

Google Books & the small, non-profit publisher

Allen Press Emerging Trends in Scholarly Publishing Seminar
April 8, 2010
J. Alex Speer, Mineralogical Society of America, Chantilly, VA

Outline of the talk

- *What is it?*
- *How was it received?* One can see from next topics the answer was not well.
- *Lawsuit Settlement v1*
- *Lawsuit Settlement v2*
- *Lawsuit Settlement v3, or ?*
- *Concluding Thoughts*

This is subject matter I usually do not present. I talk on geology with lots of colorful maps, pictures, graphs, etc. This is a challenge. Here we are talking about a business model that has evolved into a lawsuit, an evolving and complex one that is ongoing. Best way follow a time line. uncertain how much the audience knows or does not know, so I have made it basic.

Google Books

- *What is it?*

- Internet accessible, electronic library containing a scanned and digital copy of any book that's ever been published, but better:
 - instant access by anyone, anywhere
 - searchable in ways not possible with card catalogues
 - » Not dependent on any indexer's notions
 - » to a fine level
 - accessible to those unable to read print – software programs that
 - » display enlarged text
 - » read text aloud with a speech synthesizer
 - real time, online language translation
 - link to any reference or further information
- 2002-2003 conceived and technical issues resolved
- 2004 - Google contacts publishers to include newly published books
- 2004 - Google partners with major research libraries to scan book holdings

- Overview & history (<http://books.google.com/intl/en/googlebooks/about.html>)

Google Books

•*How was it received?*

- little noticed by most
- What's to like by a small, non-profit, society publisher?
 - Most society purpose to make our information widely available - does that
 - publications included in potentially the world's largest library
 - publications locatable & searchable
 - instant access by anyone, anywhere
 - publications accessible to those unable to read print
 - » handicap accessibility (the vague Section 508 of the federal Rehabilitation Act)
 - real time, online language translation
- What's to dislike by a small, non-profit publisher?
 - Google profiting (by selling ads) from the copyrighted work of others (authors and publishers) without reimbursement or support for producing future publications
 - » Who will buy our books if they are free online?
- 2005 (September & October) - *Authors Guild* and the *Association of American Publishers* each file separate class action suits centered on question of copyright infringement or fair use.
 - » Does scanning an entire book for the purpose of making a searchable index and for display online constitute copyright infringement or is it fair use?
- Google temporarily suspends scanning of in-copyright works

Google Books

Lawsuit Settlement v1

- 2008 - Google reaches settlement with *Authors Guild* and the *Association of American Publishers* (134 pages and 15 appendices)
- 2009 - copyright holders notified
 - » makes settlement widely known
 - » only those registered with US Copyright Office
- website established - <http://www.googlebooksettlement.com/>
- Slow for significance to be appreciated

Legal Notice

Persons Outside the United States: This settlement may affect you because it covers U.S. copyright interests in books published outside the United States. If you hold such an interest in a book or other material in a book, this settlement could bind you unless you timely opt out.

If You Are a Book Author, Book Publisher or Other Person Who Owns a Copyright in a Book or Other Writing,

Your rights may be affected by a class action settlement regarding Google's scanning and use of Books and other writings.

Authors and publishers filed a class action lawsuit, claiming Google violated the copyrights of authors, publishers and other copyright holders ("Rightsholders") by scanning in-copyright Books and Inserts, and displaying excerpts, without permission. Google denies the claims. The parties have agreed to a settlement. This summary provides basic information about the settlement. "Books" and "Inserts" are described below.

What Does the Settlement Provide?

The settlement, if Court-approved, will authorize Google to scan in-copyright Books and Inserts in the United States, and maintain an electronic database of Books. For out-of-print Books and, if permitted by Rightsholders of in-print Books, Google will be able to sell access to individual Books and institutional subscriptions to the database, place advertisements on any page dedicated to a Book, and make other commercial uses of Books. At any time, Rightsholders can change instructions to Google regarding any of those uses. Through a Book Rights Registry ("Registry") established by the settlement, Google will pay Rightsholders 63% of all revenues from these uses.

Google also will pay \$34.5 million to establish and fund the initial operations of the Registry and for notice and settlement administration costs, and at least \$45 million for cash payments to Rightsholders of Books and Inserts that Google scans prior to the deadline for opting out of the settlement.

Who Is Included?

The settlement class includes all persons worldwide who hold a U.S. copyright interest in any Book or Insert. The meaning of "U.S. copyright interest" is broad. Wherever you are located, please read the full Notice to determine whether you are included in the settlement.

