

**AAP, Authors Guild and Google
Amended Settlement Agreement**

**Reviewing the Revisions with
Lois Wasoff & Christopher Kenneally**

Presented December 10, 2009

KENNEALLY: Thank you, Gerald, and again, welcome, everyone today to this very special program from the offices of Copyright Clearance Center. My name is Chris Kenneally. I am director of author relations for CCC and we are very pleased as we have been throughout this year to have an international audience of authors and publishers with us on the call today. Welcome, and indeed welcome back to many of you, for I know you've been following this along with us since the settlement was first announced almost a year ago.

This is the definition of a continuing story, something I appreciate as a journalist but which I also know keeps me focused on the developments as a rightsholder. We began our series in April and we've updated it periodically since then and we look forward to continuing to do so as the story progresses.

We are here today to discuss the amended Google Book settlement, and one of the questions has been what to call it exactly. The differences between the original settlement and the now-amended version involve many aspects of the agreement, but some of the analysts have indicated that it's not quite sweeping enough to be called Settlement 2.0, but perhaps GBS 1.1.

The proponents themselves who filed the documents in the case use the terminology Amended Settlement Agreement, or ASA, as you'll see in our presentation. So as a result, we will adopt that terminology in the slides and our discussion here today.

Over the past months, we've conducted this series of seminars with Lois Wasoff and other key players and as always, all of these programs are available on copyright.com and Beyond the Book, if you're in need of any kind of historical progression on this.

With all of that then, we're happy to welcome back to the program Lois Wasoff, and Lois, it's great to see you again.

WASOFF: It's good to see you, Chris.

KENNEALLY: It's always good to have you here at CCC and for all the sorts of reasons that have to do with your extensive experience in copyright law and the publishing business. We'll just remind our audience again that you were a past chair of the copyright

committee at AAP and for many years, 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've spoken around the country and around the world, in fact, on issues related to the copyright practice in the book publishing industry.

So with that, we have in Lois just the right person to help us understand the implications of the current changes to the Google Book settlement. So for the sake of rightsholders in our audience, Lois, with published works that are covered here, let's take a look at how all of this has evolved. What is so different? What's important about the amended settlement agreement?

WASOFF: There are a number of points that we really want to touch on today because I think they'll be particularly useful to our listeners. First, the deadlines that rightsholders will be considering have been revised, so we'll be discussing those. The scope of the works covered by the settlement agreement has been narrowed. The treatment of unclaimed works has been changed, and we're going to go into that in some detail. The agreement still creates a book rights registry but now includes more details about how rightsholders will be represented within that registry.

Additionally, there are some different economic terms employed and the revenue models proposed for future uses have been limited in some ways. And then there have also been some changes in the agreement that were obviously intended to address some of the public policy issues that were raised by the comments on the prior version.

And finally, the timeline for the progression of the lawsuit through the courts has changed, so we'll be discussing that.

But I think it's very important to keep in mind as we discuss those specific changes that the underlying structure of the agreement hasn't changed. This is still a settlement agreement settling a class action. Many of the original economic terms and much of the structure of the original agreement really hasn't changed.

The amended settlement agreement as currently proposed still authorizes future uses of the works covered by the agreement by Google. It still establishes the Book Rights Registry that's intended to represent rightsholders in their dealings with Google.

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. The shape has changed in some very noticeable ways, but it's still the same tree.

In some ways, the amended settlement agreement reads like a direct response to the blueprint that was set out by the Department of Justice filing, which we'll be discussing. I'll delve into some of those significant changes in more detail and I'll also try to illustrate how the crafters of the amended settlement agreement may have been addressing some of the points that were made by other commentators on the original agreement.

KENNEALLY: That's a good start. Why don't we go first to the aspects that affect authors and publishers who are on the call with us today. First, that would be regarding the deadlines that have changed, Lois. Talk about those.

WASOFF: I'll be happy to. We got together in October, Chris, for a webinar and in that webinar, we talked about the September 22 filing of the unopposed motion, the motion made by the proponents of the agreement to adjourn the fairness hearing that was then scheduled for early October.

At that point, the parties told the judge that they were working with the Department of Justice and that they were no longer going to seek approval of the original settlement agreement. They asked the judge to set a status hearing for early November. In our prior webinar, we speculated the judge would grant that motion, and we were correct. The judge granted the motion and set a date for a revised settlement agreement to be submitted to the court.

That date on November 13, the revised settlement agreement was in fact submitted to the court. With this new version, many of the other deadlines moved and changed, so we'll look at those.

