

# Legal Update from Brian Flagler

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## Google Books Settlement 2.0—Are Amendments Enough to Resolve Concerns?

The number of books covered by the potential Google Books Settlement has allegedly been cut in half, a special trustee has been created to oversee orphan works, and the controversial “most favored nations” clause has been deleted. Now, is the revised agreement likely to become reality?

First, a few dates. On November 13, parties to the Google Books Settlement filed their Amended Settlement Agreement. As expected, the federal district court granted preliminary approval of the Amended Settlement on Friday. Interested parties may object to the Amended Settlement by January 28 (comments limited to the amended portions of the agreement), the Department of Justice will file its views on the arrangement by February 4, the court will hold its “fairness hearing” on February 18, and the deadline to claim works and receive cash payments has been extended from January 5, 2010 to June 5, 2010. The September 4, 2009 deadline to opt-out of the settlement was not extended.

The one hundred and seventy page Amended Settlement (not including its exhibits) includes many revisions. You can read a summary of the changes in the [Supplemental Notice](#) and you can find helpful background on the agreement in a New York Times article [Terms of Digital Book Deal With Google Revised](#).

In my view, the four most significant changes are:

1. The settlement now applies only to books registered with the U. S. Copyright Office by January 5, 2009 or which were published by that date in the United Kingdom, Canada, or Australia. Other foreign works are no longer covered by the settlement.
2. The settlement creates an “Unclaimed Works Fiduciary” to oversee the interests of and locate the rightsholders of unclaimed works (e.g. “orphan works”), holds revenue for unclaimed works for a longer period (10 years instead of 5), and donates any unclaimed funds to literary charities.
3. The “most favored nations” clause protecting Google was

deleted. This provision would have prohibited the Registry from granting more favorable license terms to any of Google's competitors.

4. Google will allow resellers to sell access to the books in its database.

However, the revised agreement is noteworthy for not adopting two significant changes requested by the Department of Justice and certain other critics. First, the parties to the settlement did not follow the DOJ and Copyright Office's suggestion to convert the settlement to an opt-in approach. Rather, the default rule for out of print works is they will be displayed if the author does not "opt out" or turn off display rights. As a result, a core benefit of the settlement—providing libraries and consumers with access to millions of out of print works—has been preserved in the face of pressure to leave works out unless the author opts in.

Second, the Registry is not authorized to license Google's competitors to display orphan works. Rather, the Registry may only do so "to the extent permitted by law." At present, such licensing without approval is not "permitted by law." So, in order for the Registry to license Google's competitors to exploit orphan works, Congress would have to pass legislation that specifically permits the Registry to do so. Similar legislation has been proposed numerous times without success.

New York Law School Professor James Grimmelmann expressed his view of the "permitted by law" limitation in his blog [GBS: Midnight Madness](#) on the settlement:

"The DOJ all but invited Google and the plaintiffs to empower the Registry to license Google's competitors; they declined that all-but-invitation. They're going to try to tough this one out; the DOJ will have to decide whether to back down or to fight, as this amended settlement doesn't give it one of the central changes it asked for." ....  
"The speculative possibility that Congress might someday act to open up the market to others doesn't create actual competition now."

As a result, the settlement does not resolve the concern expressed by the DOJ and others that Google's de facto monopoly over the exploitation of orphan works may result in higher prices for consumers and libraries to access this content. Although the interests of orphan works rightsholders may have been better protected by formation of the Unclaimed Works Fiduciary, the revised settlement preserves consumers' access to millions of orphan works and, in turn, Google's unique position in exploiting them. As Grimmelmann points out, the ball is back in the DOJ's court to determine if the revisions are sufficient to resolve antitrust concerns.

Other revisions in the settlement that may be of interest to ECPA

publishers include:

- Children's book illustrations are now only included if the author of the text also created the illustrations.
- The original settlement excluded books that primarily consisted of musical works (such as songbooks and musicals). The revised agreement adjusts the thresholds such that more of these books will be included in the settlement.
- Rightsholders may authorize the Registry to make their works available via Creative Commons licensing.
- The default revenue split of 63% to rightsholders is maintained, but the rightsholder and Google are now free to negotiate adjusted splits for specific works (agents of high profile authors may thereby negotiate for higher revenue shares).
- Authors will receive Supplemental Notices in mid-December similar to the initial notices sent out earlier this year. These notices are sure to generate additional questions from authors; publishers should be prepared with a well-articulated position on the settlement.

If you have questions about the settlement or how it may affect your publishing house, you may reach Flagler Law Group at 541-549-8401. Our firm is assisting numerous ECPA publishers develop their digital licensing strategies and negotiate content licenses with Amazon, Google, B&N, B&T, and others.



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