There are two Sub-Classes:

- The "Author Sub-Class" (authors of Books and other writings, and their heirs, successors and assigns), and
- The "Publisher Sub-Class" (publishers of Books and periodicals, and their successors and assigns).

What Material Is Covered?

"Books" include in-copyright written works, such as novels, textbooks, dissertations, and other writings, that were published

or distributed in hard copy format on or before January 5, 2009. U.S. works must be registered with the U.S. Copyright Office to be included in the settlement. "Books" do not include periodicals, personal papers, sheet music, and public domain or government works.

"Inserts" include any text and other material, such as forewords, essays, poems, quotations, letters, song lyrics, children's Book illustrations, sheet music, charts, and graphs, if independently protected by U.S. copyright, contained in a Book, a government work or a public domain book published on or before January 5, 2009 and, if U.S. works, registered (alone or as part of another work) with the U.S. Copyright Office. Inserts do not include pictorial content (except for children's Book illustrations), or any public domain or government works.

The Notice contains a more detailed description of these terms and other essential information about the settlement.

What Should I do?

Please read the full Notice, which is available at <http://www.googlebooksettlement.com>. Decide whether you should:

- Remain in the settlement. If you do so, you will be bound by the Court's rulings, including a release of your claims against Google.
- Object to or comment on the settlement. You must object/comment in writing by May 5, 2009.
- Opt out of the settlement and keep your right to sue Google individually. You must opt out in writing by May 5, 2009.
- File a claim for a cash payment (if you are eligible to do so). You must file your claim by January 5, 2010.

The Court has appointed Class Counsel to represent the two Sub-Classes. If the settlement is approved, Class Counsel for the Author Sub-Class will request attorneys' fees and expenses that Google has agreed to pay. You can also hire your own attorney at your own cost.

The Court will determine whether to approve the settlement at a Fairness Hearing on June 11, 2009 at 1:00 p.m.

Get Complete Information, Including the Full Notice:

Visit: www.googlebooksettlement.com Call: 1-888-356-0248

Write: Google Book Search Settlement Administrator, c/o Rust Consulting
P.O. Box 9364, Minneapolis, MN 55440-9364 United States of America

Google Books Lawsuit Settlement v1

- ***What is it?*** key points for publishers:
 - goes well beyond the narrow issue of fair use
 - now a culture-changing phenomena
 - something that touches almost everyone - readers, researchers, libraries, authors, publishers, Google, Google rivals, activists, the federal judiciary, the federal executive branch, states, foreign countries and organizations, hardware and software makers, and -- lawyers
 - books only, no periodicals, magazines
 - provisions for “inserts”
 - class action suit
 - includes all that own a U.S. copyright interest as of 01/05/2009
 - 2 sub-classes: (1) authors & (2) publishers
 - unclear how books published after 01/5/2009 are to be treated
 - Google to pay \$60 per book to resolve copyright claims for books that have been scanned without permission
 - you are bound by the settlement, unless you opt-out

Google Books Lawsuit Settlement v1

- ***What is it?*** key points for publishers (continued):

- different kinds of books:
 - not copyrighted
 - out-of-copyright
 - in-copyright, out-of-print books - Google will show both the "snippet view" and a "preview" (up to 20% of a work, although no more than 5 adjacent pages)
 - in-copyright, in-print books (commercially available as bound print version) - only bibliographic information will display, unless otherwise agreed
- rightsholder opting-in have significant control over access to in-copyright, in-print book.
- Display options:
 - free bibliographic information only
 - free snippets of a few lines of text
 - free preview of up to 20% of the book
 - Pay-per-view for entire book
 - » 37% to Google, 63% to rightsholder, who can set the price

Google Books Lawsuit Settlement v1

- *What is it?* key points for publishers (continued):
 - Establish Book Rights Registry
 - a public database of rightsholders
 - excludes works to which no one has laid claim
 - funded by Google, run by publishers and authors
 - purpose:
 - » rightsholders can register
 - » collect and distribute royalty payments
 - » Google competitors can use
 - Google can
 - Sell subscriptions for access to the entire digital collection to libraries and other institutions
 - Sell perpetual access of books to individuals
 - Google granted perpetual right to scan and sell access to works of authors and publishers who have not come forward to make a copyright claim on their in-copyright, out-of-print books ("orphan works").
 - Google can display up to 20 % of orphaned work for free, and offer the entire book in subscription deals to libraries and to individual buyers.
 - The hope is that Congress will clarify status of orphaned work with legislation.