The revised settlement agreement needed time to be considered by the court and triggered a period of re-notification of members of the class, so there is now a new deadline set within which rightsholders can decide to opt in, opt out or object. And that's a key deadline for our listeners to keep in mind. That deadline is January 28, 2010. That re-opened the window for rightsholders to consider what they want to do in relation to this agreement.

It's also important to note that although objections can be filed prior to that date, the judge has made it clear that he doesn't want to accept new objections to the original settlement agreement. He wants any objections to comment only on the revisions to the agreement.

You'll recall, Chris, from our conversations before that one of the important events in the process of the consideration of the original settlement agreement was the filing by the Department of Justice of a statement of use, and that was a critical document and we'll be returning to that document and its importance from time to time.

The judge is obviously contemplating, as are the parties, that the Department of Justice will have interest in the amended settlement agreement, so the judge's order setting this new time schedule set February 4 as the date for the Department of Justice to submit comments on the amended agreement if they have any.

Following close on the heels of the closing of the comment period and the Department of Justice comments filing, if that happens, is the new fairness hearing, and that's now scheduled for February 18, 2010.

KENNEALLY: There's a lot to follow there. Are there other important dates that rightsholders should be aware of looking ahead?

WASOFF: Yes, and one in particular I think is critical. Many of the people on this call will remember vividly that the cutoff date by which claims for works that were already scanned by Google had to be filed if the rightsholder wanted to receive a payment in connection with that past scanning. That original cutoff date was January 5, 2010. Obviously, that date had to move, given all that has occurred.

The date set now, the cutoff for filing for those claims, is March 31, 2011. So rightsholders have been given a breathing space to decide how and whether to claim their works.

KENNEALLY: The scope of the copyrighted works coverage has also changed dramatically. Let's talk about that. What has changed within the scope and why?

WASOFF: This is a very critical change, Chris, and one that we should talk about in some detail. Remember that in the course of its library scanning project, the project that triggered the original lawsuit, Google had already scanned about 10 million books, books that were taken off the shelves of academic libraries and included in the Google scanning.

Now, the creators of those works were not necessarily U.S. residents or citizens. The common thread among those works was that they were in those libraries. And therefore, a lot of foreign rightsholders were swept into the structure of the original settlement agreement, were part of the class defined in the original settlement agreement, and a number of those foreign rightsholders and their representatives were quite vocally upset about that fact.

So one of the critical changes, a real threshold change, is that the amended settlement agreement includes a new definition of books and inserts. Now, that's very important, because as you remember, the class 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, are defined as rightsholders in books and inserts.

So if you change the underlying definition of what a book or an insert is, then you've changed the composition and the size of the class. And that's exactly what the amended settlement agreement does.

KENNEALLY: Before you get to just how that class has changed, I want to be sure to emphasize something that we might have missed, and that is that all rightsholders involved here have an opportunity to remove their works, is that correct?

WASOFF: Yes, they do. We can talk about that a little bit later, but it's a good point. That's another deadline that moved in the agreement. The rightsholders deadline to remove their works from Google's uses has been extended from April 5, 2011 to March 9, 2012. And we'll return to that.

KENNEALLY: OK, fine. I just wanted to be sure for the audience involved here that there is still some time there. But back to the point about the class. What's changed there?

WASOFF: What's changed is that the definition of what rightsholders are members of the class has been very significantly narrowed through that change I was discussing before in the definition of books and inserts.

Books and inserts are now defined as U.S. works that were registered for copyright before January 5, 2009 and also as works that were published in the United Kingdom, Canada and Australia as of that date.

Those three countries that are still in the settlement are all primarily English-speaking. They all have legal systems common to the U.S. Google sought to include them in the settlement and negotiated directly with representatives of authors and publishers in those three jurisdictions.

But by doing that, by creating that limitation to four primarily English-speaking countries as the definition of what's a book covered by the settlement, the amended settlement agreement now excludes from terms of the settlement agreement, from the class of rightsholders that would be covered by the settlement agreement, most foreign works. This significantly reduces the size of the class. Some have estimated that as much as half of the original works that were supposed to be covered by the settlement will be eliminated from the revised settlement.

So it's clear that the objections raised by the governments of France and Germany, by objectors in China and India and elsewhere, were heard. They wanted out of the settlement and they've gotten at least part of their wish.

Foreign works may be included but only if the rightsholder of the foreign work had taken the step of registering the work with the United States Copyright Office before that key date of January 5, 2009.

