

The Amended Settlement Agreement: what's new?

The Amended Settlement Agreement contains a number of substantial revisions, all of which are widely considered to benefit UK rightsholders. The most significant changes are detailed below.

Scope of the Settlement

- The scope of the Settlement Agreement has been amended to books that are either registered with the U.S. Copyright Office or published in the United Kingdom, Canada, or Australia

Definition of Book

- A written or printed work that as of January 5, 2009 had been published in hard copy form (as set out in the original Settlement)
- If a United States work, was registered with the United States Copyright Office
- If not a United States work, had a place of publication in the United Kingdom (or Canada or Australia), as evidenced by information printed in the hard copy of the work, (e.g. a statement that the book was "Published in the UK", or the location or address of the publisher)

Commercial Availability

- Commercially Available is now defined as meaning "for sale new, from sellers anywhere in the world, through one or more then-customary channels of trade to purchasers within the United States, the United Kingdom, Canada or Australia"
- In practice Google will assume that if a book is available for sale "anywhere in the world" then it is available to be purchased by a purchaser in the US
- A publisher need only "assert" that the book is Commercially Available and Google will promptly change the classification from not Commercially Available to Commercially Available, unless Google challenges the publisher's assertion in arbitration and wins. Under the original Settlement Agreement, the Rightsholder had to "demonstrate" that the book is Commercially Available
- Google will not make Display Uses of any Book that it has classified as not Commercially Available until 60 days after notifying the Registry. If the rightsholder disputes the determination, Google will not make Display Uses of the Book until it prevails under the dispute resolution process
- Google will consult multiple third-party databases including those from a range of United States, United Kingdom, Canadian and Australian sources that can be obtained on fair and commercially reasonable terms

BRR governance

- The Board of the BRR will have at least one representative of the Author Sub-Class from each of the United States, the United Kingdom, Canada and Australia and at least one

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representative of the Publisher Sub-Class from each of the United States, the United Kingdom, Canada and Australia

- The PA has received a written confirmation from the AAP that in practice this means the UK PA would advise AAP who to nominate as the representative of the Publisher Sub-Class from the UK

Most Favoured Nation clause

- This clause, under which third parties could not negotiate terms preferable to Google's, has been eliminated from the Settlement

Additional Revenue Models

- Limited to three additional Revenue Models specified in the original Settlement, in addition to which:
 - Custom Publishing and Abstracts, Compilations and Summaries Models have been removed
 - POD limited to non-Commercially Available Books
- The Settlement no longer provides for new, undisclosed revenue models
- Revenue split between Google and the Rightsholders will be the same as for the existing Revenue Models
- Rightsholders of claimed Books will have at least 60 days' notice prior to Google offering any additional Revenue Model, and the right to exclude their Books from these uses

Renegotiation of Revenue Split for Commercially Available Books

- For Commercially Available Books, either Google or the Rightsholder has the ability to request renegotiation of the 63% / 37% revenue split for all revenue models. If they cannot reach an agreement then neither of the parties is obligated to offer the Rightsholder's Books for sale

Negotiation of non-price features

- The Rightsholder has the ability to negotiate any non-price feature of a product (both Consumer Purchase and Institutional Subscription, as well as any additional Revenue Model) to allow for the book to be made available on a less restrictive basis than the default basic features set out in the Amended Settlement Agreement. The Amended Settlement Agreement will continue not to provide for Google to have any right to ask a Rightsholder to agree to a less restrictive feature, such that if the Rightsholder were to fail to agree, Google would have the right to refrain from making the Book available

Removal of a Book

- Google commits to remove a work as soon as reasonably practicable, and no later than 30 days after receiving notice. Google will also act "promptly" to exclude a Book from display uses for which it has received an exclusion request (important if the exclusion request is made for legal reasons, such as defamation)

Partner Programme

- It has been clarified that participation in the Partner Programme supersedes the terms of the Settlement, although if the Partner agreement expires the Settlement terms resume