Google Books Lawsuit Settlement v1

- ***What's to like?***
 - From a non-profit publisher's standpoint:
 - Copyright is recognized
 - Anyone, anywhere, at anytime can find and search all your publications in one place
 - Publications handicap accessible
 - » Section 508 of the federal Rehabilitation Act
 - real time, online language translation
 - Google will scan and post publications at no cost
 - degree of access controlled by publisher
 - price set by publisher to produce income stream
 - » Market forces still hold

Google Books Lawsuit Settlement v1

- ***What's to dislike?***
 - settlement establishes ground rules for the emerging digital book market, and largely defined by Google
 - does it amount to antitrust violation?
 - A class action settlement that addresses the specific needs of the parties directly involved. It becomes a privately negotiated, compulsory license for everyone
 - Congress has the exclusive authority granted by the U.S. Constitution to set copyright policy, not private lawsuits
 - Non-US groups object to Google's scanning of books that are under copyright in their respective countries, but that have never been published in the United States.
 - fair use claims in the settlement are so excessive that it may cause judicial change of that right for everyone
 - complete electronic distribution of books
 - cash payments & revenue sharing agreement, neither of which would have been required under a fair use ruling

Google Books Lawsuit Settlement v1

- ***What's to dislike?*** (continued):
 - institutional arrangement governing relationship between Google and **all** copyright owners governed, in addition to copyright law by:
 - Settlement agreement itself
 - collective rights management organization called the *Book Rights Registry*
 - *Author-Publisher Procedures*
 - Google retains right to digitize and commercialize orphaned works without liability.
 - Rivals are free to launch projects of their own but to build a competing body of digital works, would have to engage in comparable litigation
 - privacy of users not protected. Google digital books repository will be a rich source of information about people's reading habits and interests for governments and civil litigants
 - censorship. Google has the power to remove “inappropriate” books the same way that it is able to remove inappropriate movies from YouTube.
 - preservation of books in digital form is too important a cultural task to be handed over to a single commercial enterprise.

Google Books Lawsuit Settlement v1

- 2008 (September 24) - US Department of Justice files brief suggesting that the Settlement is in violation of US anti-trust laws
- 2008 (October) - US District Judge Denny Chin delays October fairness hearing that was to make Lawsuit Settlement v1 final
 - significant issues, demonstrated by the number of objections and that the objectors include countries, states, nonprofit organizations, and prominent authors and law professors
 - settling parties want to revise Agreement to improve approval chances
- 2009 (February) – US Department of Justice (DOJ) submits statement of interest about the government's ongoing concerns:
 - appears to give book publishers the power to restrict price competition
 - grants Google *de facto* exclusive rights for the digital distribution of orphan works.
 - other digital distributors may be effectively precluded from competing with Google

Google Books Lawsuit Settlement v2

- 2009 (early November) Google and plaintiffs return with amended agreement, Google Books Settlement v2
- 2009 (late November) Judge Chin granted preliminary approval to the amended Settlement. Sets a final hearing for February 2010.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	:
The Authors Guild, Inc., Association of American	:
Publishers, Inc., et al.,	:
	:
Plaintiffs,	:
	:
v.	:
	:
Google Inc.,	:
	:
Defendant.	:
-----X	:

Case No. 05 CV 8136-DC

**AMENDED SETTLEMENT
AGREEMENT**

Google Books

Lawsuit Settlement v2

• *What is it?* key points for publishers:

- As version 1 but addresses DOJ's concerns
- guardian to represent orphan works - Unclaimed Works Fiduciary (UWF)
- money generated from orphan works will not go to Google and the plaintiffs
 - spent on efforts to search for the rightsholders
 - after ten years, unclaimed funds distributed to literacy groups
- only include countries with a common legal heritage and similar book industry practices:
 - covers works registered with the US Copyright Office by January 2009, or published in Australia, Canada, and United Kingdom
 - orphan works from only United States, Australia, Canada, and the United Kingdom.
- Google will not share personal information it collects about users without a “valid legal process”.

Legal Notice

Updated Summary Notice: New Opt-Out/Objection Deadline is September 4, 2009

If You Are a Book Author, Book Publisher or Other Person Who Owns a Copyright in a Book or Other Writing,
Your rights may be affected by a class action settlement regarding Google's scanning and use of Books and other writings.

