Objections to the Google Books Settlement and Responses in the Amended Settlement: A Report

The Public-Interest Book Search Initiative

New York Law School

Version 1.0

December 2009

Introduction

This report collects information about the objections raised to the original proposed settlement in the *Authors Guild v. Google* litigation. We identified 76 distinct issues, which we grouped into 11 categories. This report briefly summarizes each issue, provides an illustrative quotation from a filing with the court, and indicates any related changes in the amended settlement.

We have necessarily used discretion in deciding which issues to discuss and how to categorize them. We attempted to avoid overlap, and have sometimes combined as one "issue" related arguments, whether raised by the same party or by different parties. We also tried to omit issues that were described only in external commentary or that were described only briefly in filings. Our summaries are meant to be concise descriptions of the objections and responses, but are necessarily less detailed and precise than the originals.

This report is descriptive, not evaluative. Inclusion of an issue means only that at least one party made the full argument in a filing to the court. It does not represent any judgment about whether the objection accurately characterizes the settlement or the underlying facts. Nor does it represent any judgment about the legal merits of the objection. Our classification and ordering of the objections are meant as an aid to the reader, not substantive commentary. Our choice of representative quotations is not meant as an endorsement of any particular filer's arguments. Similarly, inclusion of changes from the amended settlement does not represent a judgment about whether the changes address the relevant objection.

This report is not legal advice and is not meant to substitute for independent legal analysis. If you are interested in the effect of the settlement on your rights, you should consult with a lawyer.

Please write to us at booksearch@nyls.edu with any corrections or suggestions for future versions of this report. Thank you for your interest in this important issue.

James Grimmelmann, Associate Professor of Law

Benjamin Burge, NYLS '11
Stephanie Figueroa, NYLS '10
Leanne Gabinelli, NYLS '11
Cynthia Grady, NYLS '11
Marc Miller, NYLS '10
Deva Roberts, NYLS '11
Andrew Smith, NYLS '11

Definitions

Periodicals Excluded

Objection: The Proposed Settlement excludes periodicals, journals and reference materials, even where Google has already scanned them and should pay compensation for the scanning.
Example: American Psychological Association, p. 6: "As indicated by the Book Rights Registry, Google digitized approximately 455 APA journals without permission. . . . Overall, approximately two thirds of the APA works digitized by Google without consent are not covered by the Proposed Settlement."
Amendments: No change.

Visual Material Excluded

Objection: The settlement defines "Insert" to exclude "pictorial works," thereby depriving visual artists of the benefits of participation.
Example: American Society of Media Photographers et al., p. 4: "A partial settlement that selectively provides for compensation only to certain categories of copyright owners (*i.e.*, authors and publishers) and not for other types of copyright owners (*i.e.*, Visual Arts Rights Holders) is fundamentally unfair and arbitrary, and inevitably would place the excluded copyright owners in a compromised position. Approval of this Proposed Settlement would leave Visual Arts Rights Holders with no financial compensation and very little practical ability to pursue a remedy for a separate financial package after this class action is terminated."
Amendments: No change.

New Books Excluded

Objection: The settlement does not prevent Google from using works published after January 5, 2009.
Example: Canadian Standards Association, p. 5: "In other words, if unchanged, the Proposed Settlement is destined to be most notable for what it did not accomplish or even attempt to accomplish, *i.e.*, at the end of the day, Google never promises that it will not Digitize works published after January 5, 2009. Thus, unless restrained by this Court, it is overwhelmingly likely that Google will Digitize such works, forcing a new class . . . to needlessly litigate these same issues again at great expense.
Amendments: No change.

Music and Lyrics Included

Objection: Although the settlement attempts to exclude sheet music, the definitions of "Book" and "Insert" leave open the possibility of substantial quantities of music and lyrics being included.
Example: EMI Music Publishing, p. 1: "Further, while we understand that the Settlement specifically excludes 'sheet music and other works that are used primarily for the playing of music,' both the definitions of 'Book' and 'Insert' include certain references to and definitions of music and lyrics that seem to, nevertheless, implicate the interests of music publishers such as EMI, and its songwriters."

Amendments: The amended settlement decreases the quantity of music that will be included. If a more than 20% (previously 35%) of the pages in a Book are more than 20% (previously 50%) music notation, it will be excluded. "Insert" now excludes musical notation entirely.

Microforms Included

Objection: The settlement includes microforms, which other entities have spent great time and effort creating, enabling Google to free-ride off of their work.
Example: ProQuest, p. 12: "It is unfair to ProQuest and other similarly situated Class Members to be forced to forfeit a non-digital asset that it has assembled and invested at great expense."
Amendments: Amended settlement does not permit Google to Digitize microforms.

Dissertations Included

Objection: The definition of "Book" includes dissertations, which are already being digitized and distributed.
Example: ProQuest, p. 6: "Well over 2,500 institutions worldwide use ProQuest's enhanced online service to discover and research these dissertations through highly detailed, digital versions of the dissertations, abstracts, and indices ('ProQuest Dissertations and Theses'). Anyone in the world with an Internet connection can already discover and obtain these dissertations through ProQuest's existing web service, 'Dissertations Express.'"
Amendments: No change.

Children's Books Undefined

Objection: Although "children's Book illustrations" are specifically included in the settlement as Inserts, the term is undefined.
Example: Matthew Canzoneri, p. 1: "At Section 1.72 of the Settlement Agreement, the definition of 'Insert' specifically includes 'children's Book illustrations' but there is no definition of either 'children's Book' in the Settlement Agreement. This could cause considerable confusion in administering the settlement. . . . ."
Amendments: The definition of "Insert" is amended to remove the reference; children's books are now treated identically with other books.

Comic Book Status Unclear

Objection: The settlement does not make clear whether individual comic books, collections of comics, or graphic novels are meant to be included.
Example: DC Comics, p. 7: "Moreover, the terms 'Book,' 'Insert' and 'Periodical' create uncertainties for various categories of material owned by DC Comics: individual comic books, original graphic novels and collected editions."
Amendments: "Periodical" explicitly includes "comic book[s]."

