

Q: We're rolling on this. 3, 2, 1.

Welcome, everyone. My name is Chris Kenneally, and on behalf of Copyright Clearance Center I want to welcome you to a very special program looking at the latest developments in the Google Book Search Copyright Class Action.

On Friday, November 13, the parties in this historic case, The Authors Guild, the Association of American Publishers and Google itself filed a revised settlement proposal responding to concerns voiced by authors, publishers and the U.S. Department of Justice about their original proposal announced in October 2008.

For the benefit of our customers and rightsholders, Copyright Clearance Center welcomes back to our offices today intellectual, property and copyright law expert Lois Wasoff to speak with me about the most noteworthy changes in the revised settlement proposal.

Lois, welcome back. Good to see you.

A: Good to see you, too, Chris.

Q: It's good to have you back. We bring you back for all sorts of very good reasons and a lot to do with your extensive experience in copyright law and the publishing business. Tell people briefly that you were past chair of the copyright committee at AAP. For many years you were the vice president and corporate counsel at Houghton Mifflin. You've served on study groups that look at a variety of issues related to copyright law and libraries, and you're a frequent speaker in this country and abroad on issues related to the copyright practice in the book publishing industry.

And Lois, CCC began doing programs with you in April that have followed the twists and turns in the Google Book case. Over the spring and summer we conducted a pair of online seminars and several interviews with you and other key players. We're back again today because the parties have done something quite dramatic. They've amended their own proposal for a settlement, even before the judge has made any ruling on its merits.

So, for the sake of rightsholders in our audience with published works that are covered under the settlement, what are the major changes in dates and definition of terms that this new revised settlement makes?

A: Well, Chris, there have been many very significant changes. But I think it's also important to keep in mind that the underlying structure of the agreement and many of the economic terms of the agreement have not changed. The agreement still provides for payments for past scanning, if claims are filed by a certain date. What's very significant for our listeners is that that date has been moved. The old

deadline was January of 2010. The new date by which claims have to be filed in order to get payments for past scanning is March of 2011.

The agreement still authorizes future uses by Google, and it still establishes a Book Rights Registry that is intended to represent rightsholders in dealings with Google. So, if you think of the agreement as a tree, it hasn't been chopped down, it hasn't been replanted, the trunk's still there, but the branches have been pruned so that the shape of the tree has certainly changed in some very noticeable ways.

One of the key changes – one of the sort of gateway threshold changes that we need to talk about is that the amended settlement includes a new definition of Books and Inserts. Now that's very important, because as you remember, the class that is covered by the settlement, that is, the non-named parties that are going to be bound by the terms of the settlement if it is approved, is defined as Rightsholders of Books and Inserts. So if you change the definition, that underlying definition, you've changed the composition and the size of the class, and that is why the proponents have done.

Books and Inserts are now defined as U.S. works that were registered for copyright before January 5, 2009 and works published in the U.K., Canada and Australia as of that date. So the settlement class no longer includes rightsholders from other parts of the world. That is, obviously, a very significant reduction in the size of the class.

And as we've also discussed, Chris, one of the gateway definitions in the agreement, a key definition, is deciding when a book is commercially available. That's because if a book is not commercially available, under both the original and the amended settlement agreements, the default rule would be that Google can make certain so-called display uses of the work. In the amended agreement, the initial determination of commercial availability is handled differently, as are the mechanisms through which a rightsholder can object to the classification of his, her or its work as not commercially available.

The effect of these changes is really to shift the burden in that area and to make it more difficult for Google to simply decide a work is not commercially available and start to use it for those display uses.

Q: Well, what seems important about that is something that started out as a global settlement is now slightly less than that, still very significant, of course.

What about the way money will change hands under the revised settlement?

A: Well, the basic pricing structure, the basic revenue sharing structure, hasn't changed. The split in the original agreement of 63% to the rightsholders and 30% to Google is the same in the amended agreement. There have, however, been extensive changes in how the prices charged to users will be calculated and in how

much control the rightsholders will have over prices. The agreement now contemplates more individual price negotiation. It also provides that a rightsholder may choose to set a price of zero. Other changes related to economics are in the treatment of unclaimed funds, which are the revenues that are attributable to the uses under the agreement of works for which no rightsholder has come forward – the so called orphan works.

Under the old agreement, those revenues would've been kept by the Book Rights Registry if no claimant came forward. Under the amended agreement, those funds can be used after five years to search for rightsholders who have not yet come forward, and after 10 years they can be given to charity, but they don't go to the Book Rights Registry, which had been the original formulation.

And finally, another significant change in the agreement is that – as I said, it still contemplates future uses by Google and it still contemplates that the Book Rights Registry and Google may decide to add new revenue models, uses that aren't authorized to be made by Google as of the moment that the settlement agreement actually takes effect. And those uses, those new revenue models are still as they were in the original agreement – print on demand, file download, which was called pdf download in the old agreement, and consumer subscriptions.