As a footnote to that, I think there's been some confusion about what this means for foreign works and I think it's good to keep in mind that Google's scanning of foreign works in those library collections will presumably continue. Snippets from those foreign works will presumably still be displayed in Google Search. The reduction of the settlement class is not resulting in the elimination of digital scans of those works, as far as we know.

KENNEALLY: So if we have an international audience here, it's not exactly as if people can walk away from this if they're not part of that limited class. They still really need to be very much focused on what's happening here.

WASOFF: Well, their works will not be covered by the terms of the settlement agreement, so in that sense, they are out of this. But I think it's a safe assumption that Google will continue to make use of those foreign works in their search product, for example, by arguing that that use is a fair use, which is the position that Google's taken all along. It's a position that has not yet been tested conclusively by the courts. It was the original basis of the lawsuit that led to this settlement, but because of the settlement, that legal question will

never – if the settlement is ultimately approved, that legal question will not be resolved by this court.

KENNEALLY: At least by this court, right.

WASOFF: At least by this court.

KENNEALLY: Right. What are some other definitions that have been changed or otherwise clarified by this amended settlement?

WASOFF: These are important changes in the agreement and it's definitely worth going over. There were a lot of objections to the way works were defined as being part of or not part of the definition of books or inserts.

For example, comic books. There was some concern that comic books were being treated as books and should have been treated as periodicals and that that was an ambiguity in the original settlement agreement. So those kinds of issues, to some extent, are being addressed in some specific cases.

Two examples that we've highlighted are – the treatment of comic books is now clear. They're periodicals. And periodicals were always outside of the settlement agreement. Journals, for example, scholarly journals are not subject to the terms of the settlement agreement.

And again, keep in mind that that doesn't mean that Google didn't scan them. It just means that Google's uses of them going forward are not covered by this settlement agreement.

And speaking of journals and other periodicals, it is very common for, for example, a year's worth of journals to be bound into a single volume for convenience, and that volume ends up on a library shelf. There was an apparent ambiguity in the definitions in the original version. Is that a book or is it still periodicals? Now it's clear. Bound compilations of periodicals are not books and therefore are not covered by the settlement agreement.

KENNEALLY: What about inserts? There's something special about those. Talk about that.

WASOFF: Yes, the definition of inserts has changed and that's important. And again, these were changes made for clarity and in response to concerns raised about ambiguity in the original definitions in the first version of the agreement.

Now it's clear that in order to qualify as an insert so that the use is covered by the settlement agreement, the insert itself must be registered with the U.S. Copyright Office as a standalone work.

The treatment of children's book illustrations in the original settlement agreement was criticized. It is now clear that children's book illustrations are not considered inserts.

And finally, the treatment of musical notation has been clarified so it's clear that musical notation is not considered an insert.

KENNEALLY: What about other terms that have changed or been redefined?

WASOFF: This is particularly important because one of the areas of controversy about the original settlement agreement had to do with the definition of commercial availability. Commercial availability is one of those gateway definitions. It's one of those threshold definitions when you look at the agreement and you think about how it will apply to your works.

KENNEALLY: It's critical.

WASOFF: It's important because the determination of whether a particular work is commercially available or not determines what Google can do with it as a default matter. If a work is not commercially available as a default, absent alternative instructions, Google can make display uses of it. If a work is commercially available, the reverse applies and Google has to get permission from the rightsholder in order to make display uses.

And there were substantial concerns expressed at the earlier stages in response to the original settlement agreement that the definition of commercial availability was weighted in a way that favored Google. It was not sufficiently clear in the minds of some of the objectors exactly what steps Google had to go through in order to determine if a work is commercially available. There were also comments that challenging that determination on the part of a rightsholder was going to be burdensome and difficult.

And that's been changed. Rather than the rightsholder having an affirmative obligation to demonstrate that a book is commercially available in order to get a Google initial determination that it's not commercially available changed, all the rightsholder has to do now is to assert that the book is commercially available and Google will be required to change the status of the work to not commercially available unless and until Google prevails in an arbitration. So the burden of proof has kind of shifted.

In addition, the definition of how you determine whether a book is commercially available has been changed. It's now clear that if the book is available for sale new anywhere in the world to a buyer in the U.S., U.K., Canada or Australia, the work will be deemed to be commercially available. So it's both a higher burden in the first place and there is a mechanism that gives the rightsholder better ability to question a determination of commercial availability. That's actually an important change for a lot of rightsholders.

KENNEALLY: And because it's so important, that notion of commercial availability, what's happened with the amended settlement is that rightsholders really spoke up, right? That's the source of these changes.