Fairness to Rightsholders

Cash Payments Insufficient

Objection: The $60 cash payment for each work digitized before May 5, 2009 ($15 for each Insert) is too small in light of Google's likely liability for statutory damages.
Example: Darlene Marshall, p. 2: "The compensation suggested by the settlement for damages for *past* copyright infringement is inadequate in light that if a defendant is found to have infringed a work registered with the Copyright Office, the minimum statutory damages award is $750.00."
Amendments: No change.

Revenue Split Insufficient

Objection: A 63/37 revenue split is unfairly favorable to Google.
Example: Ian Franckenstein, p. 5: "One suspects that the basis of Google's 37% share of e-book sales is not based on any true cost analysis, but instead is based on the fact that books are traditionally sold through bookstores on a 40% mark up over wholesale price. Recently, one leading e-publishing site, Scribd, is paying rights holders 80% of e-sales, and even many members of the Publishers Association have or will be seeking such better deals directly with Google under its separate Partner program outside the purview of this Settlement."
Amendments: Rightsholders are explicitly allowed to negotiate different revenue splits.

Non-Copyright Claims Released

Objection: The settlement requires copyright owners to waive Lanham Act, right of publicity, tortious interference with contract, and other non-copyright claims. All of these claims are unrelated to Google's acts of infringement and waivers of them are not necessary for the various Revenue Models under the settlement.
Example: Arlo Guthrie et al., p. 6: "This broad release raises substantial concerns for all authors, and particularly for those who have a large and popular body of in-print works and may have trademark rights in their names and titles. For instance, Catherine Ryan Hyde's novel *Pay it Forward* was adapted and released as a major Hollywood movie, and a film adaptation of another of her novels, *Electric God*, is currently in development. Hyde also has trademark rights in her non-profit Pay it Forward Foundation, which provides grants to schools, churches, and community groups for projects designed to provide learning opportunities for young adults."
Amendments: No change.

Non-Display Use Claims Released

Objection: The settlement requires an open-ended waiver of claims relating to Non-Display Uses by Google. Some of these uses, however, may infringe copyright and be commercially valuable.
Example: Arlo Guthrie et al., p. 8: "One obvious example of an undisclosed Non-Display Use might well be sales of book titles, key lines or portions of text, or authors' names in Google's AdWords program. Additional examples might include personalized advertising, which has been described as the 'holy grail' of the search industry. Google's CEO Eric Schmidt has acknowledged that using data such as this vast database of written works to 'get better at personalization' is key to Google's continued growth. The Agreement contains no

restrictions on Google's ability to do just that through Non-Display Uses of authors' works, or even on the sale of information derived directly from these works."
Amendments: No change.

Objectionable Advertising Possible

Objection: The settlement does not give copyright owners the opportunity to object to particular advertisements that appear on pages with their books, even when they find those advertisements to be offensive or contrary to the message of those books.
Example: Arlo Guthrie et al., p. 6: "Because it is so broad and untethered from the underlying dispute, the release effectively bars authors from preventing objectionable uses of their works and names in connection with GBS. For example, Google may allow advertisements to appear alongside works that are harmful to an author's reputation or contrary to their core philosophical or political principles; bury an author's own web site far down in search results in response to a search for that author's works; allow third-party websites to run Snippets against objectionable content on those sites; or make other objectionable uses of authors' works."
Amendments: No change.

Author-Publisher Procedures Favor Publishers

Objection: The Author-Publisher Procedures prescribe particular revenue splits between authors and publishers. Under governing precedent, however, most contracts reserve electronic rights to authors, so the splits unfairly give power and revenues to publishers.
Example: Edward Hasbrouck, p. 7: "There's little reason for publishers to be involved at all in making decisions about electronic publication of most of these works. The vast majority of in-copyright books subject to the settlement (a) were published before e-books or the Internet were conceived of, and (b) are out of print. Authors never assigned publishers any electronic rights to most of these books."
Amendments: No change

Arbitration Unfair

Objection: The settlement subjects many disputes to mandatory, expensive, binding arbitrations. These procedures are confidential and do not create precedent.
Example: American Law Institute, p. 7: "In addition, the Arbitration Dispute Resolution Process is unfair to the Institute as it is designed to prevent precedential aggregation (and publication) of arbitration rulings. It instead requires that each arbitration be kept confidential so that only the immediate parties will know it—and they cannot disclose it to others. This violates transparency and accountability, and will only insure a lack of consistency and effective oversight as to what will be determined to be 'Commercially Available' over time."
Amendments: The parties to an arbitration may agree "to resolve such dispute in court or by such other dispute resolution procedure as they may agree."

Insert Copyright Owners Disadvantaged

Objection: Copyright owners of Books participate extensively in the Revenue Models and can control which Display Uses their Books appear in, but copyright owners of Inserts have limited participation and control.

Example: Arlo Guthrie et al., p.12: "The Named Plaintiffs also failed to attach meaningful value to the exploitation of Inserts. Under the Agreement, Insert authors are consigned to accept $15 for Google's past infringement of their works, and a small Inclusion Fee of "no less than US $50 per Entire Insert and US $25 per Partial Insert" solely for future subscription uses of those works and subject to a cap of $500 for all uses ever. Yet authors like Catherine Ryan Hyde and Eugene Linden may command as much as $1,000 or $1,500 for the inclusion of just one of their works in a larger work. Moreover, Insert authors are afforded merely the right to Exclude their works from all – but not less than all – Display Uses, and have no right to Remove or Exclude them from Revenue Models."
Amendments: No change.

"Commercially Available" Definition Inconsistent with Industry Norms

Objection: The definition of "commercially available" is not the same as the publishing industry's standard definitions for "in print." It does not take account of new models such as audiobooks and e-books.
Example: Jesus Gonzalez, p. 8: "Print-on-demand books can be declared out of print (or Not Commercially Available) according to the settlement, but the criteria for doing so are completely undefined. The publisher (and author) can be happy with the volume of sales, but Google can declare the work Not Commercially Available, thereby asserting their right to step in and reprint the book regardless."
Amendments: No change.