Persons Outside the United States: This settlement may affect you because it covers U.S. copyright interests in books published outside the United States. If you hold such an interest in a book or other material in a book, this settlement will bind you unless you timely opt out.

Authors and publishers filed a class action lawsuit, claiming Google violated the copyrights of authors, publishers and other copyright holders ("Rightsholders") by scanning in-copyright Books and Inserts, and displaying excerpts, without permission. Google denies the claims. The parties have agreed to a settlement. This summary provides basic information about the settlement. "Books" and "Inserts" are described below.

What Does the Settlement Provide?
The settlement, if Court-approved, will authorize Google to scan in-copyright Books and Inserts in the United States, and maintain an electronic database of Books. For out-of-print Books and, if permitted by Rightsholders of in-print Books, Google will be able to sell access to individual Books and institutional subscriptions to the database, place advertisements on any page dedicated to a Book, and make other commercial uses of Books. At any time, Rightsholders can change instructions to Google regarding any of these uses. Through a Book Rights Registry ("Registry") established by the settlement, Google will pay Rightsholders 63% of all revenues from these uses.

Google also will pay \$34.5 million to establish and fund the initial operations of the Registry and for notice and settlement administration costs, and at least \$45 million for cash payments to Rightsholders of Books and Inserts that Google scans or before May 5, 2009.

Who Is Included?
The settlement class includes all persons worldwide who own a U.S. copyright interest in any Book or Insert. The meaning of "U.S. copyright interest" is broad. Wherever you are located, please read the full Notice to determine whether you are included in the settlement.

There are two Sub-Classes:

- The "Author Sub-Class" (authors of Books and other writings, and their heirs, successors and assigns), and
- The "Publisher Sub-Class" (publishers of Books and periodicals, and their successors and assigns).

What Material Is Covered?
"Books" include in-copyright written works, such as novels, textbooks, dissertations, and other writings, that were published or distributed in hard copy format on or before January 5, 2009. U.S. works must be registered with the U.S. Copyright Office to be included in the settlement. "Books" do not include periodicals, personal papers, sheet music, and public domain or government works.

"Inserts" include any text and other material, such as forewords, essays, poems, quotations, letters, song lyrics, children's Book illustrations, sheet music, charts, and graphs, if independently protected by U.S. copyright, contained in a Book, a government work or a public domain book published on or before January 5, 2009 and, if U.S. works, registered (alone or as part of another work) with the U.S. Copyright Office. Inserts do not include pictorial content (except for children's Book illustrations), or any public domain or government works.

The Notice contains a more detailed description of these terms and other essential information about the settlement.

What Should I do?
Please read the full Notice, which is available at <http://www.googlebooksettlement.com>. Decide whether you should:

- Remain in the settlement. If you do so, you will be bound by the Court's rulings, including a release of your claims against Google.
- Object to or comment on the settlement. You must object/comment in writing by September 4, 2009.
- Opt out of the settlement and keep your right to sue Google individually. You must opt out in writing by September 4, 2009.
- File a claim for a cash payment (if you are eligible to do so). You must file your claim by January 5, 2010.

The Court has appointed Class Counsel to represent the two Sub-Classes. If the settlement is approved, Class Counsel for the Author Sub-Class will request attorneys' fees and expenses that Google has agreed to pay. You can also hire your own attorney at your own cost.

The Court will determine whether to approve the settlement at a Fairness Hearing on October 7, 2009 at 10:00 a.m.

Get Complete Information, Including the Full Notice:
Visit: <http://www.googlebooksettlement.com> Call: +1.612.359.8600
Write: Google Book Search Settlement Administrator, c/o Rust Consulting
P.O. Box 9364, Minneapolis, MN 55440-9364 United States of America

Google Books Lawsuit Settlement v2

- ***What's to like?***
 - little or no changes from Lawsuit Settlement v1 for publishers.
- ***What's to dislike?***
 - Limits scope of Google Books, a less universal library
 - At the February hearing, opponents to the settlement outnumber supporters 3 to 1. A lot of hyper-ventilating, but several salient legal points:
 - privacy of book readers. Google is able to monitor which books users search for, which pages they read, when and how long they spend on each page. Combining this with information from other Google services creates a massive "digital dossier". There are many "valid legal processes" and highly tempting for fishing expeditions by law enforcement or civil litigants.
 - requires authors and publishers to "opt out". Copyright law is an "opt-in" approach. You have to be asked.
 - *Authors Guild* and the *Association of American Publishers* do not have a right to grant third parties rights to use another's work.