WASOFF: Yes. A lot of the objections to the agreement did come from rightsholders who were concerned about their ability to protect and manage their works. And as we're going through this, I think it's fair to say Google and the proponents were pretty comfortable with the deal they proposed originally. They believed in what they had done. They felt it was a good deal for rightsholders. They had accomplished something that they wanted to get support for.

So you can read all of these changes as responses. In some cases, some of these changes were more clarifications rather than responses to a problem, but in every instance, I think, Google, the Authors Guild, AAP, were listening to the objections and were attempting to accommodate them.

KENNEALLY: Right. There's also the matter of the handling of unclaimed or so-called orphan works. That was a source of concern for many, and I remember that you told us that Mary Beth Peters from the U.S. Copyright Office said the settlement had, quote, turned copyright on its head. She wasn't alone in expressing her concern. DOJ itself had concerns about class representation of these unknown rightsholders of unclaimed works. Has anything really changed in that regard?

WASOFF: Yes and no. There has been a very significant change. The agreement still gives Google the right to use unclaimed works. The significant change is that the amended agreement, the new version of the agreement, provides for an independent fiduciary trustee to be appointed who will represent the owners of the unclaimed or orphan works.

The revised settlement is very specific in designating that the representative will be neither an author nor a publisher, will be approved by the court and will be chosen by a super majority of the Book Rights Registry board. But the fiduciary won't be serving as a voting member of the board.

The other very significant change in the treatment of unclaimed works is how funds derived from the exploitation of those works are going to be treated. In the prior settlement agreement, the prior version, those funds were going to be – if rightsholders didn't come forward to claim them within a certain period of time, the funds would have been used to fund the operations of the Rights Registry.

That was an extremely controversial structure and issues were raised by the attorneys general of several states. A number of commentators also noted that that created a potential conflict of interest because the Book Rights Registry might not have an incentive to find these owners to get the money to those owners of the unclaimed works because if the owners remained missing, the money went to the Book Rights Registry.

The revised settlement agreement now dictates that revenues attributable to orphan works will first be used to locate the owners and then eventually utilized for charitable purposes, specifically for literacy initiatives in the U.S., U.K., Canada and Australia.

And the way that's structured is that the revised settlement now says after funds have gone unclaimed for five years, up to 25 percent of the funds being held can be used to search for the rightsholder, and after 10 years, if the rightsholder hasn't come forward, then the remaining 75 percent, upon approval – there's a process for approving how the monies will be distributed and how the charities will be identified, but once that approval process is accomplished, the money can be used to support literacy charities.

KENNEALLY: What further impact does this have then on the Book Rights Registry?

WASOFF: Before we get to that, Chris, there's one other thing I did want to talk about and that has to do with how the fiduciary will be able to make determinations about the use of unclaimed works. This is a change and I think it's important to point out.

One of the hot-button issues in the structure of the agreement has been the advantage that it gives Google with respect to this body of unclaimed works. The agreement does include specific language now that says that the fiduciary trustee in his role as the protector of these unclaimed works will be able to make determinations about certain future uses of the unclaimed works to the extent permitted by law.

That's being read by many people as an invitation by the proponents of the agreement for Congress to act and give the fiduciary trustee some authority to make decisions with respect to these unclaimed works, to address legislatively the orphan works problem.

Now, the impact this has on the Book Rights Registry is that the Book Rights Registry is going to be deprived of a potential source of revenue. That's potentially a problem for the Book Rights Registry, but we don't know now how much money it will take, how much money the Book Rights Registry will be taking out of other revenues to support its activities.

KENNEALLY: We didn't even before, but it certainly is a loss of potential revenue there.

There's changes as well in the representation of rightsholders that may impact the registry as well. Can we talk about that?

WASOFF: Sure. The Book Rights Registry is still a key portion of the agreement and it's still intended to fulfill the role described in the original agreement, which is to be the intermediary between Google and the rightsholders. The management of the board in the original agreement was conceived as being equally divided between authors and publishers, but there wasn't further definition about who would be on the board.

Now, in the new agreement, it's quite explicit that on both the publishing side and the author side, there will be representatives – at least one representative from each of the four countries whose works are now clearly covered by the settlement.

And in addition, as we discussed, the independent fiduciary trustee will be working with the board. He won't be a voting member of the board but he will be involved with the

board and there will be some representation of the interests of the owners of the unclaimed works.

What hasn't changed – and this is a set of objections that were not responded to in the amended settlement agreement – is among the objections were requests on the part of various constituencies for there to be representation on this Book Rights Registry board of open access proponents, academic authors, librarians, foreign authors. That hasn't changed. All those various constituencies still do not have representation on the Book Rights Registry board.