Compilations Disadvantaged

Objection: The settlement only defines as an "Insert" those United States works that have been individually registered, and only defines as a "Book" those United States books that have been registered as a whole. In many cases, for practical reasons, copyright owners will register only the collection or only the individual works.
Example: DC Comics, pp. 7–8: "Without clarification and additional precision, this definition could be interpreted to exclude from the proposed SA copyrighted works that have not been registered by DC Comics for any number of reasons. As an example, individual contributions to a 'collective work' or 'compilation' are often registered, but the compilation or collected edition may not be. If the individual works are registered, the compilation or collected edition of such individual works should qualify as a "Book" regardless of each individual works' inclusion in (or exclusion from) the proposed SA and notwithstanding the compilation's or collected edition's registration status.", their names often do not appear in the 'Search and Claim' database of the Settlement."
Amendments: The amended settlement defines "Insert" to include United States works that have been registered as part of another work. Some compilations would be excluded entirely under the amended definition of "Periodical."

Burden of Claiming Works

Objection: Particularly given the errors in the Books Database, the settlement imposes on copyright owners a substantial burden of identifying and claiming their individual works. Publishers will have thousands of editions and entries to verify. Even those who wish to opt out of the settlement are instructed to identify their particular works.
Example: Harrassowitz et al., pp. 19–20: "The Books Database is, moreover, seriously flawed in numerous respects, making it extremely difficult for rightsholders to identify all of their works, should they wish to direct Google not to use them or to challenge Google's

designation of a work as not Commercially Available. This is because the Books Database does not group works by "book." Rather, the database contains multiple, and at times, duplicative listings for each work—80 million record entries, which are riddled with errors and conflicting information, including incorrect ISBNs, misspellings of publisher and author names and incorrect publisher and author information, and misuse of publisher and imprint categories."
Amendments: Not directly addressed, although the exclusion of many foreign works from the settlement reduces the overall burden.

Opting-Out Rightsholders Prejudiced

Objection: Even Righsholders who formally opt out will still, in practice, be required to abide by the settlement's terms.
Example: Harold Bloom et al., pp. 19–20: "Any Rightsholder who opts out of the Proposed Settlement is likely to be placed at the end of the line for digitization and publishing because for the near-future Google will likely have more than enough to do dealing with the works of class members who did not opt out of the Settlement. Google and the BRR will also be in a position to tender 'take it or leave it' terms to those who opt out, since they know that no other entities can provide service of similar scale and scope."
Amendments: No change.

Secret Termination Clause

Objection: The settlement contains a confidential termination clause, giving Google and the plaintiffs a private right to void the settlement, possibly to the detriment of class members.
Example: Federal Republic of Germany, pp. 18–19: "Article XVI astonishingly provides that Google, the Author Sub-Class and the Publisher Sub-Class each will have the right to terminate the Settlement . . . . This *private* right by Google to completely undo the Settlement — which settlement is promoted as serving the *public* interest — is shrouded in secrecy . . . ."
Amendments: The termination clause has been omitted.

Fairness to International Rightsholders

Formality in Violation of Berne Convention

Objection: The requirement that class members claim their works with the Registry is a "formality" of the sort prohibited by art. 5.2 of the Berne Convention.
Example: Consumer Watchdog, pp. 14–16: Not only does the proposed Settlement Agreement attempt to do an end-run around the legislative process, but it also proposes a scheme that Congress could not have adopted because of its clear violation of the United States' international obligations under the Berne Convention for the Protection of Literary and Artistic Works. . . . By attempting to impose requirements on international Authors and Publishers that are directly contrary to the anti-formality provisions of Berne Art. 5(2), the parties are asking the Court to put the international business interests of the United State's 'artists, authors and other creators' at risk."
Amendments: Many foreign works have been removed from the settlement.

Not a Permissible Exception Under Berne Convention

Objection: Under art. 9.2 of the Berne Convention, any exception to the exclusive rights is permissible only if it "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." If the proposed settlement is treated as an exception, it does not pass this test.
Example: Harrasowitz et al., pp. 24–25: "Article 9(2) of Berne provides for a narrow exception to Berne's protection of copyright owner's exclusive rights, but that exception is limited to legislative acts, providing that it 'shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases.'"
Amendments: Many foreign works have been removed from the settlement.

"Commercially Available" Definition Disfavors Foreign Rightsholders

Objection: "Commercially Available" is defined only in terms of "then-customary channels of trade in the United States." Books that are in print only in other countries will be made available by default under the settlement.
Example: Hachette Livre, S.A., p. 12: "The concept of 'Commercial Availability' used in the Proposed Settlement does not take into account non-US Rightsholders. The Proposed Settlement, which sets no parameters regarding these channels of trade, thus grants Google wide discretion to *ignore* a book's 'Commercial Availability' in a non-US jurisdiction or through a non-US website, opening the door for disparate treatment of non-US Rightsholders."
Amendments: The definition of "Commercially Available" now also includes the United Kingdom, Canadian, and Australian markets. A Book will be considered "Commercially Available" if it can be purchased by consumers in any of these countries from sellers located anywhere in the world. All other countries have been excluded from the settlement.

Registry Does Not Represent Foreign Rightsholders

Objection: Although approximately half of the nearly 10 million books digitized by Google are foreign works, non-U.S. Rightsholders would be denied any representation on the board of the Registry.

Example: Booksellers Association of the United Kingdom and Ireland, p. 12: "Furthermore, it is proposed that the Registry is controlled by US publishers and authors. But much of the material held electronically comes from authors and publishers outside the US. There is, for example, no European representative on the Board of the Books Registry."
Amendments: The amended settlement specifies that the Registry must have at least one author and at least one publisher representative from each of the four countries that remain in the settlement.

Settlement Violates Foreign Law

Objection: The terms of the settlement conflict with the laws of various countries.
Example: New Zealand Society of Authors, pp. 1–2: "The settlement therefore seeks to override New Zealand copyright law by, for example, extending copyright in New Zealand books further than the term granted under New Zealand law."
Amendments: Many foreign works have been removed from the settlement.

Foreign Rightsholders Required to Act Illegally

Objection: Where terms of the settlement are contrary to their obligations under foreign law, compliance with the settlement would require foreign rightsholders to act illegally.
Example: Hachette Livre, p. 9: "Finally, disputes between French publishers and their authors are subject to French law. The dispute resolution procedure set out in Appendix A to the Proposed Settlement may contravene the contractual obligations of the parties under French law. A decision by the Registry under the procedure set out in Appendix A of the Proposed Settlement would probably not be enforceable in France."
Amendments: Many foreign works have been removed from the settlement.