But there's been a really significant change here, as well. The language in the prior agreement made that list illustrative rather than exhaustive. In other words, there was language permitting the Book Rights Registry and Google to think of other new revenue models going forward and agree to those. That flexibility doesn't exist in this new version.

And registered rightsholders are given a more extensive opportunity to opt out of those specified new revenue models when and if they are added to the agreement by agreement between the Book Rights Registry and Google.

Q: Well again, some important limitations there in an agreement that many saw as very far reaching. And in September, when we did our last webinar, we highlighted the main objections from various parties, including authors, publishers and not least, the Department of Justice. How does the revised settlement respond to those objections that they made, and what kinds of amendments and changes have been made in the revised settlement that are most significant?

A: Well, it's very clear when you look at the settlement that the proponents carefully weighed the comments that were received. We also know that they engaged in direct negotiations with the Department of Justice. The Department of Justice brief, as you recall, contained extensive comments on the prior version of the settlement agreement, and I think it's clear that many of the changes made reflect an attempt on the part of the proponents to address those comments. The changes also address some of the many comments filed by others involved in the process.

When we talked about this before, we broke those objections up into certain categories. The antitrust concerns is the first category that we discuss, and the DOJ brief was certainly not the only place where those concerns were raised. Antitrust implications were extensively discussed by other commenters as well. The concerns raised by the Department of Justice and others related to, among other things, the pricing mechanisms in the agreement, the way, for example, the Book Rights Registry and Google would agree to prices was problematic for some commenters.

The “most-favored nations” clause in the agreement, which I’ll talk about in a minute, the role in composition of the Book Rights Registry was questioned by some of the commenters, and there was a lot of commentary on the potential impact on competition if Google were to be the only entity that could use the database and, in particular, the orphan or the unclaimed works, which are part of the database.

The amended agreement addresses each of these issues. The way that the algorithm for determining prices to users is going to be implemented has been changed. The rightsholders have been given more ability to negotiate individual prices and individual splits of revenues.

The “most-favored nations” clause, which could’ve had an impact on the Book Rights Registry’s ability to grant licenses to third parties, that clause has simply been deleted. It is not in this new version of the agreement.

The composition of the board, as you and I speculated back in September, has, in fact, changed. The Book Rights Registry board will now include representatives of U.K., Australian and Canadian publishers and authors.

And finally, following up on public statements that Google had made previously but which were not reflected in the actual language of the agreement, there is now language in the amended agreement that contemplates that Google will license the database to other resellers.

It’s not yet clear that these changes will go far enough to allay all the concerns expressed, but it’s clear that allaying those concerns was one of the proponents’ key goals.

Q: Right. And so far, at least, on the revised settlement, DOJ hasn’t spoken, so we’ll have to wait for that particular shoe to drop.

What about in class action rules and changes there?

A: Well, that was another area that occasioned a lot of comments. There were concerns expressed by the Department of Justice and by many others that the class

definition was inappropriate and too broad, combined too many different entities that had conflicting interests. There was also a concern expressed that the original agreement went further in authorizing future activities instead of just providing a remedy for past actions than is appropriate for a class action. And we've already discussed some of the changes that were made to address those concerns – eliminating many foreign works and rightsholders, limiting authorized future uses to those actually listed in the agreement, adding the new class representatives to the plaintiff groups – all of those changes were clearly intended to address those class action based concerns.

Q: There are changes, as well, regarding copyright law and policy.

A: That's right, though objections were expressed about this, and addressing this concern is pretty difficult, because even more than the other objections, this goes to the underlying concept of the agreement. The basis of this objection is that this settlement structure is essentially private, orphan works legislation for Google and uses a judicial tool to achieve a goal that should be achieved through legislation.

The revised agreement does make certain changes to the sections describing the Book Rights Registry and makes it clear, although in fairness, it was clear in the old agreement as well, that the Book Rights Registry can license unclaimed works to third parties to the extent permitted by law. Whether that is seen as sufficient to pave the way for orphan works legislation really remains to be seen.

But the issue that Google will have a preferential position with respect to the use of orphan works really comes out of the basic concept that the agreement uses an opt-out rather than an opt-in mechanism, and that really hasn't changed.

We also in September discussed funding concerns that had been raised by some of the objectors, and there has been a very significant change in the way that revenues derived from uses of unclaimed work will be treated. Those changes address issues that were raised by several state attorneys general who were concerned that those funds were going to the Book Rights Registry instead of to the states under relevant state laws. And this, also, was part of some of the class action issues, as well. A number of commenters noted that there was a potential conflict of interest presented, because the Book Rights Registry would benefit if the orphan works owners were not found.

