Uses (or remove it altogether), whether or not the Book is correctly or incorrectly classified as not Commercially Available.*

## ***Why is the definition of “book” that of a ‘bound copy’ and not also an e-book?***

*A “Book” covered by the Settlement is limited to those that have been published, distributed or made available in “hard copy” because Google generally has only been scanning hard copy versions of books in libraries and from other sources where it has purchased hard copy books. If a Book were only ever published as an e-book, Google would have had no hard copy book to digitize. Accordingly, no dispute over Google’s infringement of copyrights in e-books has arisen or, at least with respect to books published on or before January 5, 2009, is likely to arise.*

## **E-books**

A book released as an e-book it is deemed to be commercially available. Whether it is regarded as in print or out of print depends on the individual specifications in the author contract.

## Use of third party materials

***Will cover materials for works be blacked out, as is the case for illustrations? Who will be liable for unauthorised uses of third party materials? Will Google expect warranties and/or indemnities from participating publishers where third party materials are used?***

*In general, photographs, illustrations and other visual materials are not covered by the Settlement. This general proposition would extend as well to any photographs and other*

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*visual materials on the cover of the Book. (If the cover material is entirely textual, this general rule would not apply.)*

*There is one exception to this general principle that would be applicable to cover art: If the Rightsholder of a Book also is the Rightsholder of the photographs and illustrations (including those on the cover of a Book), Section 3.15(a) of the Settlement Agreement would authorize Google to display them to the extent otherwise permitted (e.g., if the Book is not Commercially Available, Google would be authorized to display cover art unless directed not to do so by a Rightsholder).*

*Where the Rightsholder does not also own the photographs and illustrations, Google will black them out (whether on the cover or within the Book) if and as it displays the Book.*

*With respect to any third-party materials used in a Book, the Settlement does not require any indemnities from publishers. Google is obtaining whatever rights it gets from and by reason of the Settlement itself, and the court order approving the Settlement. The only way in which Google is authorized to use third-party materials pursuant to the Settlement is if those materials are themselves covered by the Settlement.*

*For example, the owners of third-party textual material in a Book, may (or may not) be members of the Settlement Class. Textual material may be an “Insert,” in which case the owner of the copyright interest in the material would be bound by the Settlement. The definition of “Insert” requires that, if originally published as part of a United States work, then that work must have been registered with the U.S. Copyright Office. Under the Settlement, the Rightsholder in the Insert would have the right to exclude the Insert from all Display Uses that might otherwise have been authorized by the Rightsholder in the Book containing the Insert. If the textual material comes from a United States work that is not registered, it will not be covered by the Settlement. Even if the Rightsholder in the Book containing that textual material authorizes Display Uses of the Book, Google, as a legal matter, would have no authority to use that textual material under the Settlement and would do so at its own risk. Similarly, if cover art is not owned by a Rightsholder in the Book, Google has no authorization under the Settlement to make use of those materials. Again, if Google nonetheless chooses to make use of materials not covered by the Settlement, it does so entirely at its own risk.*

## Treatment of specific classifications of works

***How will Google treat new editions—will they be counted as new works? How will Google treat old editions, which—for whatever reason—should no longer be made available?***

*If two books contain the same Principal Work, but contain different or additional Protected Expression (e.g. new forewords or annotations), they will be considered separate Books under the Settlement; the same is true of a hard cover and a soft cover Book that have separate ISBNs. See Section 1.111. If more than one Book contains the same Principal Work (i.e. different editions of the same book), and any one of those Books is deemed*

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*Commercially Available, then all such books (even out-of-print older editions of the Book) will be deemed Commercially Available. See Section 3.2(d)(i)(1).*

*It should be noted that where multiple Books containing the same Principal Work were digitized by Google prior to May 5, 2009, the Rightsholder in that Principal Work will be entitled to only one \$60 cash payment under Section 5.1(a).*

## **Why are educational books excluded from takedown requests?**

*The treatment of Educational Books—including their exclusion from the procedures governing Take Down Requests—was carefully negotiated during the settlement discussions. Educational Books are often subject to complex contractual relationships, making it difficult to ascertain which of several authors would have the right to make a Take Down Request. Sections 7.1(a) and 5.5 of the Author-Publisher Procedures (Attachment A) also exclude Educational Books from the dispute resolution mechanism and arbitration over the contractual splits of revenue for in-print books, respectively.*

## Reversion

### **Reversion status**

Publishers need to be highly confident or confident that rights have not reverted before they can claim for a title under the Settlement. The Settlement does not intend for publishers to have to check individual contracts, and the AAP's lawyers have provided a number of examples to help publishers arrive at an informed decision about their works:

- If a title is in print a publisher should be 'highly confident' that it hasn't reverted
- If a title is part of a database which is routinely updated and this database shows that the rights have not reverted the publisher should also be 'highly confident' that the title has not reverted
- If the publisher bought a new company and the seller did not identify any of its titles as having reverted in the due diligence process the publisher can be 'confident' (rather than 'highly confident') that these titles have not reverted

In any challenge with respect to a Commercially Available Book where Google asserts that the claim is invalid because rights in the Book have reverted, Google must provide clear and convincing evidence specific to that book.

Where the publisher is confident, rather than highly confident, that the rights have not reverted, works are not eligible for a Cash Payment, and the publisher cannot remove these books without becoming 'highly confident', but can exclude them from any Display Use (in the case of not Commercially Available and out of print books, the publisher will need to provide reasons for exclusion).

***Will there be a definition of reversion for e-books which is different than that for bound copies?***

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*The Settlement Agreement does not define “reversion.” Determinations of whether and when rights have reverted are governed entirely by the author-publisher contract. In resolving disputes between author and publisher, “primary consideration” will be given to the terms of the written contract.*

## Reclassification of titles

### Ongoing reclassification of titles

3.2(e)(ii) of the Settlement Agreement stipulates that Google has the right to request that the classification of a Book be changed to a Display Book if Google believes that the Book is not Commercially Available (i.e., is no longer available through normal channels of trade, which typically might happen when the book goes out of print).