Arbitration Rules Inequitable to Foreign Rightsholders

Objection: The rules of the American Arbitration Association inequitably impose mandatory jurisdiction in New York and other financial costs on international Rightsholders.
Example: Japan Visual Copyright Association, p. 3: "[T]he proposed settlement agreement requires future disputes between authors and Google concerning the Google Library Project to be subject to commercial arbitration in New York unless another place is agreed to by the parties. For many authors and copyright holders living outside the United States, traveling to New York for a dispute resolution is financially burdensome, which may discourage them from actively policing their copyrights."
Amendments: Parties to an arbitration may agree to other procedures, or may request telephone or videoconference arbitration.

Unclaimed Funds

Unclaimed Funds Are Unclaimed Property Under State Law

Objection: The provisions of the settlement that permit the redirection of unclaimed funds to be used for the benefit of the Registry or distributed to claiming rightsholders violate state laws governing the distribution of unclaimed property.
Example: State of Connecticut, p. 6: "Because § 6.3 of the proposed Settlement Agreement is a contractual agreement between Google and class members for the use of property owned by class members, the funds generated by operation of this commercial agreement should become the property of the owner of the work generating the profits at the time of use. The terms of § 6.3 trigger the operation of state abandoned and unclaimed property disposition statutes."
Amendments: The Unclaimed Works Fiduciary is now charged with maintaining unclaimed funds. It may use these funds to attempt to locate righsholders of unclaimed Books. After ten years, and under court supervision, unclaimed funds may be distributed to literacy-based charities. Under no circumstances are unclaimed funds distributed to the Registry itself or to other rightsholders.

State Law Governs Distribution of Charitable Assets

Objection: Any reallocation of unclaimed charitable funds to a person or entity which is not charitable would potentially be in violation of state charitable trust law, which requires that a court, under its equitable powers, make a *cy pres* distribution of the funds to another charitable entity with a same or similar purpose.
Example: State of Connecticut, p. 11: "However, under the terms of the Settlement Agreement, if those who hold copyrights for charitable purposes fail to register with BRR, and BRR fails to locate the copyright holder, or fails to give notice to the copyright holder of funds generated by the underlying work, then § 6.3 of the Settlement Agreement becomes operative and permits BRR, in violation of Connecticut's unclaimed property laws (as set forth above), to retain those funds and use them for its own expenses, disperse them to registered copyright holders who do not own the underlying work generating the funds, or to apply to distribute the funds to another charity."
Amendments: Unclaimed funds may now only be distributed to the appropriate rightsholders, used to search for them, or given to charity.

Antitrust

Settlement Controlled Pricing Is Illegal Retail Price-Fixing

Objection: Under Settlement Controlled Pricing for Consumer Purchase, Google will set individual retail prices for many copyright owners' books using a common formula. This is *per se* illegal price-fixing under § 1 of the Sherman Act.
Example: Amazon.com, pp. 18–19: "Under that provision, a Rightsholder can elect to set its own price, or else it can choose to sell its book at a price created by a "Pricing Algorithm" to be developed by Google—with the latter as the default. Such coordinated pricing is unlawful. . . . It matters not that the coordination would be executed through use of a common formula . . . ."
Amendments: Settlement Controlled Pricing must now "maximize revenues for the Rightsholder for such Book and without regard to the price of any other Book."

63% Royalty Rate Is Illegal Wholesale Price-Fixing

Objection: By fixing the royalty rate at 63% of Google's net advertising and purchase revenues, the settlement constitutes an collective agreement fixing prices in the wholesale market.
Example: United States of America, pp. 19–20: "The parties have fixed the royalty rate at 63% of all revenues Google earns under the settlement. This term operates as a price floor (even for those who elect not to use the Proposed Settlement's default pricing mechanisms), diminishing the incentives of individual authors or publishers to discount or offer other terms more favorable to the purchaser."
Amendments: The amended settlement gives both Google and Rightsholders the right to request renegotiation of their individual revenue splits.

Google Is Illegally Restricted from Offering Discounts

Objection: Google is permitted to offer only "temporary" discounts regardless of its willingness to accept a smaller share of revenue in exchange for increased sales. Even with the Registry's and rightsholder's permission, discounts not funded by Google may not exceed 40%.
Example: United States of America, pp. 21–22: "The Proposed Settlement also restricts Google from discounting off a rightsholder's list price without authorization of the Registry and notification of the rightsholder, either of which may veto the discount. This term discourages Google from funding discounts and making the rightsholder whole, as any other retailer might. And allowable discounts are limited to 40% off a book's list price. In other contexts, such collective restraints on discounting have been held to be per se violations of Section 1."
Amendments: The amended settlement strikes the "temporary" discount restriction and there is no limit on the amount of a discount the Registry and rightsholders may authorize.

Blanket Pricing for Institutional Subscription Pricing Is Illegal Price-Fixing

Objection: Google sets a single price for access to the whole Institutional Subscription, which includes works from thousands of competing copyright owners. While the Supreme Court upheld a similar blanket licensing scheme licensing in *CBS v. BMI*, the Registry is not

subject to the same conditions as ASCAP and BMI, including judicial supervision of the pricing.
Example: Amazon.com, pp. 23–24: "The blanket license offered by ASCAP and BMI survived judicial scrutiny under the rule of reason only because the consent decrees and continued oversight of those decrees by the Department of Justice 'disinfected' their operations. These provisions included a requirement that all comers be licensed, that pricing be non-discriminatory for similarly situated licensees, and ultimately that the court retain jurisdiction to set a price where licensor and licensee could not agree on one. Because the Proposed Settlement lacks any comparable safeguards, the unfettered power of the Registry and Google to set the price of the institutional subscription should be judged very differently under the rule of reason than the blanket licenses sold by ASCAP and BMI."
Amendments: No change.

Google Will Have Exclusive Access to Many Unclaimed Works

Objection: Due to the requirement that class members actively claim their works to remove them, unclaimed orphan works will be available only through Google. No competitor could make them available without committing large-scale copyright infringement.
Example: Public Knowledge, p. 7: "Since no party other than Google can license the use of orphan works, Google will have an absolute monopoly on selling access to these works. The agreement prevents Google from licensing to others the use of any of the scanned works (Proposed Settlement § 2.2), and unless the agreement allows the BRR to license orphan works to other parties, this means no other entity has the legal ability to display or distribute orphan works. While the number of orphan books at stake may be debated, it remains true that for every single work orphaned, Google becomes the only permitted user, insulated from potentially massive copyright liability."
Amendments: No change.