And I just think to note here as well, the Book Rights Registry board will have the ability to license some future uses of the works of registered rightsholders – again, to the extent permitted by law – and that could also be read as an invitation for Congress to act here and clarify what this centralized group can do with respect to those rights.

KENNEALLY: Again, that's interesting because it gives us something further to watch, which is how Congress may respond to all of this.

What about the economic terms and additional revenue models here?

We are speaking with Lois Wasoff, and I should tell everybody we're about halfway through our special program looking at the amended settlement agreement in the Google Books case, and Lois, we're covering an important piece of all this, which is revenue. This is what this is all about, actually, so why don't you tell us how the amended settlement, the ASA, has potentially changed things there from what we knew before?

WASOFF: There have been some significant changes. I think I should preface what I'm going to say first by saying that the underlying structure of the agreement and that many of the economic terms of the agreement really have not changed.

But what has happened with the new agreement is that the amended settlement kind of pulls back the curtain a bit, and as we'll discuss, those changes were made very much in direct response to statements from the Department of Justice and objections that were filed by some of the rightsholders.

First, to discuss settlement controlled pricing. The split hasn't changed. The split is still 63 percent to the rightsholders and 30 percent to Google for revenues generated by uses of the works. But there have been some pretty extensive changes in how the prices charged to users will be calculated and in how much control the rightsholders will have over prices.

The amended settlement agreement now contemplates more individual price negotiation and it also explicitly says that the rightsholder will have the option of setting a price of zero, which is a direct response to some of the public policy advocates who were concerned that the agreement was too motivated by a desire to maximize economic return and perhaps, in their view, not motivated enough by a desire to maximize access.

The changes that have been made in how prices are arrived at, the algorithms, are extremely important because it's now clear that Google will be applying an algorithm in determining the prices for the works for which it determines the price. Rightsholders can determine their own price or they can accept the Google-set price, and it's clear that that algorithm is going to be designed to stimulate market prices. That came right out of the Department of Justice filing.

That's clearly a response to the Department of Justice brief, which expressed a concern that the pricing mechanisms in the original agreement could be seen to be what's called a horizontal agreement between authors and publishers that could have the potential to restrict price competition and therefore violate the Sherman Act. So that was a pretty strong statement on the part of the DOJ and what we're seeing now is the attempt on the part of the proponents to address that statement.

Related to that is the part of the amended agreement that makes it clear that the Book Rights Registry is not going to reveal that algorithmically derived price, the Google-set price, for one book to rightsholders of other books. The idea is to eliminate the potential and certainly the appearance of price fixing among books. That came directly out of the Department of Justice concerns.

What isn't in the pricing structure is something that was asked for by some of the public policy advocates, and that was court oversight and some reassurances about how prices for the institutional subscription, which is one of the major rights that Google will be exploiting under the settlement – how prices for that would be set. There were concerns expressed from the academic and library communities that Google could have such market power in that area that it could abuse its power and set unreasonable prices. We haven't seen that concern explicitly addressed on the institutional pricing side in the amended settlement agreement.

KENNEALLY: It is interesting to see how the parties have responded to the points that were raised throughout all this, and they've done so as well with regard to additional revenue models and provisions for future uses.

WASOFF: Yes, and this is an elegant response, I think, to a problem that was raised by a number of commentators, because it's in some ways a subtle change, but it's a very important one.

In the settlement agreement as originally proposed, there were three new revenue models that were given as examples, and that was print on demand, file downloads and consumer subscriptions. The idea in the original settlement agreement was that the Book Rights Registry and Google could at some time in the future agree to the terms under which Google could exercise those rights with respect to the works covered by the agreement.

In the original agreement, that list, those three uses, were illustrative rather than exhaustive. And by that, I mean Google and the Book Rights Registry could have thought of other things that Google wanted to do with the works and agreed to the terms and moved ahead.

That was quite controversial. The Department of Justice had issues with that. Many of the commentators who dealt specifically with class action issues and appropriate procedure for class action lawsuits were quite concerned about that. It is not unusual – well, I wouldn't say it's usual, but it's not unheard of for a class action settlement agreement to authorize future behavior, but the objectors felt that and told the court that authorizing future behavior in this very open-ended kind of a way meant that you were asking class members to agree to a settlement without giving them the ability to understand really what they were agreeing to because so much was left to happen in the future.

So the solution to this in the amended settlement agreement is that this list is now exhaustive. There are no other – now they're called additional revenue models instead of new revenue models – but there are no other additional revenue models authorized by this settlement agreement, so that built a bit of a box around it and made the future still not completely knowable because the terms are still subject to negotiation, but clearer for the members of the class that are deciding whether or not to opt in or opt out.