In that case the procedure is as follows:

- Google would make a request of the Registry and the Registry would contact the Rightsholder and has 120 days to do so. (Note: there isn't an additional period for the publisher to respond to Google's request on top of these 120 days. Instead the total period to respond to Google's indication of a proposed reclassification of a Book is 120 days. Presumably, if the Registry can easily notify the claimant of the proposed reclassification, there should not be much delay between the time of Google's notification of the Registry and the Registry's turn-around notification of the claimant. In such case, the claimant could take most of that period to respond.)
- Once notified, the Rightsholder can direct that the Book should remain No Display (which, at the time, would be its status, so long as it is Commercially Available).
- The Rightsholder's direction may be based either on the fact that the Book still IS Commercially Available (with information to that effect produced by the Rightsholder) or on the Rightsholder's right to turn off one or all Display Uses.
- If the Registry so directs the Registry, then the Registry will so notify Google and Google will not change the classification of the Book to a Display Book.

Reclassification requests may be made at any time. When a publisher puts an out of print Book back in print, such that the Book should be reclassified as Commercially Available, there isn't a similar mechanism. In these instances the publisher is in control of the process and can instruct the Registry as to how it wishes the Book to be treated (e.g., by making it a No Display Book if it had been a Display Book).

***Can, and will, Google reclassify works whenever they choose? If yes, will publishers need to monitor this on a rolling basis or will Google / the BRR notify rightsholders on a regular basis of the status of their works?***

*Yes, Google will, over the lifetime of the Settlement, reclassify Books. Books may go out of print (and become not Commercially Available) or, conversely, a Book that is out of print today could be put back in print in the future (and be classified as Commercially Available).*

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*A Rightsholder who has claimed a Book will always be notified by the Registry if Google determines to reclassify a Book as not Commercially Available. The Settlement provides that if at any time after one year from Final Approval Date of the Settlement Google determines that a Book is no longer Commercially Available, it may request that the Book be reclassified to permit Display Uses of the Book. Upon receipt of this request, the Registry will have 120 days to attempt to contact the Rightsholder and/or collect evidence whether the Book is Commercially Available. If the Rightsholder indicates that it does not want the book reclassified, or if the Registry determines that the Book is Commercially Available, Google may not reclassify the Book. If, however, neither the Rightsholder nor the Registry objects within 120 days, Google may reclassify the Book. See Section 3.2(e)(ii). Accordingly, publishers should not need to constantly monitor the status of their works so long as they ensure that the Registry has accurate contact information regarding all of their Books.*

## Orphan works

***What will the Settlement's impact be on orphan works? How will publishers then keep to the EU principle of "due diligence," and keep control of the relevant rights information, rather than Google or the libraries deciding what is and is not an orphan work?***

*The legislative proposals to address issues relating to orphan works that have been introduced previously in the U.S. Congress contemplate a limitation on the infringement remedies available to a copyright owner who wins an infringement suit, if the user/defendant, at or before the time of the use, had conducted a reasonably diligent search to identify or locate that owner. Whether a Book is in the database would not obviate the need for the user to identify and then locate the Rightsholder of the Book, in order to be eligible for orphan works treatment.*

*There are two scenarios. First, if a Rightsholder claims a Book and the Book is available in Institutional Subscriptions or Consumer Purchase, a user can make uses of the Book, as authorized by those Revenue Models. If the user wishes to make other uses of the Book, it could convey its request to the Registry; in turn, the Registry would convey the request to the Rightsholder. Whether that Rightsholder authorizes the requested use (or not), the Book would not be an orphan work because the user would have located the Rightsholder. Second, if no Rightsholder claims a Book and the Book is available in Institutional Subscriptions or Consumer Purchase, the user can, again, make such uses of the Book; however, the Book could remain an orphan work, assuming that the user has, through a reasonably diligent search (presumably, going beyond a search of the Google database) not otherwise identified or located the current Rightsholder.*

*In no sense will Google or the libraries be able to decide or announce what is or is not an orphan work. In all circumstances, under the proposed U.S. legislation, it is the user's responsibility to try to locate the rightsholder. If the user has undertaken that responsibility and has been unsuccessful in identifying and locating the Rightsholder, then the user may*

be allowed to invoke the limitation on remedies that the bills would afford, assuming that the rightsholder, once the use is made, brings and wins an infringement suit.

## Copyright assignments

### **Why does the Settlement not allow for copyright assignments alongside Work For Hire works?**

*We are not entirely sure about the question, because the Settlement neither permits nor prohibits copyright assignments. Those are a matter for negotiation between authors and publishers. You are correct that an author can still be considered a Rightsholder if he or she has assigned rights in a Book, even if it is an “all-rights” assignment. By contrast, under the U.S. Copyright Act, the writer who prepares a book on a “work for hire” basis (such as an employee acting in the course of his employment for an employer) is not considered the “author” of that work.*

*Under the Author-Publisher Procedures, revenues derived from Out of Print Books are distributed as follows: (1) if all rights have reverted, 100% of revenues are paid directly to the author; (2) if the Book is a work for hire, 100% of revenues are paid directly to the author; (3) if the Book was first published prior to 1987, 65% of the revenues will be paid directly to the author and 35% directly to the publisher; (4) if the Book was first published during or after 1987, 50% of the revenues will be remitted directly to the author and 50% directly to the publisher.*

*The reason that 100% of the revenues are paid directly to the author, in the case of a reversion, and to the publisher, where the Book is a work for hire, is because these are the circumstances in which it is certain under U.S. law who owns the rights. In the cases of assignments that may not be the case.*