Google's Competitors Will Be Unable to Offer a Similar Product for Claimed Works

Objection: The Settlement Agreement was a result of fortuitous coincidences. Competitors will be required to assemble competing products on an opt-in basis, leaving them with an incomplete collection.
Example: United States of America, pp. 23–24: "Google's competitors are unlikely to be able to obtain comparable rights independently. They would face the same problems – identifying and negotiating with millions of unknown individual rightsholders – that Google is seeking to surmount through the Settlement Proposal. Nor is it reasonable to think that a competitor could enter the market by copying books en masse without permission in the hope of prompting a class action suit that could then be settled on terms comparable to the Proposed Settlement."
Amendments: No change.

Settlement Thwarts Negotiations with Google Competitors

Objection: The Registry is prohibited from offering Google's competitors better terms under some circumstances, deterring others from trying to compete with Google.
Example: Yahoo!, p. 22 n. 18: "Even if authors or publishers could theoretically negotiate individually with potential competitors, the 'most-favored nation' clause insulates Google from price competition. This guarantees that no third party may negotiate terms more

favorable than those currently granted Google. PS § 3.8(a). Thus, the overall effect of the Proposed Settlement is to create an exclusive and protected market for Google."
Amendments: This clause has been removed.

Jurisdiction

Court Lacks Article III Jurisdiction

Objection: Claims by copyright owners whose books Google has not yet scanned and claims based on future acts by Google do not present a "case or controversy" over which the court has Article III jurisdiction.
Example: Consumer Watchdog, pp. 5–6 n.4: "The class members' claims against Google for reproduction and sale of complete works, which the settlement releases, are not properly before the Court, are not justiciable, are not redressed by the settlement and are neither a case nor a controversy under Article III of the Constitution."
Amendments: No change.

Court Lacks Personal Jurisdiction over Class Members

Objection: Members of the plaintiff class lack sufficient "minimum contacts" with the United States and the state of New York for the court to issue an order binding them without violating the Due Process Clause.
Example: Members of the Japan P.E.N. Club, p. 9: "[T]he Supreme Court's reasons for relaxing the 'minimum contact' requirement for absent class action plaintiffs are not present here. First, the burdens placed on the proposed foreign absent class plaintiffs—particularly those in Japan—are enormous."
Amendments: Many foreign copyright owners are removed from the plaintiff class.

States Have Sovereign Immunity

Objection: The Eleventh Amendment prohibits states from being sued in federal courts without their consent. States are therefore not proper members of the plaintiff class.
Example: State of Connecticut, p. 2: "Connecticut, and every state, is protected by the Eleventh Amendment and the doctrine of sovereign immunity, and cannot be swept into this litigation or its proposed resolution by settlement except by express consent."
Amendments: No change.

Class Action Procedure

Settlement Releases Claims for Future Conduct

Objection: Class-action settlements may only release claims arising from the "identical factual predicate" alleged in the complaint. The proposed settlement would release Google from liability for conduct it has not yet undertaken.
Example: Amazon.com, p. 35: "While a settlement can release claims that were not specifically alleged in the litigation, a settlement cannot release claims that are not part of the 'identical factual predicate' as the class claims."
Amendments: The amended settlement limits possible revenue models to a specified list.

Settlement Implements Commercial Transaction

Objection: The settlement is primarily commercial, rather than compensatory, and is therefore impermissible in a class action.
Example: Scott E. Gant, p. 5: "This part of the settlement is fundamentally a commercial transaction, which the settling parties are improperly attempting to impose through the judicial process and the procedural device of Rule 23."
Amendments: No change

Named Plaintiffs Not Representative of Diverse Industry

Objection: The Author Subclass is divided among different groups of authors, e.g. trade, academic, etc. Authors Guild membership is not available to many authors. The Authors Guild and the named plaintiffs represent only a small, atypical slice of the Author Subclass. Similarly, the Association of American Publishers does not represent the full diversity of publishers.
Example: Science Fiction and Fantasy Writers of America, p. 5: "[N]one of the individual named class representatives are authors of adult trade fiction. Thus, they do not adequately represent the interests of many SFWA members, whose works are widely distributed in the stream of commerce."
Amendments: No change

Named Plaintiffs Not Representative of Foreign Copyright Owners

Objection: All named plaintiffs are United States authors and publishers who cannot represent the interests of foreign authors and publishers. The Authors Guild and Association of American Publishers are not effective representatives for their foreign counterparts.
Example: Federal Republic of Germany, pp. 7–8: "For an author to join the Authors Guild, he or she must have been published by an established American publisher. . . . This fails to acknowledge the important role that German authors play in world literature or that not all German authors will have secured a U.S.-publishing arrangement. . . . Similarly, the plaintiff Association of American Publishers does not adequately and fairly represent Germany publishers or their interests because its membership is only to 'all U.S. companies actively engaged in the publication of books, journals, and related electronic media.' A non-U.S. publisher by definition would not be permitted membership."
Amendments: Third Amended Complaint adds representative plaintiffs from the United Kingdom, Canada, and Australia. All other foreign works are excluded from the settlement.

Named Plaintiffs Not Representative of Orphan Works Owners

Objection: Orphan copyright owner members of the plaintiff class have not been adequately represented by the plaintiffs, all of whom are active copyright owners.
Example: United States of America, p. 10: "There are serious reasons to doubt that class representatives who are fully protected from future uncertainties created by a settlement agreement and who will benefit in the future from the works of others can adequately represent the interests of those who are not fully protected, and whose rights may be compromised as a result."
Amendments: No change.

Authors Guild Played Improper Role in Settlement Negotiations

Objection: The Author's Guild, which is not a class member, improperly directed the settlement negotiations.
Example: Scott E. Gant, p. 36: "As a threshold matter, the Authors Guild never asserted it had standing to pursue damages claims against Google for copyright infringement – as reflected in the Complaints, where it sought to pursue only injunctive or declaratory relief. It is therefore apparent that the Authors Guild did not – and never could have – served as an appropriate class representative with respect to the litigation of damages claim, or the negotiation of a potential resolution of those claims. Yet it appears the Authors Guild was intimately involved in negotiating the compromise of class members' damages claims, culminating in the Proposed Settlement."
Amendments: No change.