KENNEALLY: If I could put it this way, the original proposed settlement kind of left a lot to the imagination in this regard and so in this case, they've very much sort of limited it, as you say, put it in a box.

WASOFF: They've made it clear what their future intentions are with respect to the kind of rights they'll be exploiting, but there's still room for negotiation within this framework, yes.

Finally, the other place that we saw a change – and this is again a very specific response to objections made that related to antitrust considerations – is in the resale of consumer purchases. Google is now obligated to allow third-party resellers to sell access to books covered by the settlement through consumer purchase models.

This was a response to Department of Justice objections, objections from others, who were concerned about the potential monopoly position. And I'm using that word advisedly because I'm not opining on whether or not this is monopolistic. That's for an antitrust lawyer to deal with and perhaps someday for a court to deal with. But the powerful market position that Google was going to have with respect to these works.

KENNEALLY: They were going to be the single source.

WASOFF: They were essentially going to be the single source for a lot of these works. So now Google had said publicly that they would permit resellers, but it wasn't in the agreement. Now it is, so now Google is going to be contractually obligated to do what it had outside the agreement in the discussion period said it intended to do anyway.

But we need to keep in mind a couple of things. One, Google would still be the host of the digital copies. Google isn't giving away the database or access of the database. It would still be controlling that piece of it.

And quite importantly, we're only talking about consumer purchase here. Google has not said in the agreement or frankly, elsewhere, that it's going to let third parties offer institutional subscriptions or similar offerings for the entire database. That's an important point to keep in mind when you're thinking about whether this mechanism fully addresses the concerns that were raised.

KENNEALLY: There are still just a few other loose ends to take a look at. That would be, of course, the antitrust issues, which you've alluded to from time to time here. Talk about those.

WASOFF: There's one real lightning rod in the agreement called the MFN clause, the Most Favored Nations clause. And that was a clause that required the Book Rights Registry in certain specified circumstances to give Google a deal as good or better than the deal that it gave to third parties. It was a little more complicated than that. That was a fairly dense, single, not-that-long paragraph, and it was controversial.

This is a simple change. They literally just crossed it out. So the clause has simply been amended entirely, in its entirety in the new version.

There were other concerns expressed by a number of proponents that Google and the other proponents might claim in the future to be immune from further legal actions involving antitrust because they'd be operating under an agreement – we're positing now that we have a court-approved settlement agreement. There was a concern that the proponents might say, we're operating under an agreement that was approved by a federal court and therefore we cannot be sued for antitrust based on our behavior pursuant to this court-approved agreement.

That concern has been addressed now, not in the language of the agreement but in the new proposed final judgment and order of dismissal that was filed by the proponents of the settlement. That now provides explicitly that court approval of a settlement agreement will not be seen as conferring immunity on Google or the other parties for potential antitrust liability.

And that's an interesting nuance that may have an impact on what we see in the next month or two because this could give the Department of Justice the ability to hold off on making recommendations or even on commenting on the amended settlement agreement. This provision could let them adopt a wait-and-see attitude if they chose to.

Then finally, one of the areas that was criticized heavily had to do with the original notice procedure and the language of the original notice. Was the notice process adequate? Did the full class really get notice of this? Was the description of the agreement sufficient to let people know what issues were at stake?

As we discussed before, the class is now cut in perhaps half. In order to advance the next procedural stage – given the fact that this is a revised agreement, it's a new proposal for the

class to consider – there needed to be a new notice process anyway. So that was covered in the request filed by the proponents and in the order that the judge issued setting the time schedule going forward. Now there's a revised notice procedure going on attempting to reach this much smaller and presumably more reachable class. There's outreach now going to all of the individuals and corporations that registered already at the settlement website and to those that opted out.

The notice process has begun again and as I said before, will end on January 28. And I just think it's worth emphasizing that to people. That's the deadline coming up for the rightsholders on this call. What this new notice period ending January 28 does is give all the class members another opportunity to opt out if they didn't before or to change their minds after a prior opt-out, decide they're comfortable now and opt in.

But as before, if you do nothing by that cutoff date, if you're a member of the newly defined class and you do nothing by that cutoff date, you will be bound by the terms of the settlement. So as before, silence is consent.

KENNEALLY: Right. And the fact that this is a class action suit and therefore has drawn in so many more people than were actually in court lo those many years ago, has really drawn a lot of attention regarding public policy issues. The objectors raised some specific concerns and the amended settlement has attempted to address many of them, not all of them. Talk about the ways that some of those public policy issues have been spoken to in this new settlement.