*First, an assignment from an author to a publisher may not be for “all rights.” If the author has only assigned hard copy rights, for example, the issue could arise as to whether the absence of an assignment for electronic rights meant that the author retained those rights. The parties negotiating the Settlement Agreement agreed that rights under the Settlement should not be dependent on contract-by-contract review or on arriving at a legal determination as to who owns which rights when the author-publisher contract is silent.*

*Second, under U.S. copyright law, an assignment does not permanently extinguish the author’s rights. If an author has transferred an interest in a copyright, she is permitted to “terminate” that transfer during a statutorily-defined period “notwithstanding any agreement to the contrary.” (Because the creator of a work made for hire is never vested with rights as an “author,” and thus possesses no rights to transfer, works for hire are not subject to these provisions.) The termination of transfer provisions in the Copyright Act are detailed but, in general, provide as follows: transfers effected (1) by an author on or after January 1, 1978 that cover the right of publication may be terminated during a five-year window beginning at the earlier of (a) the end of thirty-five years from the date of publication of the work or (b) the end of forty years from the date of execution of the grant (17 U.S.C. § 203(a)) and (2) by an author or heirs prior to January 1, 1978 may be terminated during a five-year window*

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beginning at the end of (a) fifty-six years from the date copyright was originally secured (17 U.S.C. § 304(c)) or (b) seventy-five years from the date copyright was originally secured (17 U.S.C. § 304(d)).

*The purpose of the termination rights is to allow authors whose works were of little commercial value at the time of their assignment to benefit from a later increase in commercial value (usually through renegotiating publication contracts). Because, in theory, any work for which the rights have been assigned to a publisher might be subject to the termination right, there is no assurance as to who is the Rightsholder under the Settlement.*

*Finally, the parties to the settlement concluded that in the exploitation of a work by Google both the author and the publisher would have a stake in the work (even in the case of a work that is the subject of an assignment), except where the contract or the law otherwise provide, in the reversion and work for hire situations described above.*

## Google Partner Programme

***How does the Settlement relate to Google Partner Programme, and how will the two models coexist? Will the Settlement make it necessary for publishers who are monetising their content through the Google Partner Programme to renegotiate points in the Partner Programme as a result? What would be the effect of Rightsholders wishing to monetise their content opting out of Settlement and pursuing this solely through the Partner Programme?***

*The Settlement Agreement and the Partner Program are designed to coexist in parallel without requiring a renegotiation of points in the Partner Program. As noted above, Google intends to make available the revenue models in the Settlement to participants in the Partner Program. No renegotiation is required. Unless a Rightsholder opts out of the Settlement or Removes a Book entirely, a Book can be governed by both the Settlement and by the Partner Program. In such case, the Partner Program agreement controls; however, if that agreement were to terminate, or the rights in the Book were to revert to the author (and, therefore, would not be subject to the Partner Program agreement), that Book would automatically be subject to the rules of the Settlement.*

*If Rightsholders do not wish to participate in the Settlement but do want to participate in the Partner Program, they may either (1) opt out of the Settlement and approach Google separately regarding the Partner Program; or (2) participate in the Settlement, Remove their Books and then provide those Books to Google, for inclusion in the Partner Program.*

*Google has said that, through the Google Partner Program, it may accept Books that have been Removed from the Settlement and that it may then use the Book in ways authorized by the publisher, which may be similar or identical to uses that are available through the Settlement. A Book that has been Removed and is being exploited through the Google Partner Program, is not subject to the “coupling” requirement of Books included in the Settlement. “Coupling” is the requirement that if a Rightsholder authorizes a not Commercially Available Book to be made available for Consumer Purchase (i.e., direct sales*

to an end user), such Book must also be made available for access through Institutional Subscriptions and the Public Access Service.

*In one limited circumstance, an author can prevent a publisher from removing a Book from the Settlement and exploiting it via the Partner Program. If (a) the Book is In-Print and (b) the Book is subject to a pre-1992 publishing agreement that has not been amended thereafter to address electronic rights, the author has the ability to demand that a Book being exploited in a Google program other than the Settlement Agreement program (e.g., the Partner Program) either (1) be taken down from the other Google program or (2) be transferred from the other Google program into the Settlement Agreement program. This provision evolved out of the authors' concern that a publisher could avoid application of the Author-Publisher Procedures (e.g., the requirement that notice be provided before a publisher authorizes Google to exploit an In-Print Book, or arbitration regarding royalty disputes for such a Book) simply by removing a Book from the Settlement Agreement (or excluding an Out-of-Print Book from the Display Uses) and then separately authorizing identical uses through the Partner Program (where the author need not be notified). The authors viewed this possibility as an "end-run" around the safeguards that they had negotiated for authors in the Author-Publisher Procedures.*

## Book pricing

***Was the likely impact on book pricing taken into account when determining the initial pricing algorithm under which 65% of works will retail at \$7.99 or less?***

*The initial distribution percentages listed in Section 4.2(c)(ii)(1) reflect Google's estimates for the price points based on its own models, using its pricing algorithm. The Settlement contemplates that the actual percentage distribution will evolve over time based upon Google's development of the pricing algorithm and input and oversight by the Registry. Whether Google, in developing its pricing algorithm, took into account the effect of the output of that algorithm on pricing of books through other distribution media, is unknown.*

*Of course, Rightsholders need not rely on Google's pricing algorithm to set the price at which they wish their Books to be available for Consumer Purchase; at any time, they may indicate a Specified Price for those Books. See Section 4.2(b)(i)(1) & (ii). If Rightsholders do not opt for a Specified Price, prices of Consumer Purchases will be the Settlement Controlled Price. The pricing algorithm is designed to maximize revenue for the Rightsholder through the Settlement program.*