Notice Insufficient

Objection: Some class members received no notice at all, and the publications chosen for notice were inappropriate for reaching class members.
Example: Members of the Japan P.E.N. Club, p. 14: "Here, the notice given to Japanese rightsholders was woefully deficient. While we have not been able to ascertain the precise methods of notice used due to the settlement proponents' failure to provide that information to date, we have not been able to identify any author, including those who are prominent and successful in Japan, who received an individual actual notice in the mail. The only publication notices we have been able to identify appeared in a single publication of two major daily newspapers on the same day, and in a single publication of a trade paper on a subsequent date."
Amendments: Not directly addressed, but many works are now excluded, reducing the scope of required notice.

Individual Notice Required but Not Given

Objection: Individual notice must be mailed to all class members whose addresses are known. Most copyright owners have a last-known address, but notice was not individually mailed to them.
Example: Scott E. Gant, pp. 17–18: "[T]he Supreme Court has made clear that Rule 23's individual notice requirement 'may not be relaxed based on high cost.' The fact that there are millions of class members does not excuse the settling parties from their individual notice obligations."
Amendments: No change.

Notice and Settlement Not Properly Translated

Objection: The notice was poorly translated, and the settlement itself was not translated at all.
Example: Harrassowitz et al. pp. 6–7: "Plaintiffs expressly promised this Court that 'Plaintiffs and Google will maintain a Settlement website . . . on which the Notice, this settlement agreement, and other relevant information (translated into approximately 35 languages) will be displayed.' . . . Inexplicably, since its launch over seven months ago, the Settlement Website has never included any translation of the Settlement – even though large numbers of foreign rightsholders lack the language skills necessary to read or comprehend this dense 334-page document in English."
Amendments: Foreign works from non-Anglophone countries are excluded from the settlement.

Notice Confusing and Misleading

Objection: The summary notice and full notice were confusingly written and mischaracterized important aspects of the settlement.
Example: Edward Hasbrouck, p. 3: "The repeated references to 'against Google and the [sic] Participating Libraries' and to 'against Google' fasely and misleadingly imply that these are the only two parties or categories of parties against whom claims would be released by those who opt in (or don't opt out.)"
Amendments: No change.

Attorneys' Fees Excessive

Objection: The proposed fees are excessive and disproportionate n light of the work actually performed on behalf of the class.
Example: Harold Bloom et al., p. 27: "Forty-five million dollars in attorneys' fees is excessive when compared to the $45 million that the Proposed Settlement *may* provide to members of the Author sub-class."
Amendments: No change.

No Fee Petition Filed

Objection: Settlement does not meet requirements of FRCP 23(h) because no fee petition has been filed.
Example: Charles D. Weller and Dirk Sutro, p. 7: "Notwithstanding the fact that the Fairness Hearing was originally scheduled for June 11, 2009, with an objection date in May, no fee petition has been filed as of the date that these objections are being filed. This does not comport with the requirements of Rule 23(h)."
Amendments: No change.

Opt-Out Period Too Short

Objection: Deadline for opting out or objecting was too short for class members to make an informed decision.
Example: Sanoma Magazines Belgium, p. 3: "As however European rightsholders weren't part of the negotiations, they should have enough time to think about the possible consequences of the settlement for them and should have enough time to make a decision with regard to the settlement. Also because of the objections mentioned in this letter, and

because of the ongoing investigation of the European Commission on the effect of the Google Book Settlement agreement on the European publishing sector, European authors, European consumers, and society at large . . . the deadline for making objections is still too short and should therefore be postponed."

Amendments: The deadline for opting out or objecting has been extended to January 28, 2010, and other relevant deadlines have also been extended.

Institutional Subscription

Institutional Subscription Pricing Unclear

Objection: The current explanation of how much institutional subscriptions will cost is vague. Given the lack of comparable products and the uncertainty about bundling and pricing tiers, it is impossible to predict what these prices will be and whether they will be reasonable.
Example: University of California Faculty, p. 2: "Even with the dual objectives of revenue and public access, we perceive grave risks of similar price gouging if the Book Search Settlement is approved without some additional safeguards. The agreement now states in Sec 4.1(a)(ii) that pricing decisions made by Google in consultation with the Book Rights Registry (BRR) will be based on several factors, including importantly 'pricing of similar products and services available from third parties.' If this clause is meant to refer to pricing of journals from commercial publishers, this bodes ill as a meaningful limitation on price increases, for commercial publishers have priced journal subscriptions as excessive levels for years. If the intent is not to compare institutional subscriptions to the Book Search corpus to these journals, then we are at a loss to comprehend what it might mean."
Amendments: No change.

Libraries At Risk from Google Monopoly

Objection: Lack of competition compromises core library values of access and dissemination. If libraries become dependent on the Institutional Subscription and Public Access Service, Google will acquire dangerous power over these civic institutions.
Example: Urban Libraries Council, p. 4: "The practical effect of the proposed settlement will be a monopolistic situation. Google and Book Rights Registry will control the market for delivery of millions of books, without much danger of effective competition. While there is no present indication that the parties to the settlement will abuse their position, there is also no check upon them."
Amendments: Amended University of Michigan agreement includes pricing review arbitration. The amended settlement allows the Registry to authorize more than one Public Access Service terminal per library building.

Institutional Subscriptions Treat Institutions Differently

Objection: Different institutions, such as university libraries, K-12 schools, and governments, are treated differently in the terms on which they may purchase access to the Institutional Subscription.
Example: American Library Association et al., pp. 9–10: "While this price discrimination could promote economic efficiency by setting the price at the point that meets the demand within that category, it could lead to bizarre results from a societal perspective. Google will conduct surveys among potential subscribers, and might learn that the higher education institutions have a much stronger demand for institutional subscriptions than K-12 schools. The low demand for institutional subscriptions at K-12 schools might cause the price of an institutional subscription to fall so low that many K-12 schools could afford to purchase the subscription. Meanwhile, higher education institutions in the same communities might not have the resources to pay the higher demand-drive prices charged to that category."
Amendments: No change.