The amended agreement provides for an independent fiduciary to be appointed who will represent the owners of the unclaimed works, and for the revenues attributable to those works to be used, as we've said, only to locate owners or eventually for charitable purposes. So this addresses many of the issues that were raised. It also deprives the Book Rights Registry of potential revenue source, but it does, I think, answer some of the questions that were raised about how revenues from unclaimed

works were going to be used and how orphan works owners were going to be protected under the agreement.

And then there was our final category of objections – that was the public policy objections, and we grouped under there a number of concerns that came from different constituencies, and the amended agreement really does address some of those issues. I'll give you a couple of examples. The amended agreement provides for a possible increase in the number of public access terminals in public libraries. It had been set at only one per building. It also provides for the use of Creative Commons licenses that may permit broader free uses for works distributed under those licenses.

In response to complaints from privacy advocates, and consistent with some of Google's public statements, the amended agreement also now includes some specific requirements that Google protect the personal information of users.

I mean, these are early days for the newly amended agreement. We'll see if these changes go far enough to satisfy those who had concerns before, but clearly that was the goal of the proponents.

Q: Well, there's a lot here to cover. You've done a good job of summarizing it fairly quickly.

Are the revisions that you've discussed so dramatic in scope that they've taken this settlement back to square one? And with regard to all the changes, can you help our audience understand what steps the proposed settlement is going to have to go through to get to approval? From a legal perspective, what are we anticipating in the way of reactions and rulings from Judge Chin, whose court it is that this is all being heard in, the Department of Justice, the states' attorneys general and so forth? Give us a quick look at all of that, a timeline and who we could expect to hear from.

A: I'd be happy to. Procedurally, the parties really have taken a step back. They're asking the court now for preliminary approval of the settlement and of the class, which is something that they had gotten for the prior version a year ago. But they've coupled that request with a proposal for a fairly aggressive timeline moving forward. So, though procedurally they seemed to have moved backward, they really are still trying to maintain the momentum and keep this agreement review and approval process moving.

If the court takes the plaintiffs' suggestions about a schedule for going forward, the supplemental notice, that was included in the papers filed with the court, will be sent out in a smaller version of the notice program. The notice program, instead of being the extensive world-wide program with publication in periodicals and all that we saw back in the beginning of this year, would instead be more targeted. The

notice would be sent to those who've already registered, those who've opted out, those who more generally are rightsholders reaching out to them through trade associations, RRO's. And that period would begin – the sending of that notice, if the judge approves the notice – would start a 45-day period running. In that 45 days, class members would have the option of opting in, opting out, perhaps withdrawing an earlier opt-out decision and deciding to join instead, or file objections. So depending upon what the judge says, we could be looking at our listeners having some decisions to make in the relatively near term.

Q: And then decisions they thought they'd already made, they're going to have to review.

A: Well, they're going to have to think about those decisions in the light of all this new information.

What the plaintiffs are also doing to try and keep this moving is that they're asking the judge to set a date for the Full Fairness Hearing that is three weeks after the end of the new notice period and to set a deadline for the Department of Justice, whose comments we are all awaiting, to provide comments to the court about two weeks before the Full Fairness Hearing is held. So, the Fairness Hearing that we had originally expected to see in October, when we were still looking at the original settlement agreement, we'd be thinking about in the early part of 2010. And the agreement to be considered is obviously the new agreement. The target date, I think, is in early February, the date I've heard is February 10, 2010. But it's premature, because as you and I are sitting here together recording this interview, we don't know yet if the judge is going to accept this scheduling proposal. If he does, we can expect a Full Fairness Hearing to take place sometime early in 2010.

Q: Well, thanks very much for all of that, Lois, and obviously today we've just scratched the surface of this very important, extensive, and it's not an inappropriate term, in this case, historic agreement.

So, we've arranged to bring you back. We're going to do this again. We'll be back together on Thursday, December 10 for a one-hour, online webinar at which we will provide a more detailed analysis of all the settlement changes, calling out important deadlines for rightsholders, and discussing, as well, the reactions of the affected parties.

We hope everyone listening to us today will join us for that free program. And to register, please go to www.copyright.com, or send an email to education@copyright.com.

We've been chatting today with Lois Wasoff, our resident copyright law expert. And Lois, thank you very much, indeed, for coming back and helping us with the

latest in this very important case. And we look forward to having you back on December 10.

A: Thank you, Chris.

Q: And thank you, everyone in the audience. We, as we say, hope you will join us for our special one-hour webinar, free, on December 10. To register, go to copyright.com.

And in the meantime, to all in the audience, a very happy Thanksgiving.

My name is Chris Kenneally. Thanks for listening.

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