***Clause 4.5(iii) of the Settlement Agreement: There seems to be no right of approval over intermediaries used or the discounts given.***

*Section 4.5(b)(iii) permits Google to offer a discount of up to 10% of the List Price for Institutional Subscriptions if sold through an intermediary. Section 4.1(c) of the Settlement Agreement provides that the use of intermediaries to sell Institutional Subscriptions is subject to Registry approval. The Settlement Agreement limits the amount of the discount to Google's intermediaries to no more than 10%, but no more than that. This provision was*

*intended to allow intermediaries to participate in the revenues from sales of Institutional Subscriptions.*

## Liability

***Will the Settlement represent a liability for Rightsholders, if their existing contracts with other retailers stipulate that they are not able to enter into similar service contracts? If so, how should publishers manage this?***

*By participating in the Settlement, Rightsholders are not entering into a service contract. The Settlement is the resolution of a class action lawsuit that is binding upon participants under court order; it is not contractual in nature. In other words, a publisher would not be violating any exclusivity clauses in other retail or distribution arrangements by claiming Books in and participating in revenues from the Settlement.*

***Clauses 8.5(b) and 8.6(b) of the Settlement Agreement: There is a cap on liability for wilful or intentional misconduct which seems extraordinary. Under clause 8.7: the cap can only be updated every 10 years – is this appropriate in the current economic climate?***

*Sections 8.5(b) and 8.6(b) of the Settlement Agreement provide that, in the case of Unauthorized Access or breach of a Security Implementation Plan, a Rightsholder could recover actual damages from Google. The central concept is that actual damages could be in a range beginning with zero and ending with the amount of statutory damages available under the Copyright Act (discussed below). Google's aggregate liability for all such breaches (i.e., involving multiple books) from a single incident are capped – under Section 8.5(b), at US\$40 million (if Google acted recklessly) and US\$50 million (if Google acted willfully or intentionally); and under Section 8.6(b), at US\$20 million (if Google acted recklessly) and US\$25 million (if Google acted willfully or intentionally). These provisions were the subject of careful, intense and prolonged negotiations aimed at arriving at dollar amounts that would both protect Google from crippling large monetary awards and provide meaningful incentives for Google to comply with its obligations under the Settlement.*

*In most instances, if Google fails to comply with its obligations under the Settlement – thereby triggering the dispute resolution procedures of the Settlement – it is rather unlikely that these caps would actually operate to limit, in any material way, Rightsholders' ability to recover for damages they had suffered. Currently, the Copyright Act allows statutory damages in the range of \$750-\$30,000 per infringed work; if the infringement is "willful," the court may increase the statutory damages award, up to \$150,000. Under the Settlement Agreement, actual damages must be proven and it is not clear what would be the actual damages for millions of out of print Books that might be exposed to a security breach. For in print Books, sustained exposure to a security breach – or willful display of Books contrary to Rightsholders' instructions – could be more damaging, of course. Nevertheless, it is uncertain, absent a catastrophic and reckless or willful breach or failure resulting in provable damages to hundreds of thousands of Books (or more), that the caps would be reached.*

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*Google was concerned that if there were a security breach, it would theoretically be possible that millions of Books could be displayed. To be sure, Rightsholders would, as noted, have to demonstrate that they had suffered actual damages resulting from any breach, whether willful or not. The cap on actual damages available to a Rightsholder is US\$150,000, in the case of willfulness. Google was concerned about the theoretical risk of an astronomical damages award for a catastrophic breach. For example, if there are one million In Print Books in the database, the award, if all of those Books were displayed or downloaded, could theoretically reach US\$150 billion. The liability caps, though substantially less than the maximum conceivable amount that could be recovered, contemplate what would be a very large award for a copyright infringement lawsuit, particularly where each cap is tied to a single incident. Were Google to repeatedly violate its obligations under the Settlement, the cap on its exposure to damages would be multiples of the amounts listed in Section 8.5(b) and 8.6(b).*

*The provision allowing an inflation-based readjustment every 10 years was also heavily negotiated. In light of (1) recent rates of inflation, (2) the time and energy that would be involved in more frequent renegotiation of the caps and (3) the parties' view that the caps were unlikely to be reached, the parties ultimately agreed to the provision that appears in the Settlement Agreement.*

## Territoriality

### ***How will Google manage territoriality issues, for example EU-published books that have found their way into US libraries?***

*Books published in Europe will have a U.S. copyright interest based on the Berne Convention and United States law. Who owns that copyright interest—whether the publisher in Europe or an exclusive licensee in the United States that owns the United States publishing rights—would be a matter for the two publishers involved to resolve. The rightsholder of the U.S. copyright interest would have the ability to sue for infringement of the Book in the United States. As a legal matter, the Settlement only implicates these U.S. copyright interests because it only releases claims against Google in the United States and it only authorizes Google to make uses in the United States.*

*The Settlement neither authorizes nor prohibits uses by Google outside the United States. The plaintiffs and Google determined not to address the legality of such uses principally because only claims for infringement under U.S. copyright law are being released and because such uses would involve the rights under laws other than the United States. Accordingly, issues of territoriality are not affected or managed by the Settlement. Put another way, an EU-published book is treated like a U.S.-published Book—each is only covered by the Settlement to the extent that it is protected under U.S. copyright law.*

*Because Google's authorizations to make Display Uses under the Settlement only extend to rights under U.S. copyright law, Google has indicated that it will use technical measures, such as Internet Protocol addresses, to detect the location of a user. Users located outside*

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*the United States who are seeking to access Display Uses of Books and Inserts will be blocked.*

***Is illegal access to Google Book Search outside the U.S. reliant on ISP recognition for enforcement? If so, given there is evidence that these systems can be hacked, what assurances exist to reassure publishers their works will be 'protected'?***