WASOFF: Well, there were some attempts to address some of the public policy concerns, though not as extensively as the antitrust and class action concerns were addressed in the amended settlement agreement.

On the privacy and security front, in response to complaints from privacy advocates, the amended agreement now does include some specific language that says that Google will not give any personal information about users of the database to the Book Rights Registry except as required by law.

Google has outside of the four walls of the settlement agreement indicated that it will use privacy policy that will be protective of user privacy, but that isn't part of the contractual obligations set out in the settlement agreement.

On the public access front, the agreement now provides that the Book Rights Registry will have the ability in its discretion to authorize more than one terminal per public library. As you'll recall, Chris, the original agreement required that there be one terminal in each public library that gave full access to the full database. That now will be within the discretion of the Book Rights Registry to expand the number. That has a revenue aspect too because printing will be charged for in those public library situations.

And finally, there were a lot of comments from academic authors and others who felt that the agreement was too consumed with generating revenue and not concerned enough with

maximizing access. Commentors who pointed out that some authors don't care about being paid, they care about broad distribution. So the agreement does contemplate that a little more in two ways.

First, it now permits the use of creative commons licenses, which typically permit broader free uses for works distributed pursuant to those licenses. And as I mentioned before, it also lets the rightsholder set the price of the work at zero if that's what the rightsholder wants to do. This has the potential, obviously, to further reduce the funds available to the Book Rights Registry, but it does address some of those access concerns.

KENNEALLY: Well, Lois, that's a pretty quick but reasonably thorough review of the major changes here. We have just over five minutes left in our program today and we want to just help people understand what the reaction has been to the amended settlement. It's still rather fresh, although there are deadlines fast approaching. It's only been just under a month since it came out. How have people reacted?

WASOFF: I'll run through this pretty quickly because there have been, as one would expect, strong expressions of support from the major proponents. Richard Sarnoff is the co-chair of Bertelsmann Inc. and president of Bertelsmann Digital Media. He's a board member of AAP, he's been an architect of the agreement, he's a strong proponent of it. Dan Clancy is the Google Books engineering director for Google. He has been Google's public face on this. Paul Aiken of the Office Guild has been supporting it heavily.

And another real proponent of the settlement has been Paul Curran, who is the University of Michigan library. University of Michigan, you'll recall, was one of the first full participants in the library scanning project and they've consistently been supportive of the Google Books project and of the settlement.

There have been academic commentors on this. Jonathan Band, the first person listed there, is a lawyer in Washington, D.C., who does a lot of work with library associations. He's written several analyses of the agreement called *A Guide for the Perplexed*, and they are helpful. His most recent one is particularly – is a good summary of the changes in the amended settlement agreement.

And James Grimmelmann has a website. He's a lawyer and faculty member at New York Law School who's been following this very closely from the beginning. He was one of the first to raise some of the antitrust objections. He's been doing analyses of these.

And Pam Samuelson, who's a law professor at Berkeley, filed with the court during the objection period on the original agreement on behalf of academic authors emphasizing – her major point was that academic authors care more about access than money.

All three of these people have been commenting on the agreement, not entirely favorably, not entirely critically, but have been expressing views and it's interesting to see what they have to say.

Mary Beth Peters you mentioned before. Mary Beth spoke – testified in front of the Judiciary Committee and expressed some real concerns about the agreement as being a usurpation of a legislative function setting copyright policy by a judicial process. Mary Beth has not said anything publicly that I'm aware of since the agreement came out, the new version of the agreement came out. But since the portion of the agreement that deals with unclaimed works and the authority that Google will have to exploit those unclaimed works was the gravamen of her concern and that hasn't changed. I think we can make an assumption. I think her testimony in front of the Judiciary Committee is still relevant in looking at concerns about that aspect of the agreement.

I've listed a couple of other people here. Brewster Kahle of Internet Archive has consistently been concerned about the agreement and the position it gives Google with respect to particularly the unclaimed works, the orphans.

Robert Darnton, who's the librarian at Harvard, recently wrote a very interesting article for the *New York Review of Books*, his second on the Google Book settlement, and still, I believe, has some of the concerns he had with his first article that Google would have enormous authority in pricing over the institutional subscription.

Scott Gant was one of the first people to raise class action issues. He will probably file objections to this as well.

And then Amazon is still concerned and France hasn't given up. Nicolas Sarkozy said just the other day that he wants the European Union to do its own scanning instead of relying on an American company.