Institutional Subscription Excludes OCLC Networks

Objection: The definition of "Institutional Consortium" eligible for discounts unfairly excludes networks affiliated with the Online Computer Library Center.
Example: Lyrasis et al., pp. 3–4: "[T]he Settlement does not permit *amici* to determine whether any or all of them are members of 'ICOLC' or 'affiliates' of OCLC, simply by virtue of their dealings with these two named organizations."
Amendments: OCLC-affiliated networks are now eligible to be treated as Institutional Consortia for discount purposes.

Privacy

Constitution and State Laws Require Reader Privacy Protections

Objection: Forty-eight states protect library patrons' privacy by statute. The proposed settlement does not guarantee similar protections for users of Google Books.
Example: Privacy Authors and Publishers, pp. 19–20: "Virtually every state protects public library reading records by statute, in recognition of the importance of having a citizenry that can freely avail itself of all the information in all the books without fear of monitoring. . . . Without explicit privacy protections in the Settlement, these long-held rights to privacy and freedom to read could be extinguished in this new digital age merely because Google converts public library books into a private set of services."
Amendments: No change

Privacy from Government and Third Parties Not Required

Objection: Google will have sensitive information about users of its services under the settlement, and should be required not to divulge this information unless compelled by law.
Example: Electronic Privacy Information Center, pp. 17–18: "Privacy laws have typically regulated the circumstances under which such information may be disclosed to the government. But there are no such restrictions contemplated in the settlement which underscores the threat to the right to receive information anonymously and the associated First Amendment interests."
Amendments: No change

Institutional Subscription Database Provides Google Too Much User Data

Objection: Subscribing institutions should be responsible for authenticating their own end users without sharing that information with Google.
Example: Center for Democracy and Technology, p. 17: "Under the terms of the Proposed Settlement, institutions can obtain an 'Institutional Subscription' that allows many users to use the New Services through the institution . . . There is no need under the Proposed Settlement for Google to be involved in the authentication of individual users within institutions. Institutional Subscribers alone should be responsible for authenticating their own end users without sharing authentication credentials or other personal information with Google."
Amendments: No change

Registry Does Not Protect User Privacy

Objection: The settlement requires Google to provide the Registry with usage data, but places no limitations on the level of detail of the data that will be collected and reported to the Registry.
Example: Electronic Privacy Information Center, p. 7: "The Settlement also requires that Google provide data to the Book Rights Registry (BRR), including the "name of any library to which it has provided Digital Copies of Books Digitized in the United States…This information may also implicate reader privacy."
Amendments: The amended settlement provides that Google will not reveal personally identifiable information about users to the Registry absent valid legal process.

Book Search Data May Be Combined with Other Google Data

Objection: Google is free to combine the data it obtains from Book Search with other data that it collects, adding a rich and personal dimension to the profiles that Google already maintains about individuals' searching and Web searching habits.
Example: Electronic Privacy Information Center, p. 5: "The Settlement provisions indicate that users will practicably be required to use a Google Account to use the Google Book Search database. Such a requirement would permit Google to integrate Google Book Search users' information with data concerning other Google products. The Settlement contemplates integration of Google Book Search and other products, stating that Google may create hyperlinks to Preview Use Book pages from its other revenue generating services 'including, for example, Google Web Search, Google Earth and other Google services that show search results by browsing.'"
Amendments: No change

Notice and Transparency Not Required

Objection: The Proposed Settlement contains no provision requiring Google to notify readers about the data it collects in connection with services under the settlement.
Example: Center for Democracy and Technology, p. 15: "Although Google does voluntarily provide some notice, we believe that it should be required to clearly and prominently disclose the following:

(a) What information Google collects in connection with the New Services, including information that can be used to identify individual readers;
(b) What information Google collects about individuals' use of the New Services;
(c) The purpose for which this information is collected;
(d) How long each type of data is retained;
(e) What technical mechanisms Google uses to track readers on the site;
(f) How readers can exercise choice about having their data collected and used in connection with the New Services; and
(g) How reader data is safeguarded against theft or misappropriation."

Amendments: No change

Personal User Information Collection Not Limited

Objection: The Settlement does not significantly limit what other information Google might collect, nor does it say whether Google is permitted to collect details about how individual readers interact with books.
Example: Center for Democracy and Technology, p. 16: "Google's potential technical capability to intimately track reader behavior should not trump individuals' long-standing ability to read books anonymously. Thus, CDT believes that Google should be permitted to collect only the data necessary to provide the services described in the settlement, and that Google should limit collection of detailed data connected to readers' use of books (for example, pages read or time spent reading) to situations in which such usage data is necessary to account for Preview uses (or to provide services chosen by the user where the user has expressly given consent for the collection of the data)."
Amendments: No change

Copyright Policy

Orphan Works Issue for Political Branches

Objection: The political branches of government, rather than the judicial branch, are best positioned to respond to the orphan works problem, which bears all the hallmarks of a traditionally legislative issue. The political branches also have the political and electoral accountability required to make their decisions democratically legitimate.
Example: Consumer Watchdog, pp. 7–8: "The proposed Settlement Agreement, if approved, would so massively reallocate the existing rights and remedies under copyright law that it would effectively rewrite the existing statutory regime for the benefit of a single player —Google. But Supreme Court precedent is clear: courts may not modify copyright law. Only Congress has "the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests" that must be balanced when amending the Copyright Act."
Amendments: No change

Settlement Makes Foreign Policy

Objection: This settlement in a private lawsuit will interfere with the public interest in international copyright relations and conflict with international agreements.
Example: Microsoft, p. 13: "Notice and registration are two formalities that international treaties prohibit as forbidden "condition[s] on the enjoyment and exercise of copyright." Imposing this new regime can only be done by Congress – and to the extent it implicates international treaties, the President – not the courts."
Amendments: Many foreign works have been removed from the settlement.