*Access to Google Book Search is available worldwide and access to the service will not be affected by the Settlement. Access to Google Book Search is not now illegal. Today, in Google Book Search, full text of in-copyright books is not available to users, whether within or outside the United States.*

*The Settlement only authorizes Google to make Display Uses of a Book in the United States. In other words, only U.S. users will be able to make consumer purchases of Books (i.e., to view whole Books online) or enter into institutional subscriptions to have access to all of the Books in the database; similarly, only U.S.-based users will be able to see entire pages of Books as part of a "Preview Use." Google's rights to make Display Uses of Books outside the United States is not governed by the Settlement. Google has indicated that it will only make such uses if authorized by the laws of other countries or by separate agreements with Rightsholders.*

*With respect to Books for which the Settlement authorizes Display Uses in the United States Google has indicated that it will use technical measures, such as Internet Protocol addresses, to detect the location of a user, and users located outside the United States who are seeking to access Display Uses of Books and Inserts will be blocked. If these technical measures are ineffective in blocking access to the display of Books in countries outside the United States, the Settlement leaves untouched the Rightsholder's ability to bring claims against Google for unauthorized display of its works outside the United States. Accordingly, if Google displays (or facilitates display of) Books outside the United States, it does so at its own peril.*

Google has additionally clarified that, for access outside of the US, for example in the EU, internet users accessing Google Book Search would find the following:

- If the rights holder has removed the book, then there would be no access, or snippets
- If the rights holder has chosen to turn off display uses, Google has admitted they do not yet know how different books will be treated e.g. dictionaries do not currently have snippets displayed, but others might
- If the rights holder accepts display uses then snippets will be displayed
- If the rights holder opts out of the Settlement, then snippets will be displayed

## Libraries

***What enforcement will there be of interlibrary loans between participating and non-participating libraries?***

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*The Settlement provides that the only class of libraries that will be obtaining “Library Digital Copies” (digital copies of Books in their library collections) are Fully Participating Libraries (“FPLs”) and the Settlement expressly prohibits an interlibrary loan of Library Digital Copies, whether from one FPL to another FPL or to any other library. See Section 7.2(c)(iii). To become a FPL, a library must execute a Library-Registry Agreement with the Registry; that Agreement will embody all of an FPL’s rights, and the prohibitions to which it is subject, under the Settlement Agreement. Unauthorized reproductions or displays by a FPL, which would include an interlibrary loan, are considered as “Prohibited Access” under the Settlement, see Section 1.113, and, accordingly, would be barred by the Library-Registry Agreement between the FPL and the Registry.*

*Upon executing a Library-Registry Agreement, a FPL agrees to be bound to the enforcement remedies for breach outlined in Article VIII of the Settlement Agreement. The Registry could sue for violation of the Library-Registry Agreement. Each Rightsholder is a third-party beneficiary of the Library-Registry Agreement, and is entitled to enforce it.*

*Section 8.5 of the Settlement Agreement provides that, in the case of Prohibited Access by a library, a Rightsholder could recover actual damages from the FPL. (The recovery of actual damages, which is intended to mirror the relief available under the Copyright Act for an infringing act, could include a publisher’s lost sales.) The FPL’s aggregate liability for all such breaches from a single incident are capped at US\$300,000 (if FPL acted inadvertently or negligently); US\$5 million (if FPL acted recklessly); and US\$7.5 million (if FPL acted willfully or intentionally). Article IX of the Settlement Agreement provides that, in general, disputes as to whether a use constituted Prohibited Access are subject to mandatory arbitration. Section 9.11, however, provides for a Rightsholder to seek immediate relief from the United States District Court for the Southern District of New York if the publisher would be prejudiced or irreparably harmed by delay in remedying the FPL’s breach or if the FPL’s breach is repeated, willful or intentional.*

***Library-Registry (Fully Participating) Agreement clause 2(a) – no contractual right to termination for breach. There does not seem to be a right to terminate for breach in other Library-Registry agreements either. Why not?***

*All remedies under the Settlement are set out in Article VIII for Google and the Fully Participating Libraries. Thus, you correctly note that there is no contractual right to terminate a Library-Registry (Fully Participating) Agreement for breach. The Settlement provides for monetary penalties instead of termination in order to more effectively encourage compliance with Settlement obligations. Or, put another way, all of the breaches of the Library-Registry (Fully Participating) Agreements either are Prohibited Access (i.e., unauthorized use of the Library Digital Copy) or failure to comply with a Security Implementation Plan; in both cases, there are associated monetary penalties in Article VIII.*

*It was and is a central objective of the plaintiffs to assure that libraries with Library Digital Copies (i.e., digital copies of in-copyright material) enter into and remain subject to Library-Registry (Fully Participating) Agreements. Were those agreements to be terminated, such libraries would have Library Digital Copies and would be free from contractual restrictions on*

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*their use of them. Accordingly, if such agreements were terminated and libraries were to make unauthorized uses of Library Digital Copies, Rightsholders would be required to bring a lawsuit for copyright infringement; in such case, the libraries would be likely to raise fair use defenses.*

*As to the other Library-Registry Agreements, the libraries that are parties to those agreements will not have any Library Digital Copies. So, they will be unable to make any uses – display or otherwise – of in copyright Books. The only obligations they have are to destroy any Library Digital Copies that are in their possession or that they may have inadvertently received. Termination of their respective Library-Registry Agreements would not make sense, because plaintiffs want them to comply with those obligations.*

*Finally, in the case of all Library-Registry Agreements, for repeated, willful or intentional breaches, Rightsholders have the ability under Section 9.11 of the Settlement Agreement to seek injunctive relief against the Participating Libraries. Injunctive relief might, for example, require the cessation of Prohibited Access, compliance with a Security Implementation Plan or destruction of Library Digital Copies.*