So the controversy is still out there. There'll be more comments.

KENNEALLY: As we say, it's the definition of a developing story. We're coming to the close here and would like to get in maybe one question if we can. But before we do, let's review the revised timeline so people have fresh in their minds when they finish the program what's ahead.

WASOFF: OK. What's ahead is, as I've said – I guess everybody's heard it by now. January 28, 2010. If you want to opt out, do it by then. If you want to file an objection, do it by then. And you get to reconsider whatever decision you made the last time when you were facing the other deadline. So that date's important.

The DOJ comments, we'll see. They may take advantage of that wait-and-see opportunity that they have now since nobody's waving antitrust liability. But we'll see. If the DOJ files on February 4, it's going to tell us a lot about what's likely to happen.

And then, we have the fairness hearing on February 18 and that will be the opportunity for objectors to actually come forward, speak to the judge about their concerns, and that's the earliest possible date on which this agreement could be approved by the court.

KENNEALLY: I can imagine that between now and then, Lois, we're going to be back together to discuss some of the objections that may get filed and maybe some of the questions that rightsholders and others have raised here today with us at this very special presentation and with the court itself.

There's one shoe left to drop that was important, and that of course is whether the Department of Justice is going to weigh in. Are you willing to do any speculation at all as to what they may say about this revised settlement agreement?

WASOFF: They do have the option now of remaining silent if they choose to. It's very clear that the amended settlement agreement was drafted not exactly against the blueprint that was laid out in the Department of Justice brief, but the Department of Justice brief was pretty clear in saying that they saw some good public purposes to be served by some form of this going forward, and there were some very specific – there was specific guidance offered to the proponents as a way of fixing the agreement in the Department of Justice's view to let the agreement go forward.

And it's pretty clear looking at these changes that the proponents were very aware of the Department of Justice's concerns, but they didn't address all of them, and you can map the changes against the DOJ brief and see where they don't mesh completely.

So I think it's fair to assume that the Department of Justice could have some comments. Certainly some of the issues they raised were either not addressed or were not addressed in the way that they suggested they be addressed. But on the other hand, the Department of Justice would not be foreclosed from raising objections later if the agreement is approved, and the earliest that could possibly happen in the most optimistic scenario is if the agreement is approved at the fairness hearing – unlikely, but if it were approved from the bench at the fairness hearing on the 18th – and if 30 days goes by – that's the period for appeal – and nobody files an appeal, then the effective date would be mid-March.

I doubt the judge will approve it from the bench on the 18th. I doubt that no one will appeal. I think there probably will be appeals. So the effective date of the agreement will probably be much further out. I think that's one of the reasons that the proponents picked March of 2011 as the date by which the claims need to be filed. I think they're hoping by March of 2011, they may have a fully approved and tested agreement.

And then to return to the Department of Justice, Department of Justice could wait and see what happens once this theoretically approved agreement takes effect and sees how the parties behave and could still act.

So I don't know which way they'll go, but they had to file in the first instance. They don't absolutely have to file now. So we'll see. We'll see what happens on February 4. It's going to be interesting to watch.

KENNEALLY: It certainly will be, and I want to just thank Lois Wasoff, intellectual property attorney, for joining us again in this continuing series of programs about the

Google Book Settlement that we've been producing here at Copyright Clearance Center. My name is Chris Kenneally. I'm director of author relations.

We have up on the screen today some places you may want to go for further information if you have other questions, including where all of the court documents themselves reside, websites such as the Google Book Settlement itself. They have their own site explaining the whole class action case and everything involved there. AAP's own website, the Authors Guild website, something called the Public Index, and last but certainly not least, our own website, copyright.com, where all of our previous programs are indeed archived.

Your questions today – and there have been many of them, fascinating questions – will help us with our programs moving forward.

Let me just remind everybody briefly about Copyright Clearance Center and our own role in the rights licensing world. We were created more than 30 years ago by authors and publishers and today are the collective licensing agent for more than 30 million rights. We're part of an extensive global network of collective licensing organizations that you may have heard of. It's called IFRRO, and in the last 15 years, we've helped to pay more than \$1 billion in royalties to rightsholders here in the United States.

It's our work to include these rights from all of your organizations as well as from individual authors, and we certainly would be very interested in hearing how we can better help you with the value of your rights and how to manage them. If you have any questions at all about all of that, you're welcome to write to me, Chris Kenneally. My e-mail is chrisk – making it easy for you – chrisk@copyright.com.

Thank you again to all who have attended from the United States and indeed around the world. We appreciate your time and look forward to having you back on a future program.

END OF WEBINAR