Google Rewarded for Unilateral Infringement

Objection: Google deliberately infringed copyright by scanning books without permission. A settlement that should punish Google for these acts of willful infringement instead rewards it by giving it a lucrative business opportunity.
Example: United States of America, p. 23–24: "Nor is it reasonable to think that a competitor could enter the market by copying books en masse without permission in the hope of prompting a class action suit that could then be settled on terms comparable to the Proposed Settlement. Even if there were reason to think history could repeat itself in this unlikely fashion, it would scarcely be sound policy to encourage deliberate copyright violations and additional litigation as a means of obtaining approval for licensing provisions that could not otherwise be negotiated lawfully."
Amendments: No change

Involuntary Transfer of Copyright

Objection: The Copyright Act prohibits governments from seizing, expropriating, transferring, or exercising rights of ownership over copyrights whose authors have not voluntarily transferred them.
Example: Amazon.com, p. 32: "To the extent the Proposed Settlement purports to reallocate the rights of copyright owners, it can constitute a valid exercise of judicial power only over those authors who have previously given express or implied consent. Where the Proposed Settlement purports to apply more broadly, reaching authors who have not

previously transferred their copyrights voluntarily and who have not clearly authorized such a transfer, it runs afoul of this statutory provision."
Amendments: No change.

Information Policy

Privatization of Knowledge

Objection: The settlement establishes Google and the Registry as uniquely powerful gatekeepers over human knowledge in book form. This role should not be played by any single institution, let alone a private company devoted to its shareholders, rather than to the public welfare.
Example: Pamela Samuelson et al., p. 12: "The future of public access to the cultural heritage of mankind embodied in books is too important to leave in the hands of one company and one registry that will have a de facto monopoly over a huge corpus of digital books and rights in them. Google has yet to accept that its creation of this substantial public good brings with it public trust responsibilities that go well beyond its corporate slogan about not being evil."
Amendments: No change.

Excessive Discretion to Exclude Books from Display Uses

Objection: The settlement allows Google to exclude books from Display Uses. It could choose to do so for reasons of commercial self-interest or in response to political pressure.
Example: Pamela Samuelson et al., pp. 9–10: "How, if at all, will Google exercise its right under the Settlement Agreement to exclude up to 15% of books from the corpus for editorial and non-editorial reasons? . . . It is difficult to discern answers to these simple questions from the Settlement Agreement or from public statements of the parties and their lawyers. It would be helpful to know the answers to these questions before making decisions about whether and how academic authors might want to participate in the Settlement Agreement."
Amendments: No change.

Scan Quality

Objection: Google's scans are not at high enough resolution for preservation purposes and are marred by frequent errors. Given the risks that Google's collections will displace print collections of many libraries, the scans should be of higher quality.
Example: Pamela Samuelson et al., p. 8: "Neither in the Settlement Agreement, nor as we understand it, in the side agreements Google has been negotiating with library partners, has Google committed itself to providing guarantees as to the quality of digital scans. . . . As scholars, researchers, and academic authors, we are seriously concerned that the Book Search corpus will fail to achieve its potential as an important scholarly resource unless Google makes meaningful commitments to improving the quality."
Amendments: No change

Metadata Quality

Objection: The database is filled with incorrect publication dates, authors, countries of origin, and other mistakes that will prevent users from locating books, or will mislead them about the nature of the books.
Example: Hachette Livre, pp. 13–14: "At present, the databases used by Google are deficient and unreliable for a number of reasons including, *inter alia*:

- Some records show wrong identifiers.

- The same publisher has different names in different records;
- Some records show wrong publishers;
- The same contributor may have different names in different records;
- Some records show wrong contributors;
- Some records show wrong titles or year of publication;
- Some records show wrong information about the availiability statue (in print)
- Some records show missing information about title, contributor, year of publication, etc.
- Some works, such as journals, which are not part of the settlement are included in the database."

Amendments: No change.

Open Access Not Allowed

Objection: The settlement does not respect the wishes of authors who wish to make their books available freely for broad distribution. Where these books have been made available under licenses (such as Creative Commons ShareAlike or the GNU Free Documentation License) that require unrestricted distribution and the display of the license, the proposed settlement programs violate the terms of those licenses.

Example: University of California Faculty, pp. 4–5: "[T]he agreement does not explicitly acknowledge that academic authors might want to make their books, particularly out-of-print books, freely available by dedicating their books to the public domain or making them available under a Creative Commons or other open access license. We think it is especially likely that academic authors of orphan works would favor public domain or Creative Commons-type licensing if it were possible for them to make such a choice through a convenient mechanism. We are concerned that the BRR will have an institutional bias against facilitating these kinds of unfetterered public interest, open access alternatives."

Amendments: The amended settlement allows rightsholders to direct that their books be "sold" at a price of $0.00 and allows them to choose a Creative Commons license to be applied to the work.

Research Corpus Encumbered

Objections: Use of the Research Corpus is artificially restricted to "non-consumptive" research, and access is unnecessarily restricted to certain users. Google and the Registry must approve commercial use of information gathered from the Corpus, even where copyright law would not be implicated.

Example: Pamela Samuelson et al., p. 8: "The Settlement Agreement restricts the class of persons eligible to be 'qualified users' of the GBS research corpus for purposes of engaging in non-consumptive research to non-profit researchers. Many academic researchers routinely engage in joint research projects with researchers from profit-making firms. The Authors Guild did not adequately appreciate that the restriction on who could be a qualified user would be harmful to the research freedoms of academic researchers."

Amendments: No change.

Library Holdings of Physical Books Endangered

Objection: Libraries will rely solely on the Institutional Subscription and will have no need for hard copies of books. This will present a problem if the Institutional Subscription fails.

Example: International Federation of Library Associations and Institutions, p 2: "When the digitization project is concluded, it will comprise a large proportion of the world's heritage of books in digital format. The participating libraries will have copies of "their" files for preservation or other uses. Although the Google settlement has provisions for business continuity, the settlement does not seem to include provisions for the long-term preservation of the entire database. Anaylses of cost effectiveness may at some point in the future lead Google to reduce the amount of data by discarding parts of them. The importance and utility of the entire database for users worldwide requires that the agreement include provisions ensuring the long-term database as a whole."
Amendments: No change

Printing and Copy/Paste Restrictions Excessive

Objection: Restrictions on the number of pages that can be printed, per-page fees for the Public Access Service, and restrictions on copy/paste artificially impede research and access to knowledge.
Example: Pamela Samuelson et al., p. 7: "Academic authors would not have agreed to the provision that severely restricts the number of pages that users of the Book Search subscription database can cut and paste from particular "display" books or can print out at any one time. Given that the institutional subscription database available both to institutional subscribers and to public libraries will consist mainly of out-of-print books, we think the cut-and-paste and page print-out restrictions are unreasonable narrow."
Amendments: No change.