## Institutional subscriptions

***If Google sells a subscription to an institution and after that, rightsholders decide to withdraw their books or to exclude display, will the institution still be able to have access to the works it has subscribed to?***

*Under the Settlement Agreement, if an institution (such as a university) subscribes to an Institutional Subscription that includes a Book, but, after the beginning date of the subscription, the Book is excluded or removed by a rightsholder, Google is required to cease "Display Use" except that Google can fulfill its obligations - as of the date of such exclusion or removal - to any user who purchased access to the Book through that Institutional Subscription, but only for a period not to exceed 10 months or the term of the Institutional Subscription, whichever is less, after the date of the exclusion or Removal request. The term of an Institutional Subscription is expected to be one year. Assume that the term runs from September 1, 2010 to August 31, 2011. If the exclusion or removal request for a Book is received January 1, 2011, the subscriber (who had purchased access to the Book on September 1, 2010) would only have access to the Book until August 31, 2011. If the exclusion or removal request for a Book is received November 1, 2010, the subscriber would only have access to the Book until July 31, 2011. This is governed by Section 3.5(b)(vi) of the Settlement Agreement.*

## Long-term implications of the Settlement

***What happens to books published after 5 January 2009?***

*The Settlement only applies to books published anywhere in hardcopy on or before January 5, 2009. For books published after that date, Google is not released from any claims that may arise from its digitization and use. Because Google faces legal uncertainty with regards*

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to those books, Google is unlikely to scan such books. Google has indicated that it will, in parallel, make the economic and other terms of the Settlement available to Rightsholders via its Partner Program (though those Books, again, will not be subject to the Settlement).

**Is the Settlement likely to affect the future treatment of journals? If so, then in what ways?**

The Settlement does not address the treatment of journals. Google's obligations, if any, with respect to journals that it has scanned or will, in the future, scan would need to be addressed separately.

**What will be the likely ramifications of the Settlement in terms of how it is eventually extended beyond the U.S.?**

In terms of extension beyond the United States, that is not possible under the Settlement. Google may seek to offer similar programs, implicating copyright rights under countries other than the United States, to rightsholders in those countries. We understand that Google has been visiting author and publisher organizations in Europe—including the Publishers Association—to explain its plans and intentions.

## Book Rights Registry

**What will be the constitution of the Book Rights Registry? What will be its status as a legal entity?**

The Book Rights Registry will be a not-for-profit corporation incorporated in the State of New York under the Not-for-Profit Corporation Law. The Registry will have two members, the Authors Guild and the Association of American Publishers, who will each be responsible for appointing one half of the directors of the Registry's Board.

**What level of representation will be granted to non-US publishers?**

The AAP will be responsible for selecting the "Publisher Directors" of the Registry's Board. The Settlement Agreement requires that they represent the members of the Publisher Sub-Class. Although there is no guaranteed representation for non-U.S. publishers, the AAP will endeavor to ensure that the Publisher Directors are representative of the entire Publisher Sub-Class, including those publishers located outside the United States.

**Does the AAP's definition of an "international publisher" in this context only mean a US publisher who exports?**

The Settlement Agreement and the Registry's organizing documents do not contain a definition of "international publisher." When the AAP has referred to "international publishers," it has meant to include international publishers who publish within and outside the United States. In this sense, international publishers were well-represented in the settlement negotiations by Holtzbrinck (through its subsidiary Macmillan), Random House, and Pearson.

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## ***Will different language publishers be represented?***

*As noted, the AAP will select the Publisher Directors. The Registry documents do not set aside seats for particular sub-sets of the Publisher Sub-Class. It should be noted that Holtzbrinck and Random House, among other publishers involved in the settlement discussion, publish in multiple languages.*

## ***How will payments be administered and divided amongst recipients?***

*Google will pay 63% of revenues derived from Consumer Purchases, Advertising Uses and Institutional Subscriptions to the Registry. The Registry, in turn, will allocate those funds pursuant to the Author-Publisher Procedures and the Plan of Allocation. For Consumer Purchases and Advertising Uses, the Registry will pay the Rightsholders of the Books purchased or for which Google made Advertising Uses. For revenues received from Google for Institutional Subscriptions, the Registry will develop a fair and equitable usage formula in order to determine a particular share of subscription revenues received for Books. (In addition to revenues received from Google, all Books and Inserts included in Institutional Subscriptions are entitled to an Inclusion Fee, targeted at \$200 per Book; \$50 per Entire Insert, and \$25 per Partial Insert.)*

*The Registry will allocate these monies, after taking a modest share for reimbursements of its administrative expenses, as follows: First, if a Book is In-Print, the Registry will pay the publisher, and the publisher will, in turn, share revenues as specified by the author-publisher contract. Second, if a Book is Out of Print, the Registry will distribute revenues as follows: (1) if rights have reverted to the author, 100% of the revenues will be paid directly to the author; (2) if the Book is a work-for-hire, 100% of the revenues will be paid directly to the publisher; (3) if the Book was first published prior to 1987, 65% of the revenues will be paid directly to the author and 35% directly to the publisher; (4) if the Book was first published during or after 1987, 50% of the revenues will be remitted directly to the author and 50% directly to the publisher.*

## ***How will the BRR coexist, rather than conflict, with RROs in each country?***

*The Registry is only authorized by the Settlement to distribute payments from Google's exploitation of covered books and inserts in the United States. The Settlement does not authorize Google to exploit such works outside the United States and the Registry is not authorized by the Settlement (and members of the class) to clear rights for such exploitation. We anticipate that Google will need to work with RROs and other non-U.S. rightsholders to obtain permission to digitize or display works outside the United States; however, that is beyond the scope of the Settlement or the remit of the Registry. Accordingly, to the extent that RROs are administering rights in their own countries there should be no conflict between the roles of the Registry in the United States and the RROs outside the United States.*