Google Books Lawsuit Settlement v2

•**What's to dislike?** (continued):

- US government continues to investigate whether the agreement violates antitrust laws.
- Google is interested in including "orphan works"
 - how does one pay someone who is entitled to compensation, but is unknown to you and unaware of it themselves?
 - revenue from orphan works is said to make a digital library a feasible business.
- settlement does not create mechanisms for Google's competitors to obtain licenses to orphan books without obtaining similar settlements of their own.
- Unclaimed Works Fiduciary (UWF) - the guardian to represent orphan works
 - not appointed and no power until after the settlement is in place, too late to alter settlement terms
 - not empowered to change terms by which unclaimed works are made available
 - chosen by members of the Book Rights Registry, who represent known rightsholders whose interests may be adverse to the owners of orphan works.
 - cannot be held accountable by the rightsholders they are to represent

Google Books Lawsuit Settlement v2

•*What's to dislike?* (continued):

- large commercial authors and publishers have goals and interests differing from smaller and academic authors and publishers:
 - Profit-maximizing goals of the former inconsistent with the access-maximizing goals of the later
- interests of authors can differ from those of publishers
 - how to divide revenue from the sale of e-books where the contract is silent
- Foreign rightsholders are disadvantaged by the process
 - no translations of the key documents
 - lack representation on the Book Rights Registry
- several class representatives had entered or would soon enter into Partner Agreements with Google, exempting them from the terms of the Settlement.
- Settlement is inconsistent with state unclaimed property laws
 - state takes control of unclaimed funds such as money due to authors of orphan works.

Google Books Lawsuit Settlement v2

What's next?

- Judge Chin was to rule February 18, but, citing the complexity of the deal, put off a decision, not saying when he'd rule
- The ruling could be:
 - Accepted entirely (with appeals no doubt)
 - Returned for reworking with instructions (Lawsuit Settlement v3?)
 - Rejected entirely

Google Books Lawsuit Settlement v2

- If the Settlement is accepted, a publishers will need to
 - decide to Opt-in or Opt-out of the Settlement. Actually you are in unless you act to remove yourself.
 - » The only gain by opt-outing would be the right to sue Google on your own, expending resources to pursue and reach some agreement with Google about its books, an agreement that likely would be like the one already reached.
 - » Being included would make sure that your publications are included in what might be the largest reference library ever.
 - » opting-in does give you a fair amount of say what Google can do with your in-copyright publications.
 - submit a claim form listing your publications
 - » receive payments for books already scanned
 - » real reason is to establish for which books you are a rightsholder, considers in-copyright, and commercially available
 - submit requests for removing books from digitization. Probably little point in having a book “removed”
 - » You can always instruct that a publication can be restricted in its display.
 - » Asking that a book be removed could make the book unlocatable in most online searches.
 - » If you change your mind in the future about a removed book, you might have to pay to have it scanned to be included.
 - instruct Google about the display options for each individual book and about pricing.

Google Books & *the small, non-profit publisher*

Concluding

Thoughts -- I could not get away without having at least one colorful mineral picture



Google Books

Concluding Thoughts

- widespread access to digital copies of nearly every book ever published, coupled with translation capabilities, would be a tremendous benefit
- There will be continuing clamor for it
 - Think not? Consider the push for Open or Public Access
- It will happen in some fashion eventually, but with much discussion about the best and fairest way to do so.
 - unlikely Google Books Settlement will be accepted as is. There are too many interested parties at cross purposes.
 - like health care, there is also a push for a public option.
- You were promised that you would learn how an organization (MSA) and its publications have been affected by the Google Books project
 - It has consumed a fair amount of time to understand and respond to, and yet no conclusion is in sight.
 - experience has aspects that are distressingly common. More than once we have contacted with proposals that are, in essence, something along the lines - *I have a website, some programming, and I want to make money. I think my website so great that you must give your content at no cost to me so I can make money from it. If not, you will need to expend a lot of your time stopping me.*

Google Books

Concluding Thoughts (continued)

- However, the Google Books Settlements, unlike many other proposals, appear to be a great deal for a small, non-profit publisher
- does it remain economically viable with the increasing number of constraints, or become another paid electronic publishing site with less than universal content? Hints:
 - sale of library subscriptions
 - orphan books said to be key to financial viability
 - publishers have costs to include new works
- Google's credo: "Do no evil", but can Google, or anyone, do well by doing good or does no good deed goes unpunished?