*RROs may participate in the Settlement—and the claiming process—depending on the extent to which they are authorized to do so by their national authors and publishers. RROs may be authorized by their authors and publishers to act as their agent in filing claims on*

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*their behalf and otherwise managing their rights in the United States. It is also possible that some RROs may have the exclusive worldwide rights to exploit, or authorize the exploitation of, books of their authors and publishers; in such case, if those rights extend to the United States and to the rights implicated by the Settlement, the RROs may themselves be considered the Rightsholders of books and inserts and make claims under the Settlement.*

*To the extent that an RRO is authorized by its agreements with authors and publishers, or by national law, to file claims under the Settlement (whether as an agent for Rightsholder or as a Rightsholder in its own right), in principle, it would seem efficient for the Registry to accommodate such collective management of books and inserts. Although how to proceed will be for the Registry to decide, the Registry could, in principle, disburse payments to authorized RROs for further distribution to the Rightsholders in their countries. At this point, however, the Registry has not yet been formed, nor have any staff been hired.*

*Whether an RRO can represent its authors and publishers in the claiming process under the Settlement, or whether the RRO is itself the Rightsholder, depends on the specific right or action under the Settlement and the rights granted from the members to the RRO, in each case according to national law. We have advised that RROs investigate this matter themselves. If the RROs conclude that they are authorized to act as agents and are entitled to claim books and inserts for their members, they should contact the Settlement Administrator.*

## ***Will the BRR have all the necessary rights information, including different (and overlapping) territorial rights? If not, how can this be fed in?***

*The Settlement only applies to exploitation of U.S. copyright interests. It is not clear why territorial rights outside the United States would be relevant to administration of the Settlement. For that reason, works are being claimed only with respect to their respective U.S. copyright interests. Accordingly, the Registry will only have information regarding copyright interests under United States law; its database will not contain information regarding territorial rights outside the U.S.*

*To the extent that a U.K. publisher licenses a Book to a U.S. publisher for publication in the U.S., depending on whether Google has scanned the Book published in the U.K. (which has found its way into a U.S. library) or the Book was published in the United States by the U.S. publishers, the two publishers would have to work out between them (based on the publisher-publisher license or other commercial arrangements) who is the Rightsholder of the U.S. rights implicated by the Settlement. (The issue would arise if both the U.K. publisher and the U.S. publisher claimed the rights in the Book.) The Registry will not have a formal role in this process and the Settlement does not require that publisher-publisher disputes be submitted to arbitration; however, the two publishers involved, if they wish, could avail themselves of the dispute resolution procedures described in the Settlement.*

## Author publisher procedures

***Why does the Settlement impose an arbitration process which takes the author / publisher relationship out of publishers' hands, effecting significant changes without sufficient consultation to justify this?***

*In general, the Settlement does not affect contractual relationships between authors and publishers; this was an important point for both publishers and authors. In resolving disputes under the Settlement, the Settlement specifically provides that the Arbitrator "will give primary consideration to the terms of the written contact and amendments thereto, if any, between the parties." Author-Publisher Procedures § 7.2(a).*

*With respect to Out-of-Print Books, the Settlement does prescribe a royalty split that may supersede arrangements set out in the author-publisher contract solely with respect to revenues received from the Settlement. Given the uncertainty with respect to who has the rights at issue, and the opportunity to resolve issues of control (both authors and publisher have control over such Books) in the context of a class action, albeit only for the Google Book Settlement, the parties concluded that the approach taken in the Author-Publisher Procedures was not only prudent but was an advantage of the Settlement.*

*A publisher can remove a Book from the Settlement and put the Book into the Google Partner Program (if it wishes). In such case, if the author disputes that the publisher has the rights necessary to authorize Google to exploit the Book, the author can bring a legal challenge based on the author-publisher contract. In that circumstance, the legal procedures prescribed in that contract would govern.*

***Author Publisher Procedures clause 10.2(g)(i) and 3.5(c)(ii)(4) and clause (5) of the Settlement Agreement: if an author and publisher disagree about control of a pre-1992 work, Google has discretion to carry on using the work whilst the Author and Publisher must sue each other to resolve the dispute. Is this intended? Google should only be able to exploit works with clear authority so in the face of dispute over control they should be unable to use the work.***

*Section 3.5(c)(ii)(3) of the Settlement Agreement only applies in the situation where (1) an Initial Authorizing Rightsholder has authorized Google to include a Book in an Other Google Program (e.g., the Partner Program); (2) that Book is an In Print Book for which the author-publisher contract was executed prior to 1992 and has not been amended to expressly grant or retain electronic rights; (3) a Notifying Rightsholder has sent a Take Down Request that Google remove the Book from the Other Google Program; and (4) the Initial Authorizing Rightsholder has objected to this Take Down Request through filing a Counter-Notice with the Registry. In these circumstances Google does have discretion whether to take down, maintain or restore access to the Book in the Other Google Program; continuing to display the Book will therefore be at Google's own risk.*

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*The most likely situation to arise is where a publisher has put a Book in the Partner Program. Pursuant to the Partner Program agreement, the publisher may have represented that it owns the rights and will indemnify Google for third-party claims of infringement. If an author nonetheless submits a Take Down Request, Google could (a) determine that the publisher does have the rights because the rights asserted in the Take Down Request seem unworkable on their face; (b) rely on the Counter Notice from the publisher, which is a sworn statement; or (c) otherwise contact the publisher to verify that the publisher has the rights. There is no reason for Google, having assured itself that the dispute may be groundless, to be required to take down a Book, given the representation and indemnity of the publisher. If the Take Down Request appears valid, however, and the publisher is unable to provide support for its assertion of rights, Google may determine that taking down the Book is advisable to the risk of being sued for copyright infringement.*

*This provision was crafted to follow the concept in the “take down” provisions of the Digital Millennium Copyright Act (“DMCA”) (17 U.S.C. § 512). As you may know, under Section 512, it is within the discretion of the service provider to “take down” infringing content upon receipt of a DMCA “take down” notice from a copyright owner. If it does take down the content expeditiously, and if it otherwise complies with the safe harbor requirements of the DMCA, then it will not be exposed to monetary liability. If, however, the person who supplied or uploaded the content sends a counter-notice, the service provider may choose to restore the content. If the service provider restores the content, the person who sent the DMCA notice must obtain a court order in order to have the content removed. If the service provider does not restore the content, the person sending the counter-notice must affirmatively establish its rights to authorize display of the content.*

*The shifting burdens under the DMCA are, to a certain extent, mirrored in Section 10.2(g)(i) of the Author-Publisher Procedures, which apply only to the Section 3.5(c)(ii)(3) situation (not to Section 3.5(c)(ii)(4)). If Google does decide to take down a Book (i.e., it appears that there is a clear dispute because the Initial Authorizing Rightsholder did not have the rights), then the burden is on the Initial Authorizing Rightsholder to resolve the dispute. Conversely, if Google maintains the Book (i.e., it appears that the Notifying Rightsholder did not have the right to ask that Google take down the Book), then the burden is on the Notifying Rightsholder to resolve the dispute. In either case, the dispute could be resolved pursuant to the dispute resolution procedures in the author-publisher contract, through an agreement or otherwise.*

*By contrast, if the Notifying Rightsholder sends a Transfer Request, Section 3.5(c)(ii)(4) applies. Under this provision, if the Initial Authorizing Rightsholder objects to the Transfer Request, Google must not display the Book in either the Settlement’s Revenue Models or in the Other Google Program until jointly authorized by the parties or ordered by a court. Google has no discretion in this situation and, accordingly, it would seem that your concerns – that Google should not be able to exploit works when a dispute has been raised – are addressed. Accordingly, if a Rightsholder wants to ensure that no Display Uses of its Book are being made while there is disagreement as to who is the proper authorizing party, it should serve a Transfer Request.*

*It should be noted that these provisions afford rights and remedies to each of the Notifying Rightsholder and the Initial Authorizing Rightsholder only if it has not opted out of the*

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*Settlement. If Google continues to display the Book pursuant to the Settlement or the Other Google Program, it does so at the risk that a class member that opted out will seek to enforce those rights against Google.*

*Note further that if the Notifying Rightsholder wishes to exclude all Display Uses or Remove the In Print Book, subject to these procedures in Section 3.5(c), it could do so by submitting a Transfer Request. Once transferred, the In Print Book could only be displayed in a Display Use if and to the extent that the publisher agrees and if the author does not object. Alternatively, the Book could be Removed by either party. In practical terms, this provision could result in a negotiation between the author and the publisher over royalty splits for revenues earned from Google's display of an In Print Book, whether that display is through the Partner Program or the Settlement Revenue Models.*

## Advertising

***What control will rightsholders have over the nature of the advertising which appears alongside their content?***

*Pursuant to Section 3.5(b)(i), a Rightsholder may at any time exclude its Book from Advertising Uses. The Settlement does not, however, provide a mechanism for controlling the particular types of advertising that appear in connection with the Book, should such uses not be excluded. Section 3.10(c)(iii) prohibits Google from placing advertisement on, behind or over the content of a Book, but the Settlement "does not otherwise limit Google's right to display advertising anywhere on Google Products and Services." Section 3.14.*

***Rightsholders cannot control the particular types of advertising that appear in connection with a Book. What is Google's policy regarding the kinds of advertising it permits? Is there a possibility that any of this advertising could be considered inappropriate for certain audiences?***

*Advertising in the forms permitted by the Settlement, as previously explained, will be subject to Google's regular advertising policies and procedures. Google has advised us that these policies can be found at:*

<https://books.google.com/support/partner/bin/answer.py?answer=17878>

*If any Rightsholder objects to Google's advertising practices, he or she may exclude a Book from all Advertising Uses. You are correct that Rightsholders cannot control the particular types of advertising that appear in connection with their Books.*

## Non-consumptive research

***The definition of "non-consumptive research" excludes researchers reading or displaying "substantial portions of a Book." How will "substantial" be defined, and how will it affect dictionary publishers, for example? Is Google defined as a "Qualified User" and if so will it be the only commercial body to have access to "non-consumptive research"?***

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*The Settlement Agreement does not further define “substantial portions” of a Book for purposes of determining what is not “Non-Consumptive Research.” If a Rightsholder disagrees with the amount of material read or displayed by any person in the course of non-consumptive research, the dispute resolution procedures in Article IX of the Settlement allow the Rightsholder to challenge this determination.*

*Google does not need to become a Qualified User in order to access the Research Corpus because Google itself already is expressly authorized to make Non-Display Uses (including internal research and development) of all books covered by the Settlement unless the Books have been removed by the Rightsholder. This makes it unnecessary for Google to invoke the rights of a Qualified User entitled to conduct “non-consumptive research.”*

*Google is not the only commercial entity that could have access to the Research Corpus for the purposes of conducting Non-Consumptive Research. Section 1.121(d) of the Settlement Agreement contemplates that a Qualified User could be an entity that intends to commercially exploit the results of the Non-Consumptive Research, subject to agreeing to additional terms and conditions with the Registry. In addition, although commercial uses of data extracted from the Research Corpus are subject to certain restrictions, Section 7.2(d)(x) indicates that commercial uses can be made of algorithms developed when performing Non-Consumptive Research.*